



**Karol Jakubowicz**

# Media revolution in Europe: ahead of the curve

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Karol Jakubowicz

Council of Europe Publishing

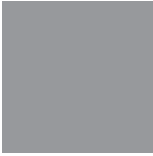
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## Foreword 1

Maud de Boer-Buquicchio,  
*Deputy Secretary General of the Council of Europe*

Words matter. We sometimes need someone like Karol Jakubowicz to remind us of this and the fact that words, especially those that come at turning points in history, have a tendency to stick. Therefore, we must set our minds free to move beyond the limits that words can impose on our thinking.

When the revision of the European Convention on Transfrontier Television was discussed, he wrote, in a paper on the scope of the new convention: "If the scope of the Convention is to be extended beyond television, then its title will obviously have to be changed". And indeed, the draft second protocol amending the convention suggests a new title: "Convention on Transfrontier Audiovisual Media Services".

Karol Jakubowicz promoted the change of the time-honoured expression "public service *broadcasting*" to "public service *media*" in a Committee of Ministers recommendation, so that the debate on this subject could move into the 21st century and escape from the linguistic and policy traps that the former term entailed.

His proposal to change the name of the "Steering Committee on the Mass Media" to the "Steering Committee on the Media and New Communication Services" opened up entirely new paths for Council of Europe work, putting the Organisation at the centre of the crucial international debate on the information society.

However, of his many contributions in this area, the most interesting and far-reaching came during his keynote speech (also reproduced in this publication) at the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik in May 2009. There, he challenged us to take yet another step and release words and notions from pervasive constraints, to look beyond assumptions and to go back to the basics in a new technology-enabled reality capable of devolving the right to public expression to the people.

Montesquieu advocated the separation of the powers of the state – executive, legislative and judicial – which is broadly accepted as a pre-condition for democracy. President Abraham Lincoln gave us the words that we all adhere to that democracy is the "government of the people, for the people, by the people". The so-called "powers" of the state are thus reduced in a democracy to the exercise of authority by delegation from those who matter in democracy, the people. In modern constitutions, this is reflected in the recognition that the ultimate

power (or sovereignty) in a democracy lies with the people, subject of course to fundamental human rights, democracy and rule of law imperatives.

However, old words stick and people continue to humble themselves in front of “powers” and those who detain power in a democracy, thus paving the way for those who are inclined to abuse power and make it serve their own interests.

It has very rightly been said that the media are the “fourth power” of democracy. The media have a key role to play in observing the exercise of authority, in denouncing abuse and in contributing to political debate. The right to freedom of expression – public expression in the case of means of mass communication – is there to ensure that media can do this. But words stick. Some media forget that, in a democracy, power comes from a delegated authority and therefore entails important responsibilities. Karol Jakubowicz reminds us that media should never use this power for their own objectives or loyalties.

Now that technological development has released public expression from the constraints of traditional forms of media, we must look again at the place of people in this context. Are their rights sufficiently preserved within the “right to freedom of expression”? Hence Karol Jakubowicz’s challenge: perhaps we should consider renaming it the “right to public expression”.

With great foresight and intellectual rigour, and through his invaluable work with the Council of Europe which is reflected in this volume, Karol Jakubowicz has made a considerable contribution to developments in European media policy in recent decades.

Thank you, Karol Jakubowicz. You have helped us to identify both the challenges and the opportunities emerging in a rapidly evolving environment. At a time when citizens all over Europe feel more and more disconnected from democratic processes, the debate you are launching about a right to public expression is particularly important. I hope it can be used as an opportunity to further empower citizens and advance DEMOCRACY, so that this keyword continues to matter.



## Foreword 2

Professor Dr Delia Mucica,  
*Chair of the CDMC*

It is a pleasure to offer the reader a view of the ever evolving work on media and media-related issues, through the speeches and papers presented by Karol Jakubowicz at various Council of Europe and international events, and collected in this volume.

Through his long association with the Steering Committee for Media and New Communication Services and the Standing Committee for Transfrontier Television, Mr Jakubowicz has provided invaluable insights into our field of work, opened up new avenues of thought and action and offered us all the benefits of his vision.

Some of the results of our common work, which have enriched the debate in many other international fora, are presented in this volume. The Steering Committee on Media and New Communications Services, true to its name, steered not only Council of Europe approaches, but the international debate as well, in addressing emerging trends and issues and bringing them to the attention of policy makers and stakeholders.

Human rights, and in particular freedom of expression and freedom of the media have been, more often than we would have thought, challenged by new developments, either technologically based or emerging from changes in consumer patterns and business models. The media landscape – in which I include the new communication services or the “media-like services” – has evolved and changed at an unprecedented pace during these last years. Understanding its new dimensions, anticipating the possible threats and obstacles they may pose while retaining the fundamental values that lie at the core of our work in the CDMC, and which in fact are our *raison d'être*, was, and indeed is, a difficult endeavour. One which we, the CDMC, and especially Mr Jakubowicz, undertook, often using innovative approaches, challenging traditional or conservative ways of thinking and treading sometimes into uncharted territories.

This is why, paraphrasing one of his speeches, I can say that Karol Jakubowicz is a man with “a heart, a social conscience and courage”.

The CDMC continues its work and its tradition of breaking new ground and setting the agenda for the future, building upon our collective expertise and the vision and foresight of some truly outstanding experts, one of whom is Karol Jakubowicz.







## Introduction

“East is East, and West is West, and ne’er the twain shall meet”  
*Rudyard Kipling, 1889*

It must have been 1990 when I attended my first meeting of what was then the Steering Committee on the Mass Media (CDMM) of the Council of Europe. Two other experts from “eastern” Europe were also present: Zoltan Jakab from Hungary and Milan Jakobec from the then Czechoslovakia. Our colleagues from “western” Europe were so struck by the similarity of our family names (a strange coincidence which I do not understand myself) that one of them asked me: “Do you all have the same name over there?”

It may have seemed at that particular moment that Kipling had been right after all. Of course, he was referring to a different “East,” but ever since the Iron Curtain descended over Europe his words also seem prophetic in the European context. Had we not been convinced for decades that the “East” and “West” of Europe would never come together again?

This collection of papers bears testimony to 16 years (I stopped representing Poland in the CDMM/CDMC and its subordinate bodies at the end of 2006) of my efforts to prove Kipling wrong. In November 2004, when I had the great honour of being elected the first “eastern” European Chairman of the CDMM (after having been also the first “eastern” European chairman of the Standing Committee on Transfrontier Television), the job could be regarded as successfully completed. Two years after my term of office expired, another “eastern” European, Delia Mucica of Romania, was elected Chair of what was now the Steering Committee on the Media and New Communication Services (CDMC) and no one batted an eyelid: at long last it was accepted and taken as a matter of course that what matters in such cases is personal qualifications for the post, and not who comes from where.

This short introduction is intended as a guide to the book and as a sentimental journey through some of the highlights of my involvement with the Council of Europe. The tone will be very personal and the approach subjective, but this is unavoidable if one wants to convey the quality of that experience and give a true account of what it has meant to me and others like me.

The first order of business after “eastern” Europe joined the Council of Europe was to learn and understand “European standards”. The early 1990s were a time when post-communist countries were formulating ideas about a new media order. Some of those concepts as well as some factors impacting on the process

of their implementation are presented in Part IV in “Post-communist central and eastern Europe: promoting the emergence of open and pluralist media systems”, and “Media concentrations and foreign media presence in central and eastern Europe”. Post-communist countries were then constantly being told that if they wanted to “return to Europe,” in the popular phrase of that time, they had better fully accommodate to “European (that is, human rights and democratic) standards”.

For us, newcomers, the thrill of being part of the Council of Europe was that we soon realised that it was precisely the place where most of the “European standards” came from. After all, Boris Navasardyan, president of the Yerevan Press Club in Armenia, has been quoted as saying that “the Council of Europe serves today as the main tutor of democracy” for European post-communist states. The thought that now we would be part of the process of formulating those standards was awe-inspiring. Moreover, I was soon invited to help the Council of Europe in serving as the tutor of democracy. Hence the list, available at the end of this collection, of expertises and reports regarding media legislation in new democracies that I wrote for the Council of Europe (sometimes in conjunction with the European Union). In addition, I sought in some of the papers and reports included in Part IV “Creating and protecting democratic media systems” to spell out the general Council of Europe view of a democratic media system and apply it to particular situations.

In this connection, mention should also be made of Part II “Public service media look to the future”. True to its human rights vocation, and to its view of how the media should serve the public interest, the Council of Europe is the only European organisation to persistently promote public service media and the cause of their survival and development in the 21st century. I considered that aspect of the CDMM’s and the Council of Europe’s activities as a whole to be very important. This is why I was glad to be invited to help write the 2004 report of the Parliamentary Assembly on Public Service Broadcasting (PSB) and also sought in various other papers to argue that media policy in European countries should support the continuation of public service media and their adjustment to social, cultural and technological conditions of the 21st century.

All this shows that with the passage of time, we “eastern” Europeans grew out of our role of pupils at the knees of our “western” European friends (some of us later actually had an opportunity to return the favour, as evidenced by the legal reviews of the Italian Gasparri and Frattini laws included in this volume). As I said in the speech “We need an EU with a heart, a social conscience and courage” which is included in this volume, we wanted, and thought we deserved, to be partners, recognised also for our ability to contribute to common endeavours. The papers in this collection bear witness to a personal effort to win that recognition. As most of the papers here were commissioned by Council of Europe bodies, evidently that has happened.

Early into the 21st century, it became obvious to me that the Council of Europe was not properly equipped to deal with information society issues. At the time of the World Summit on the Information Society, it was rather clear that matters debated there did not have a proper institutional home within the Council of Europe. True to its terms of reference, the CDMM continued to concentrate on old mass media dilemmas, when the rest of the world was breathlessly pondering new issues thrown up by the new technologies and new communication services. That is why in the run-up to the 7th European Ministerial Conference on Mass Media Policy (Kiev, 2005) I proposed that in the Political Declaration to be adopted at the conference, the ministers should “Request the Committee of Ministers of the Council of Europe ... to redefine the mandate of the Steering Committee on the Mass Media (CDMM) so that it can fully encompass the new information and communication technologies and, accordingly, to rename it Steering Committee on the Media and New Communication Services (CDMC)”. And that, indeed, is what has happened, with the result that the CDMC is now fully empowered to deal with all and not just with some communication services. And when the successive ministerial conference was held in Reykjavik in 2009, it had to have a new title: the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services.

Part III, “Human rights in the information society”, contains papers dealing both with the general issues of whether (and if so, how) the information society requires a reconsideration or redefinition of human rights (see the paper “Human rights and the information society: a preliminary overview”), and with specific issues relating to social communication. This includes the main background paper for the Reykjavik conference: “A new notion of media? Media and media-like content and activities on new communication services”, designed to make it clear to the assembled ministers that the old framework within which media issues have been considered for decades is changing fast and they have to be ready to readjust their mindsets and their policies to entirely new realities.

Bringing Council of Europe approach and standards into line with the new realities of the information society, and making them relevant in the new context, was a major objective of all the work undertaken in my final years at the Council of Europe (see “Council of Europe media standards relating to press freedom in the digital era”; “Public service broadcasting vis-à-vis the digital and online challenge”; Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society; “The role and future of public service media, in particular with regard to e-democracy”; and “Modernising the European Convention on Transfrontier Television”). Also, after the conclusion of my formal association with the Council of Europe, I was invited by the CDMC to draft what later became Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet.

My parting gift to the Council of Europe was contained in the keynote address “A new notion of media” I was invited to give at the Reykjavik conference in 2009. This

was yet another effort to take the Council of Europe in a new direction, namely a proposal that the CDMC and the Council of Europe as a whole should “take the historic step of redefining freedom of expression into the right to public expression”. The idea has found some support, so it will be interesting to see how the debate unfolds.

I cannot conclude this introduction without giving expression to my gratitude to all my friends in the CDMM and CDMC, both for the years we spent together preserving and enhancing the reputation of the Council of Europe as the conscience of Europe, in our case in the freedom of expression field, and for the singular and greatly appreciated honour of being able to publish this collection. Many thanks also to the Media and Information Society Division (previously Media Division) in the Council of Europe Secretariat for dedicated and consistent support and leadership.

## **Part I. Speeches**



## A new notion of media

*Keynote speech delivered during the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, Reykjavik, 28-29 May 2009.*

This should have been – and could have been – the 8th European Ministerial Conference on Mass Media Policy. But it is not. It is the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services.

Of course, Shakespeare's Juliet would dismiss this change of title because "a rose by any other name would smell as sweet". Yes, but she could be reasonably certain she would know a rose, whatever it was called, when she saw one. We, on the other hand, are not sure whether or not what we see emerging around us can and should be classified as media. We do not know if we can trust the information we receive from those sources. Nor do we know whether or not our policy and regulatory frameworks apply to these new modes and technologies of communication.

Policy and regulation are usually far behind the curve of what is happening in real life. This conference and the work that will follow are giving you an opportunity both to go back to basics and start by defining the very terms we are using, and, at the same time, to look far into the future. By the same token, I am proud to say as a former chairman of the CDMC, the committee is providing you with a rare opportunity to be ahead of the curve and to blaze an entirely new trail in this area.

I must also point out, however, that to call the so-called new media "new", when some of them have been around for 30 to 40 years, betrays a mindset rooted in the past. This is known as "generational fallacy": judging new technology based on one's experience with the old and treating new developments as an element of discontinuity, a disruption, an exception from the way things "normally" are. To get in the right frame of mind, and to have a chance to develop anything like an adequate and future-proof policy response, we should learn to treat the "new" media and the context they operate in as the norm – in exactly the way that the so-called "digital natives" do. If so, then the right language to use would be "digital media" and "legacy media" – the latter being traditional media inherited from the past and facing an uncertain future.

Of course, we should not get carried away. Traditional media have considerable staying power and are, for the time being, unrivalled as producers of content in general and quality content in particular. After all, Google was reported recently to be talking to both the *New York Times* and the *Washington Post* about possible collaboration and "improved ways of creating and presenting news online." What it also means, however, is that for the first time mass media development may happen differently than before. In the traditional model of cumulative media



development, old media continued, perhaps with some modifications, despite the appearance of new ones. Now we may, over time, see not accumulation but substitution: new media may begin to replace old ones. As the Council of Europe Parliamentary Assembly has put it in Recommendation 1855 (2009) on the regulation of audiovisual media services, "Much of what is now considered broadcasting may in future be delivered over the Internet, where the user controls his or her access to countless sources of content which know no geographic boundaries". Broadband networks may ultimately take over and serve as the main conduit for all forms of content. Traditional media and journalistic functions will obviously continue, but will be required to adapt to new conditions.

In all this, we should remember that technology is not the prime cause of media development. If you want to understand what is happening, follow social and cultural trends, not just technological ones. Many new communication technologies – videophones, for example – have fallen by the wayside because they failed to meet socially- and culturally-based criteria of usefulness and acceptability. Needs and expectations arising from social and cultural change feed back into the process of technical innovation, but also affect our attitude to the traditional media, requiring change on their part, as well. For example, the draft action plan to be adopted by this conference calls for the elaboration of a policy document on the governance of public service media. I applaud this proposal. The interactive and participatory Internet culture has been shaped in part by the individualism and anti-authoritarianism of post-modernity. No-one who has experienced and grown used to that culture will be prepared to accept the traditional governance arrangements of public service media. They will expect a relationship of direct accountability, partnership and participation – not something many public service media are prepared to enter into, even if it means that they will be increasingly irrelevant and out of touch.

In preparing for this conference, we have identified three new notions of media: digital, convergent media into which all existing media may one day evolve; media created by new actors, including social, citizen and user-generated media, and media-like activities performed by non-traditional media actors. No doubt, more new forms of media will appear. Also, convergence will create many new permutations of old and new media. Community media would also like to be recognised as new media, but I think they are in reality old media. Still, they do represent a new phenomenon, to which I will return in a moment.

You will be discussing all of this during this unusually interactive and participatory ministerial conference. It is itself a sign that the CDMC and the Council of Europe have understood that the right communication mode in the 21st century is not one-to-many, but many-to-many and that peer-to-peer communication means government ministers and civil society being put on an equal footing. The Council of Europe Parliamentary Assembly has called on national legislators to review their existing regulation and set up new means for achieving their objectives regarding audiovisual media policy, while securing achievement of these objectives also in the new media environment. The job the Council of Europe

is facing is indeed to preserve all that the old media order could contribute to democracy and human rights, while at the same time maximising the contribution of the new media universe and dealing with the challenges it presents. Let me mention just one such challenge, but a big one: the downside of the ease and extended freedom of choice in access to information and content can be “ego-casting”, or the ability to screen out content we are not comfortable or do not agree with, and fragmentation – both potentially undermining social cohesion and national unity and perhaps leading to the disintegration of the democratic polity.

So, as we consider the new media, let us not lose sight of what is happening to the old ones. In its 2007 resolution on the state of human rights and democracy in Europe, the Parliamentary Assembly saw the media as “too often primarily business-driven institutions” that “by prioritising their business interests over the service to the citizens and democracy, inevitably contribute to the distortion of democracy.” That is why Jürgen Habermas, the German philosopher, has called for public subsidies for the quality press which he perceived as the lifeblood of the public sphere, democratic debate and discourse. Since then, things have only got worse, due to the economic downturn which is proving disastrous, especially for the traditional media. The International Federation of Journalists stated recently that “the traditional structure of information pluralism upon which democracy in Europe depends is on the verge of collapse.”

Recently, the Dutch Media Minister, Ronald Plasterk, allocated money for 60 young journalists, to relieve the financial burden on the commercial daily newspapers they work for. In the United States, the *Huffington Post*, a popular current affairs website, is bankrolling a group of investigative journalists to look at stories about the nation’s economy. This will help keep in work professional investigative reporters who were laid-off by crisis-stricken newspapers.

More systemic solutions are needed, however. This is a conference of ministers responsible for the media. It is to be hoped that you will find ways to guide the work of the Council of Europe in the coming years in such a way that these issues will be taken up and some solutions will be proposed.

Still, while professional journalists are crucially important in social communication, we should reject what I would call an aristocratic view of society and social communication, which claims that only educated and cultured, in short elite people should have the right to take part in public discourse. Yes, today anyone from a political party to a sports club, a corporation, or a single individual, can distribute content worldwide on the Internet, without the mediation of journalists and editors, their editorial judgment and their standards for selecting and presenting information. With such an avalanche of personal, often biased information and commentary, the media are said to have entered the post-objectivity era. Yes, there may be a lot of rubbish on the Internet. But any such consideration is far outweighed by the great democratic triumph of the almost universal ability, at least in developed societies, to exercise the right to freedom

of public expression. Sometimes this produces Twitter “revolutions”; but what it also means is that with citizen journalism, community, social and other new forms of media, audiences may have access to a lot more public-spirited content than in the past. What we do need, of course, is great investment into media education and media literacy, so that people can acquire or develop the competence to separate the wheat from the chaff. And we must hold the new media to many of the same ethical, legal, reliability and accountability standards as those prevailing in the old media. One thing is certain, however: the rebellion of the masses has happened and the masses have won. The floodgates to universal expression are wide open. That is why some people say we should no longer speak of “mass media”, but of “media of the masses”. And this is where I would put community media – as media of the people, and not of the elite.

In this context, let me present you with a challenge which at the same time is a call to greatness – greatness to which you can and should aspire if you and the Council of Europe as a whole will take the historic step of redefining freedom of expression into the right to public expression. What Article 10 of the European Convention on Human Rights (ETS No. 5) calls “the right to freedom of expression” has always been an incomplete right, making it an important, but not wholly effective pillar of democracy. As President Kekkonen of Finland said many decades ago, the freedom of the press is the freedom of those who own it. The concept of the “right to communicate”, introduced in the 1970s, and the whole media democratisation movement of the 1960s to the 1980s, testify to a feeling that all is not right with social communication, and to a strongly felt desire to go beyond the social communication arrangements of that time. That movement failed because no-one could imagine how the state could make freedom of expression a positive right by providing everyone with the means necessary to join the public discourse. Still, a media reform movement is alive and well in the United States today. In any case, individuals do not now need the state to give them the tools of public expression. Anyone with the right equipment and the right cultural and communication competence can broadcast their news and views to the entire world. In these circumstances, we should – I dare not say rewrite – reconsider the practical meaning of Article 10 and develop an interpretation in keeping with what is possible today, and was not possible when the Convention was being adopted.

Access cable channels in the US; free radio in Germany; *radio associative* in France, neighbourhood radio in Sweden; licensing of community radio in the UK; very recent legislation recognising community media in Austria; recognition of community media by the Council of Europe and the European Parliament; the fact that the US State Department now “tweets” on Twitter, has a Facebook account, and has launched a social networking site on its own web server; finally the fact that New Zealand police launched a “wiki” to invite the public to suggest the wording of a new piece of legislation, the Police Act, potentially producing a user-generated (but hopefully not a Mafia-generated) Police Act – all this shows that something like formal recognition of the right to public expression is a

breakthrough waiting to happen. The Council of Europe has a long tradition of discussing this issue, going back decades, and is now making its own contribution to this movement, for example by adopting the Recommendation on measures to promote the public service value of the Internet which highlights access, openness and diversity as indispensable features of the Internet and Internet content.

The recommendation also says in part: "Member states should encourage the use of ICTs (including online forums, web logs, political chats, instant messaging and other forms of citizen-to-citizen communication) by citizens, non-governmental organisations and political parties to engage in democratic deliberations, e-activism and e-campaigning, put forward their concerns, ideas and initiatives, promote dialogue and deliberation with representatives and government, and to scrutinise officials and politicians in matters of public interest".

So, who better to seize this opportunity than the Council of Europe?

Recently *The Guardian* published an editorial "In Praise of the Council of Europe" where it said that whatever other European organisations may be doing "it still falls to the Council to promote what matters most, namely democracy and the rule of law. The Council also provides the human rights court ... And it was a Council protocol that banished the death penalty, and thus made the continent that crows about being civilisation's cradle just a little bit more civilized".

If you can launch the process that will elevate freedom of expression into a right to public expression, to be recognised, promoted and protected by member states, you will have made Europe and the whole world not a little, but a lot more civilized and democratic. I hope you will. And I wish you success in that historic endeavour.



## 2

## **We need an EU with a heart, a social conscience and courage**

*Remarks delivered at a conference to mark the 10th anniversary of the European Audiovisual Observatory (Strasbourg, 17 January 2003) during the session "Pondering the legal framework for the audiovisual sector in Europe."*

You may perhaps recall that at the Birmingham European Audiovisual Conference in 1998, I asked a question about maps. I said that on very old maps unexplored areas of which little was known used to be marked with the words "Here be dragons". That, before 1989, was how many in western Europe viewed maps of central and eastern Europe. Later, as they looked at maps of the region, what they often saw was words: "Here be markets". My question in 1998 was – when will they see the words: "Here be partners"?

What I want to discuss with you today – speaking in a purely personal capacity and concentrating on the spirit and not the letter of the law – are prospects for partnership in the area of media policy and regulation within the enlarged European Union. Theoretically, there should be no problem. However, there may be, if by partnership we mean a willingness to work together, to agree on goals and objectives to be pursued, and to assist each other in areas each side considers most important and pressing. Vision, flexibility and adaptability on many sides – the old and the new members, and all the EU institutions to boot – will be required for real partnership to flourish.

### ***Potential conflict between national interests and EU regulations***

If any common features of media policy in post-communist countries can be identified, they certainly include a general tendency to protect national culture and the national media market, as well as fear of outside domination. Many of our countries imposed domestic production quotas and caps on foreign investments into their broadcasting systems. The moment they started negotiating association agreements with the EU, they realised that both would eventually have to go and that domestic quotas would have to be replaced by European ones.

They were also given to understand that they were seen as markets to conquer. Back in 1994, the European Commission gave some consideration to promoting the growth of the programme industries in central and eastern European countries, but ultimately decided to consider the advisability and feasibility of providing incentives for EU companies "to move into these countries". Some of the candidate countries have now been admitted to the Media Plus programme, so things have changed. However, the EU's failure to do anything about media concentrations at the European level, together with guiding principles of the internal market, mean that our still relatively underdeveloped media markets

will be wide open to competition from much stronger media conglomerates from other EU countries.

***Preoccupation in new member states with domestic issues of media policy and politics***

In trying to develop a new media system after 1989, we were working with a number of models. Dissidents originally began with a model of direct communicative democracy, and direct democracy in general. Other models could be called the “western European model” and “beyond the western European model”, a more democratic version which someone has called “testing the best of the west”. Then there was a concept of wholesale media privatisation as the only – illusory, I might add – way of escaping state control. The model really applied has been called by one author a “paternal-commercial system”.

The choice of media system model naturally depended on a much more momentous choice: of social and political system. As we began writing broadcasting laws, we realised that it was like writing a constitution, or, rather, that it is impossible to adopt a broadcasting law without first adopting a new constitution.

Elemer Hankiss, a Hungarian sociologist and first post-communist President of Hungarian Television, wrote in 1992 that “Present day events and developments are questions of life and death for each individual, family, group and class in these [post-communist] societies; it is being decided in these months and years who will be the winners and who will be the losers in the next decades; who will profit from, and who will lose by, the transition to a new social and economic model; whose children will be poor and whose will be rich; who will belong to the propertied classes and who will be the have-nots”. Too much is at stake for the media not to be dragged into these battles.

We would need the EU as an honest broker to adjudicate in, and help resolve our battles around the new media order. Problems abound: media freedom, independence and pluralism; prospects for public service broadcasting to take root and survive; independence of regulatory authorities; journalistic professionalism; development of the content industry; ability to enter the digital age. We know the Community cannot easily play such a role, if at all. Still, we want to take the EU seriously as an organisation relevant to our lives, so we need the EU to take itself seriously and to face up to its responsibilities, instead of sweeping problems in new and old member countries under the carpet.

After EU accession, social and political problems in the new member countries will not go away. They may in fact intensify in the first years. Forgive me, but compared to the gravity of these problems, revision of the Television Without Frontiers directive appears somewhat esoteric and abstruse. Our representatives may perhaps find it difficult to concentrate during discussions of the more arcane points of new advertising techniques.

### ***Differences of media policy goals between new countries and other EU members***

Another common feature of early post-communist media policy was preservation of the traditional definition of the media as political, cultural and educational institutions, with almost total disregard – at least at the beginning – for their economic and technological dimensions.

We still treat the media as “meaning-making machines”. We have the impression that the EU treats the media as “money-making machines”. A meeting of minds may be difficult.

At the October 2002 meeting of EPRA, two representatives of the European Commission spoke to the subject of an EU media policy. Someone from the Internal Market Directorate-General (DG) described “our policy approach” in the following words: “Promotion of a European Space for Broadcasting by ensuring the fundamental freedoms of the *internal market* to broadcasters; guaranteeing *access and choice* for citizens; taking into account the specific nature of *public service broadcasting* – in an enlarged European Union”. To call this minimalist agenda a “policy approach” is to give it a very grand name.

In turn, someone from the Education and Culture DG outlined “themes of the work programme” on the revision of the directive: right to information, cultural diversity, protection of consumers, protection of minors, public order, right to reply, intellectual property and Television Without Frontiers. This is more recognisable as a policy approach.

However, I was greatly interested to read a speech given by Lennart van der Meulen, a Commissioner of the Dutch Commissariaat voor de Media at the Film and Television Forum in Barcelona in October last year, where he called for a change of the EU audiovisual policy ... Let me just repeat some of his proposals. He wants the audiovisual policy to serve cultural as well as economic goals. He wants more to be done to develop content production, especially at the national and regional level. He wants action to relieve commercial pressure on the media, to “untie” (as he puts it) the main multimedia concerns, to stress the social responsibility of broadcasters and to preserve and strengthen public service broadcasting as part of the dual system. He wants the directive to be revised with these and similar goals in mind.

After reading his speech, I decided we in central and eastern Europe were not as backward and underdeveloped as we had been led to believe.

I know that the effect of EU accession on the domestic politics, policies and institutions of the new members has often been referred to as “Europeanisation”: EU membership changes the way states define their interests, the international perspective becomes more part of their daily lives. However, let us be mindful of the scene that keeps being replayed at European organisations. New post-communist countries join, new people arrive – fresh from the battles on the



home front – and they begin to raise issues and make proposals on matters of current importance to them. They soon realise, however, that their proposals are getting nowhere, and they fall silent, unable to bridge the gap between what is happening at home and the issues the given organisation is concerned with. Their participation in the work of that organisation may later become formal, their contribution – minimal.

What we must avoid at all costs is repetition of this process within the enlarged European Union.

What I have just said should by no means be interpreted as supporting the view that enlargement is premature. In central and eastern Europe, we are telescoping decades and in fact centuries of change into a few short years. Attempting and achieving the impossible is nothing new for us. It's just that miracles take a little longer. We can become boring and predictable EU members, squabbling about the same things as everybody else. That's impossible, so it's easy. Or we can introduce new ideas into the EU and join forcefully and without inhibitions in the already ongoing debate about what sort of an organisation it should be. We need to change and the EU needs to change. We need an EU with a heart, a social conscience and courage – the courage of its convictions and principles. That requires a miracle, and that is why we need your vision, flexibility and adaptability to achieve that.

## Council of Europe media standards relating to press freedom in the digital era

*Remarks delivered during an ENPA-FAEP event: Press Freedom in the Digital Era, European Parliament, 2 May 2007.*

When radio was being developed, press publishers in Great Britain and elsewhere insisted it should not broadcast any news before the evening, so that sales of newspapers would not suffer. Then, they learned to live and prosper alongside a medium that broadcast news from morning till night. They made no such demands when television came along.

I am saying this because the digital media, and the Internet especially, are still a voyage of discovery for us all. According to the First Law of Technology, a consistent pattern in our response to new technologies is that we simultaneously overestimate their short-term impact and underestimate their long-term impact. This voyage of discovery will last a long time and it is far too early to draw final conclusions. We are still trying to understand these media and to develop a proper frame of reference within which to consider them – and their regulation, if and when necessary.

### ***The social value and importance of the Internet***

However, we are receiving important pointers. Bill Gates has developed the concept of a “web lifestyle”, saying that “This is a lifestyle in which people take advantage of the Internet to lead more informed and productive lives, and have more fun ... people will naturally turn to the Internet first to get information, manage their finances, make better purchase and travel decisions and communicate with friends and others with whom they have common interests”. If we are going to transfer many of our activities to the web, we would expect the same rules to apply online, and the same level of legal and human rights protection, as off-line. Even bloggers, and no-one is more fanatical about their freedom than bloggers, are now beginning to recognise that they should develop a self-regulatory code of conduct. The first draft contains this principle: “Don’t say anything online that you wouldn’t say in person” (or, in other words, as it is explained in the draft, “when you write a blog, imagine you are talking to your own mother”). That underscores my point about the same rules applying online as off-line.

Exactly the same point is made by the European Internet Coregulation Network, broadly representing the industry itself, in a policy statement on Internet governance submitted to Commissioner Reding in 2005: “Internet is a social space which needs regulation in all its aspects according to common social values. Internet cannot evolve in the future if the social dimension of this space is not recognized. Most of the human activities are now transferred on the

internet and it implies new responsibilities for all the actors, public and private". Very much along the same lines, the Summit Meeting of the Council of Europe in Warsaw in 2005 said in its Action Plan that the organisation was going to dedicate itself to strengthening human rights in the information society, and in particular freedom of expression and information and the right to respect for private life. Similar points were made in Council of Europe contributions to the WSIS (World Summit on the Information Society) and to the Internet Governance Forum. They stress that Internet governance should be approached from a people-centred perspective and should be underpinned by the core values of the Council of Europe, namely to protect and promote human rights, democracy and the rule of law based on shared values and respect for national and cultural specificities.

In general terms, the Council of Europe views the Internet as a common asset which has great potential to serve the common good, positively affecting many aspects of life, including communication, information, knowledge, business and growth. Consequently, it believes that everyone should be entitled to expect the delivery of a minimum level of Internet services of public value and that the state will have to play a growing part in the delivery of the public service aspects of the Internet. However, this does not necessarily require a hands-on approach; in most cases, the role of facilitator and overseer will suffice. To ensure the delivery of public services by delegation, the state should facilitate and lead a multi-stakeholder framework within which the private sector can operate and, where necessary, should adopt measures to fill gaps left by private operators.

The Council of Europe wants to address both opportunities to exercise human rights, and challenges to this, created by the use of information and communication technologies and to develop standards to ensure respect for human rights and the rule of law in the information society. The 2005 Declaration of the Committee of Ministers on Human Rights and the Rule of Law in the Information Society identified a number of human rights which are affected, both positively and negatively, by the ICTs (Information and Communications Technologies). The list begins with the right to freedom of expression, information and communication, and includes also the right to respect for private life and correspondence; the right to education; the prohibition of slavery and forced labour, and the prohibition of trafficking in human beings; the right to a fair trial and to no punishment without law; the protection of property; the right to free elections; freedom of assembly.

This approach was confirmed by the European Court of Human Rights recently, when it found the British Government to be in breach Article 8 of ECHR ("Everyone has the right to respect for his private and family life, his home and his correspondence") in a case where a college monitored one of its employees' emails, Internet traffic and telephone calls.<sup>1</sup>

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1. Copland v. the United Kingdom (Application No. 62617/00): [www.thegovernmentsays.com/cache/90069.html](http://www.thegovernmentsays.com/cache/90069.html).

## ***Developing and updating human rights standards for the digital media***

One of the avenues pursued by the Council of Europe is to reassess and if necessary to revise or develop its existing human rights standards in terms of their applicability and effectiveness in the information society. This applies to the media field, as much as to any other, and I want to stress in this context that “the media” are now defined in Council of Europe documents as any means of communication for the periodic dissemination of information, over which there is editorial responsibility, irrespective of the means and technology used for delivery, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public.

Accordingly, a number of texts<sup>2</sup> have been and are being prepared to update Council of Europe standards and to apply them to circumstances created by the widespread use of digital technologies. They include:

Recommendation No. R(95)13 concerning problems of criminal procedural law connected with information technology

Recommendation No. R(99)5 for the protection of privacy on the Internet

Recommendation Rec(99)14 on universal community service concerning new communication and information services

General Policy Recommendation No. 6 of ECRI on combating the dissemination of racist, xenophobic and antisemitic material via the internet (adopted on 15 December 2000)

Recommendation Rec(2001)7 on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment

Convention on Cybercrime (2002)

Recommendation No. R(2001)8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services)

Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (2002)

Convention on information and legal co-operation concerning “information society services” (2001)

Recommendation Rec(2004)16 on the right of reply in the new media environment

Recommendation Rec(2006)12 on empowering children in the new information and communications environment

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2. [www.coe.int/t/dghl/standardsetting/media/Doc/CM\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM_en.asp).

Recommendation Rec(2007)2 on media pluralism and diversity of media content

Recommendation Rec(2007)3 on the remit of public service media in the information society

The terms of reference of the Group of Specialists on human rights in the information society<sup>3</sup> include the following tasks in the next two years, emerging out of the Action Plan adopted by the Kyiv Ministerial Conference on Mass Media Policy in 2005:<sup>4</sup>

- preparation of draft guidelines on the roles and responsibilities of key state and non-state actors in the information society with particular regard to Article 10 of the European Convention on Human Rights;
- drafting a Committee of Ministers' recommendation updating Recommendation No. R(99)15 on media coverage of election campaigns, taking account of the development of digital broadcasting services, online media and other electronic communication platforms;
- preparation of a standard-setting instrument which promotes a coherent pan-European level of protection for children from harmful content when using new communication technologies and services and the Internet, while ensuring freedom of expression and the free flow of information;
- preparation of a report on the use and impact of technical filtering measures for various types of content in the online environment, with particular regard to Article 10 of the European Convention on Human Rights and, if appropriate, submission of concrete proposals (e.g. in the form of a draft standard-setting instrument) for further action in this area;
- examination of the issue of respect for human dignity in the new communication services and, if appropriate, submission of concrete proposals for further action designed to complement or reinforce existing standards in this area;
- preparation of a report on emerging issues and trends in respect of, on the one hand, the protection of intellectual property rights and the use of technical protection measures in the context of the development of new communication and information services (and the Internet) and, on the other hand, the fundamental right to freedom of expression and free flow of information, access to knowledge and education, the promoting of research and scientific development and the protection and promotion of the diversity of cultural expressions and artistic creation and, if appropriate, submission of concrete proposals for further action in this area;

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3. [www.coe.int/t/dghl/standardsetting/media/MC-S-IS/Mandat\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/MC-S-IS/Mandat_en.asp).

4. [www.coe.int/t/dghl/standardsetting/media/Doc/MCM\(2005\)005\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/MCM(2005)005_en.asp).

- development of tools to assist key state and non-state actors in their practical understanding of, and compliance with, human rights and fundamental freedoms in the information society in particular with regard to Article 10 of the European Convention on Human Rights.

### ***Freedom of expression***

All this work notwithstanding, for the Council of Europe the point of departure and the final goal, when discussing human rights and the media is, of course freedom of expression and information, as laid down in Article 10 of the European Convention on Human Rights, and freedom of the media. This is why in 2003, the Committee of Ministers adopted a Declaration on Freedom of Communication on the Internet<sup>5</sup>. The declaration says that member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery, that they should encourage self-regulation or co-regulation regarding content disseminated on the Internet, that their should be an absence of prior state control, and so on. This means, incidentally, that when the European Convention on Transfrontier Television is amended, its scope will be defined as in the draft Audiovisual Media Services Directive, and will not cover online versions of newspapers. Also the 2004 Declaration on Freedom of Political Debate in the Media<sup>6</sup> can be applied to the Internet as much as to the traditional mass media. Yet another document is now being prepared, a draft recommendation on promoting freedom of expression and information in the new information and communications environment, which will spell out in detail what states can and should do, in active collaboration with other stakeholders, and by promoting the self- and co-regulation of the industry, to pursue that goal. According to this draft, the private sector should be encouraged to “acknowledge and familiarise itself with its evolving ethical roles and responsibilities, and to co-operate in reviewing and, where necessary, adjusting their key actions and decisions which impact on individuals rights and freedoms” and to “develop, where appropriate, new forms of self and co-regulation”.

Let me give you another example of the Council of Europe approach. The World Association of Newspapers is marking World Press Freedom Day this year by waging a Press Under Surveillance campaign and warning, in the words of Timothy Balding, its Chief Executive Officer, that “There is a legitimate and growing concern that in too many instances measures used to fight the war on terror are being used to stifle debate and the free flow of information about political decisions, or that they are being implemented with too little concern for the overriding necessity to protect individual liberties and, notably, freedom of the press”. The Council of Europe Committee of Ministers adopted in 2002 “Guidelines on human rights and the fight against terrorism”<sup>7</sup> in which it called

5. [www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf\(2003\)007\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf(2003)007_en.pdf).

6. <https://wcd.coe.int/ViewDoc.jsp?id=118995&Lang=en>.

7. <http://wcd.coe.int/ViewDoc.jsp?id=991179&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

for all measures taken by states to fight terrorism to respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, and for “all measures taken by states to combat terrorism to be lawful”. Then, in 2005, the Committee of Ministers adopted a Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism,<sup>8</sup> calling on member states, and others, not to introduce any new restrictions on freedom of expression and information in the media unless strictly necessary and proportionate in a democratic society and after examining carefully whether existing laws or other measures are not already sufficient; to refrain from creating obstacles for media professionals in having access to scenes of terrorist acts; and to respect strictly the editorial independence of the media, and accordingly, to refrain from any kind of pressure on them.

### ***The multi-stakeholder approach***

Mr Chairman, let me conclude by returning to the question of “how” to regulate, when regulation is indeed found to be necessary. In its 2006 submission to the Internet Governance Forum, the Council of Europe begins by saying that “States have an important role to play in Internet Governance” and this is immediately developed by recognising the accepted working definition of Internet governance as “the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet”. The submission notes that it is important for states to encourage self-regulation and co-regulation regarding content disseminated on the Internet and says that multi-stakeholder co-operation will no doubt remain the best way forward. Also, that a state can discharge many of its responsibilities by promoting new forms of solidarity, partnership and co-operation: “Through open discussions and exchanges of information, a multi-stakeholder governance approach will help to shape regulatory and non-regulatory models and address challenges and problems arising from the rapid development of the information society”. The Council of Europe recognises in the document that the most democratically acceptable way forward is to draw on international conventions and practices when bringing all stakeholders together within a framework of shared expectations regarding the Internet and its governance.

The European Newspaper Publishers Association (ENPA) has observer status with the Council of Europe Steering Committee on the Media and New Communication Services<sup>9</sup> and has made its views known as regards documents prepared by that committee. Its views are taken into consideration and have affected the contents of these documents, and the language used in them. This shows that the Council of Europe does more than preach a multi-stakeholder approach. It also practises it.

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8. <http://wcd.coe.int/ViewDoc.jsp?id=830679&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

9. [www.coe.int/t/dghl/standardsetting/media/CDMC/](http://www.coe.int/t/dghl/standardsetting/media/CDMC/).

## **Part II. Public service media look to the future**





## Public service broadcasting vis-à-vis the digital and online challenge

*Submitted as the Polish delegation's memorandum to the 6th European Ministerial Conference on Mass Media Policy (Kraków, Poland, 15-16 June 2000).*

Public service broadcasting (PSB) is an institution resulting from deliberate state policy to create such an institution responsible for making a certain kind of content available to all inhabitants of a country, and to safeguard conditions required for its existence and operation. It is primarily a public sphere and civil society institution with a specific programming remit and philosophy, well summed up in Resolution No. 1 of the 4th European Ministerial Conference on Mass Media in Prague in 1994. Autonomy from the state (for which well-developed democracy is required) and from commercial considerations is a prerequisite for public service broadcasters to remain true to their remit.

In its traditional form, public service broadcasting was the product of, among other things, three sets of circumstances:

- the societal conditions (including far-reaching social divisions and stratification) in which it emerged, resulting in what at one time could often be described as its paternalistic approach to a large part of its audience;
- “an economy of scarcity” in broadcasting, resulting in the generalist orientation of its programming;
- a situation of monopoly, providing it with a captive audience.

Change in any, or all, of these sets of circumstances may lead to change in public service broadcasting itself.

The typical shape of this public institution (“first-generation broadcasters”) usually encompassed the following elements:

- a legal framework which determines the legal form of public service organisation(s), its place vis-à-vis the state and society, as well as its role and obligations;
- place in politics, resulting from a compromise achieved in each case between the principle of impartiality and distance from politics on the one hand, and the power of the state and other political players on the other;
- a vertically-integrated broadcasting company(ies), incorporating all or most of the elements of planning, creative work, production, transmission and distribution of programming;
- a comprehensive remit, involving:

- non-commercialism and dedication to public service goals;
- diversity, pluralism and range (offering programming reflecting the concerns of all groups in society, covering all programme types and genres);
- a cultural role: generating and disseminating the linguistic, spiritual, aesthetic and ethnic wealth of the nation, playing a societally integrative role.
- the goal of operating as a universal service, easily accessible to all citizens.

Doubts as to the continuing legitimacy of the legal and administrative arrangements, and state policy providing the foundation for the existence of this public institution first appeared on a large scale in western Europe in the 1980s, when deregulation of broadcasting resulted in the birth of “second-generation broadcasters” – a still-growing commercial sector.

In reality, however, commercial broadcasting did not threaten to supplant or replace public service broadcasters. On the whole, it focused mainly on maximising audience share and generating a financial profit, and as a result typically offered an entertainment-oriented alternative to PSB programming, with only limited overlap between them. By the same token, it showed that the values represented by public service broadcasting, though vulnerable, retained their validity.

Well-funded public service broadcasters committed to maintaining their distinction from commercial ones and able to retain a significant market share have been able to shape the new broadcasting ecology, creating a “virtuous circle” and encouraging commercial broadcasters to offer high quality programming serving objectives and employing programme genres typical of PSB.

In the 1990s, public service broadcasting in Europe was gradually extended to central and eastern Europe. This process is still continuing, reinforcing the dual system of broadcasting and strengthening the public service sector in Europe.

At the same time, globalisation of the media and the gradual emergence of the information society with its profusion of new information and communication technologies have set in train fundamental changes in broadcasting. This is seen by some observers as undermining the rationale for the existence of public service broadcasting, in part by providing alternative sources of the same content and putting control over the reception of media content in the hands of the audience.

Still, public service broadcasting will continue as long as there is political support for it and a demand for its services from the audience. Even so, the question remains whether public service broadcasting is likely to survive in its present form, or whether it will need to change – and how.

### ***Dissemination of the model of public service broadcasting***

It is premature to talk about the demise of public service broadcasting when it is yet to make its appearance in many parts of the world. As shown by the experience of South Africa and India, introduction or enhancement of democracy creates conditions for the evolution of former state broadcasters into public service ones. This process is likely to unfold elsewhere, too.

This has been the case in central and eastern Europe. After the downfall of the communist system, all the countries of the region adopted the goal of transforming their broadcasting systems into dual ones, combining public service and commercial sectors. Acting in part on Council of Europe advice and expertise, they adopted new broadcasting laws and initiated the process of reform and democratisation of state broadcasting organisations.

There is a clear parallel between the progress of general political and economic reform and that in the field of broadcasting. In many countries, the legal and institutional framework of public service broadcasting has achieved mature forms. Elsewhere, the process is still continuing.

Promoting the development of public service broadcasting in central and eastern Europe should remain a goal of Council of Europe activities in this field, in the interest of the spread of democracy in Europe and pursuit of the goals of European media policy.

### ***Policy orientations as regards the future of PSB***

There is no doubt as to the determination of European media policy makers that public service should survive and flourish in the future.

Resolution No. 1 of the 4th European Ministerial Conference on Mass Media in Prague in 1994 and Recommendation No. R(96)10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting, as well as other Council of Europe documents are eloquent expression of this organisation's commitment to the continued existence of PSB.

In January 1999, the Council of the European Union and the representatives of the governments of member states, adopted a resolution concerning public service broadcasting (1999/C 30/01) which recalls the 1997 Protocol on the system of public broadcasting in the member states to the Treaty of Amsterdam and notes in part that public service broadcasting, in view of its cultural, social and democratic functions which it discharges for the common good, has a vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity.

The document also makes the point that public service broadcasting has an important role in bringing to the public the benefits of the new audiovisual and information services and the new technologies. The ability of public service broadcasting

to offer quality programming and services to the public – it says – must be maintained and enhanced, including the development and diversification of activities in the digital age.

Another European Commission policy document, Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age (COM(1999) 657 final, Brussels, 14.12.1999), recognises the role of public service television "with regard to cultural and linguistic diversity, educational programming, in objectively informing public opinion, in guaranteeing pluralism and in supplying, on a free-to-air basis, quality programming".

The integration of public service broadcasting in the new digital audiovisual environment should "allow European public service broadcasters to fully exploit the possibilities offered by new information technology but also to fulfil more effectively their respective public service remits".

At the same time, the document points out that "the future of the dual system of broadcasting in Europe, comprising public and private broadcasters, depends on the role of public service broadcasters being reconciled with the principle of fair competition and the operations of the free market, in accordance with the Treaty".

The European Parliament, in a 1996 Resolution on the role of public service television in a multi-media society stressed that "for PSBs to remain available to all citizens, EU policy for the information society must ensure that they are capable of reaching the audiences that finances them through all digital and analogue delivery systems – satellite, terrestrial, cable, telecoms networks – when necessary through obligations for cable companies to offer PSB programmes; obligations for satellite TV companies packages when these programmes are receivable by satellite; and obligations to make PSB programmes easy to find for viewers in multi-channel navigation systems (electronic programme guides)".

Naturally, public broadcasters themselves also believe they have a future in the digital age. A press release issued by the European Broadcasting Union (EBU) on 10 February 2000, on the occasion of its 50th anniversary, noted that "public service broadcasting would be even more important in the digital age than in the Union's first 50 years ... As the choice of channels increases through digital technology, so too does the need for trusted broadcasters providing reliable information and programming for all". EBU President Albert Scharf said in a statement: "Greater quantity does not mean greater quality: the role of the EBU and its members – serving all the citizens of Europe – will only grow as the media market becomes more crowded."

It must be noted in this context that there is a shift of emphasis in the approach of some European organisations in favour of a philosophy which can be summed up as "the market when possible, the state when necessary". In this view, public

intervention should, as a matter of principle, be limited to areas where there is clear market failure.

This shift of emphasis can also be detected at the national level. Afraid that their regulatory frameworks will be out of touch with the latest developments, governments often consult the industry, thereby conferring much power on corporate actors and giving them the opportunity to influence public policy objectives. If these trends continue, a free market orientation may acquire considerable importance as the fundamental principle of broadcasting, with public service broadcasting increasingly perceived as an exception to the general rule, and perhaps in the future even as an anomaly.

These policy orientations notwithstanding, any consideration of the future of public service broadcasting must seek to examine the consequences of some of the major processes which are now sweeping contemporary world. Here, we will briefly look at globalisation and the emergence of the information society.

### **Globalisation**

Of the many definitions of globalisation, one (formulated by Anthony Giddens) clearly points to the inner contradictions of the process: "Globalization can be defined as the intensification of worldwide social relations which link distant locations in such a way that local happenings are shaped by events occurring many miles away and vice versa. This is a dialectical process because such local happenings may move in an obverse direction from the very distanced relations that shape them. Local transformation is as much a part of globalization as the lateral extension of social connections across time and space".

It is the contradiction between distant and local events, which provides the tensions mentioned above. They concern, *inter alia*:

1. erosion of the nation-state, with the supra-national or global level seen as the most appropriate for tackling many important problems, while at the same time the sub-national or regional level acquires more importance as the proper framework for dealing with other issues. This may eventually lead to the break-up of especially larger, multi-ethnic states;
2. economic globalisation and concentration, accompanied by renewed attention to local markets and customers' individual taste, especially in e-commerce;
3. spread of a "global culture", leading in part to renewed attention to national and regional culture, or indeed to the birth of national, religious or cultural fundamentalism in many areas as they respond to the threat to their identity arising out of globalisation. Some of the global television players (for example, MTV or CNN) respond to this by a process of "regionalisation", introducing new channels for particular regions or countries, involving specialised content originating from, or tailored specially for target audiences);

4. "glocalisation" of the media and communication patterns, as they both concentrate at the European and global level and at the same time progressively localise.

These and other processes forming part of globalisation may set in train an epochal reconfiguration of social organisation and institutions, involving far-reaching social, political, economic and cultural change, raising many public policy and public interest issues and requiring a public debate and consensus building. As they seek to respond to the challenges involved in these processes and develop new forms of social organisation, societies will, it can safely be assumed, require the continued existence of some form of public service media as a public forum of debate on change affecting everyone in society. Also, they will need it as a means of reinforcing existing identities, or projecting new national or regional identities emerging as part of the process.

### ***Information society***

The High Level Expert Group (HLEG) appointed by the European Commission to analyse the social aspects of the information society defines the information society as "the society currently being put into place, where low-cost information and data storage and transmission technologies are in general use. This generalisation of information and data use is being accompanied by organisational, commercial, social and legal innovations that will profoundly change life both in the world of work and in society generally" (Building the European Information Society for Us All, final policy report of the HLEG. European Commission, Brussels, 1997: 15).

Information Society communication patterns will emerge out of the integration of:

- computing (which makes possible unrestricted processing of content);
- telecommunication networks (which provide access and connectivity to diverse and distant other people and content);
- digitisation (making possible transference of content across distribution networks and reprocessibility of content as data, text, audio, video), as well as interactivity and individualisation of communication.

In any discussion of the information society, there is an inevitable emphasis on profound, all-encompassing change. The HLEG calls for the recognition of the information society as the knowledge society and for ICTs to be viewed as essentially complementary to investment in human resources and skills required in part for using ICTs to group or individual advantage. It also points out that information and communication technology must be perceived as operating in the specific social context, and as shaped and differentiated by that context. That is why it says that in the future there could be different models of information society, just as today we have different models of industrialised society.

These two premises, together with a call for social solidarity in dealing with problems of social exclusion and creating opportunities for the disadvantaged in the context of the information society, lead the HLEG to list major policy challenges which must be met to profit from prospects created by that society. These include:

- the particular importance of knowledge and skills acquisition;
- the changing role of public services which (like education, health, culture, the media, etc.) are crucial to dealing with some of the issues posed by the information society);
- the scope for decentralisation and implications for work organisation;
- the implications of globalisation for employment growth and capital flows;
- the particular concerns regarding social exclusion;
- the need to take advantage of European cultural and social diversity (taking advantage of the many emerging information societies);
- and the implications of growing transparency for democracy (including the issue of media concentration and finding ways of including everyone in the information society).

Though this is one of a number of differing approaches to the issue of the information society, the policy agenda developed by the HLEG clearly points to the need for the continued existence of public service media, and for their continued performance of many of the same functions as today.

### ***Challenges to public service broadcasting in the changing media landscape***

It is clear that the circumstances in which public service broadcasting was born no longer apply:

- a levelling of living and educational standards, and removal of social divisions have made any paternalism of approach untenable;
- there is now a growing “economy of abundance” in broadcasting and communication in general, resulting in a wide and growing variety of channels and forms of content available, including increasingly specialised and personalised forms of online communication, vesting control over, and choice of channels and content of communication firmly in the hands of the audience;
- with increasingly rare exceptions, public service broadcasting has long lost its monopoly not only on access to the audience but also on programme genres and types of content; in consequence, public service broadcasters find themselves in a competitive market situation and much of the content which once was the exclusive domain of PSB is now provided also by “third generation” broadcasters of thematic channels (often offered on a pay TV basis), even if they usually have an insignificant market share.



In view of the increasing competition by commercial channels and the increasing cost of purchasing, producing and preserving programmes, as well as sometimes distributing them (for example on several platforms), it is difficult for public service broadcasters to fulfil, on the basis of the licence fee receipts alone, the specific programming requirements which they are bound to respect.

Competition between increasing numbers of broadcasters raises the price of talent and rights for all players and makes television services more and more expensive. As subscription television evolves, we witness a migration of key programmes from free to pay TV. Many programmes that were available at no expense to the viewer are only accessible now under subscription or pay-per-view arrangements. Digital technologies, because of their encryption capabilities, are particularly well suited to pay-per-view and pay TV. Digitisation is accelerating the trend towards subscription-based services, which could soon become the norm rather than the exception.

One of the key principles of public broadcasting – universal access – is increasingly placed under threat by the growth of conditional access television. This and other forms of gateway monopoly may, unless proper legislation is introduced, reduce PSB access to the audience. The ability to perform a universal service naturally depends on the willingness of the population to take advantage of it.

Digitisation is also driving the process of internationalisation and globalisation of the broadcasting field, thereby further weakening the position of public service broadcasters ... An international scale of operation of commercial media corporations eases transfer of technology, allows cross-subsidisation and economies of scale. In turn, the strategies of dominant players, international in scope, accelerate the globalisation process of the broadcasting field, and this makes it more difficult for national broadcasters to prosper in an increasingly global environment.

In order to fulfil their remit in the converging environment, and depending on the domestic legal framework and circumstances under which they operate, public service broadcasters will be required to make important financial investments, such as for the following purposes:

- the development and acquisition of new technology;
- the operation of online services;
- the production, co-production or commissioning of programmes for digital broadcasting;
- the analogue and digital simulcasting of services before a digital switch-over;
- the adequate training of broadcasting staff.

The rising costs of broadcasting drive public service broadcasters to seek to supplement their income by engaging in commercial activities or entering into partnership with commercial companies which may lead to an erosion of their non-commercial ethos.

### ***Facing the challenges***

Public service broadcasters welcome digital technology as finally offering them a chance to do their job properly. The fundamental underlying rationale for the existence of public service broadcasting remains valid. Television is not merely a commodity and the free market model of perfect competition is not valid in evaluating the nature and efficacy of competition in the television market. Information is a public good and the market cannot be relied upon to cover the community's need in this area. New technology, expanding the possibilities for economies of scale and economies of scope, contributes to concentrate ownership. A public service broadcaster is more indispensable than ever to compensate for this trend. Additional benefits of public service broadcasting are the delivery of national coverage (to counterweigh the fragmentation of audiences) and the coverage of events of special importance for the citizenship and the community. Public broadcasters can also act as "centres of excellence" and widen the viewing choice delivered by commercial broadcasters. Additionally, public service broadcasting can:

- combat polarisation and reinforce the national community;
- widen people's opportunities by, widening their knowledge base;
- promote social responsibility;
- increase the accountability of public authorities.

According to Bernd Holznapel (*Public Service Broadcasting and the Contemporary Challenge* mimeo), there are 10 central missions for PSB to fulfil in a digital communications system:

1. PSB has to serve as an "island of credibility" in fragmented media markets.
2. PSB guarantees participation by everybody in the advantages of the digital revolution.
3. PSB has to serve as an independent and credible provider of information.
4. PSB guarantees the provision of information based on nationwide perspectives and interests.
5. PSB serves as [a] nation[']s voice in Europe and in the world.
6. PSB guarantees quality standards.
7. PSB corrects the supply shortages of the commercial sector.
8. PSB serves as a guarantor of cultural identity.

9. PSB encourages national and European productions.
10. PSB is a motor for innovation.

Given the convergence of public and commercial programming, a clear test is required to know just when public service broadcasters remain true to their remit. The criteria for applying this text have been proposed by Gavyn Davies, chairman of the Independent Review Panel appointed to propose changes in the funding of the BBC:

- the first is that not everything that a public sector broadcaster does is public service broadcasting. Still less does it mean that the output of other broadcasters falls outside the definition of public service. To support the continued existence of the public service broadcaster as the recipient of a universal compulsory charge, we need to believe both that a large share of its output falls into the public service category, and also that by no means all of the private sector's output does so.
- the second principle is that some form of market failure must lie at the heart of any concept of public service broadcasting. Beyond simply using the catchphrase that public service broadcasting must "inform, educate and entertain", we must add "inform, educate and entertain in a way which the private sector, left unregulated, would not do".
- the third principle is that, in order to believe in a full-scale public broadcaster, we need to accept that a combination of the private sector's profit motive, plus regulation, is insufficient to repair the market failure and deliver what we want. After all, the existence of public service broadcasting on commercial channels shows that a fair ration of public service output can be generated from the private sector. In order to argue in favour of maintaining an expensive organisation dedicated to public service television, we need to be satisfied that regulation of the private sector is not, on its own, enough.

Public service broadcasters recognise that they must practically reinvent themselves, or at least many crucial aspects of their organisation and operation in order to continue to fulfil their role. They are not guaranteed success in the digital age: it is expected that some may be privatised, others may be scaled down and the weakest may even vanish.

In its report "Public service broadcasters around the world", commissioned by the BBC, McKinsey & Company list some conditions which must be met in order to create a sustainable future for public service broadcasters:

- a mission designed not only to provide distinctive programming in its own right, but also aiming to influence the overall market;
- a scheduling approach that uses mainstream-type programming (albeit with appropriate standards of quality) to bring in the audience and "earn

the right” from the viewers to expose them to a wider variety of genres – particularly in educational and informative areas;

- a lean organisation, as – if not more – cost-effective than its commercial rivals and able to market its unique benefits to its audience;
- the launch of selected new services to support and enhance the proposition to audiences. Offering greater choice and convenience, and enabling the PSB to provide greater value for money – for example more extensive sports coverage from events for which it has the rights;
- a stable funding regime that enables the PSB to maintain share and thereby direct influence and to invest in new services and “riskier” activities unlikely to be funded by commercial broadcasters.

This approach supports the conclusions drawn by Arne Wessberg, Director General of the Finnish Broadcasting Company YLE in a presentation on Public Service Broadcasting, Information Society and Small Markets (presented at a conference on Public Service Broadcasting. The Digital and Online Challenge, London, 28-29 February 2000), namely that:

- although changes are profound, the information society environment will not demolish the European PSB mission;
- the fundamental aims and values are valid despite the change;
- many aspects of the ongoing change towards digital underline and support the relevance of PSB aims and values.

Wessberg has listed some basic features of communication patterns in the information society and outlined what the response of public service broadcasters to them should be:

#### **Public service media in the Information Society**

<b>Feature of information society communication patterns</b>	<b>PSB response</b>
Multiplication of distribution routes to viewers and listeners	PSB is and will need to be present on the main distribution routes. New platforms should be seen as an opportunity and PSB should ensure they are not cut off from future options.
Multiplication of actors in media and content industries	PSB is in many cases the only national counterforce to big international actors, especially in smaller markets. PSB provides a critical mass of talent in national markets. It could serve as unifying umbrella for new actors and innovative content.

New consumption patterns, new audience relationships	PSB must show commitment to service the basic audience segments as well as new emerging consumption patterns. Providing new services without discarding traditional basic ones will be judged by the licence fee players as one of the main legitimisation factors for PSB.
Share of voice of PSB diminishes	PSB will need to increasingly pay attention to those factors that constitute their true and lasting legitimacy. They will need to demonstrate convincingly their public service value, also through their marketing and branding operations.
Integration of TV and Internet	PSB will need to ensure that they are not left out of this integration process. It is a route to innovative content, new content partnerships and potentially to new business models.
Mobility: physical and cross-media	PSB will need to ensure they are not left out of this integration process. It is a route to innovative content, new content partnerships and potentially to new business models.

### **Conclusion**

European societies stand to lose an important part of their heritage and prospects for retaining their distinctive identities if they allow their public service broadcasters to become marginalised or driven out of the market. Renewed efforts at both the national and European level are required to create conditions for public service broadcasters to change in ways required for them to continue to serve society. Efforts to lock them into a traditional mould – which originated a long time ago in an entirely different set of circumstances – may weaken them and accelerate their decline.

## Public service broadcasting in Europe<sup>10</sup>

*This recommendation and report are based on a draft commissioned from Karol Jakubowicz by Mr Pascal Mooney and then incorporated into the final version in its entirety, but also supplemented by content provided by the then Media Division of the Directorate General for Human Rights, and added to, and given its final form by Mr Mooney.*

### **Summary**

Public service broadcasting is a vital element of democracy in Europe. Across the continent, its future is challenged by political and economic interests, by increasing competition from commercial media, by media concentrations and by financial difficulties.

Some post-communist countries have not yet even started the transition from state-controlled to public electronic media. In other countries, public service broadcasting is in crisis.

The report calls for a clear political commitment of European governments to maintain strong and vibrant independent public service broadcasting, whilst adapting it to the requirements of the digital age.

### **I. Recommendation**

1. Public service broadcasting is a vital element of democracy in Europe but it is under threat. It is challenged by political and economic interests, by increasing competition from commercial media, by media concentrations and by financial difficulties. It is also faced with the challenge of adapting to globalisation and the new technologies.
2. Public service broadcasting, whether run by public organisations or privately owned companies, is distinguished from broadcasting for purely commercial or political reasons by its specific remit, which is essentially to operate independently of economic and political power. It provides the whole of society with information, culture, education and entertainment, enhances social, political and cultural citizenship and stimulates the cohesion of society. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers a variety of programmes and services catering for the needs of all groups in society and it is publicly accountable.

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10. Parliamentary Assembly Doc. 10029 (12 January 2004). Report by the Committee on Culture, Science and Education, rapporteur: Mr Paschal Mooney, Ireland, Liberal, Democratic and Reformers' Group.

These principles apply whatever changes may have to be introduced to meet the requirements of the 21st century.

3. It is a matter of concern that many European countries have so far failed to meet the commitment that their governments undertook at the fourth European Ministerial Conference held in Prague in 1994 to maintain and develop a strong public broadcasting system. It is also worrying that the fundamental principle of the independence of public service broadcasting contained in Recommendation No. R(96)10 of the Committee of Ministers is still not yet firmly established in a number of member states. Moreover governments across the continent are in the process of reorienting their media policies in the light of the development of digital technology and in danger of leaving public service broadcasting without enough support.
4. Public service broadcasting was born in western Europe and has evolved by adapting itself naturally to the needs of a mature democracy. In central and eastern Europe it is not yet socially embedded since it was “transplanted” into an environment that lacked the necessary political and management culture, in which civil society is still weak and has inadequate resources and little dedication to public service values.
5. The situation varies across Europe. At one extreme, national broadcasting continues to be under strict governmental control and there is little prospect of introducing public service broadcasting by legislation in the foreseeable future. In Russia, for instance, the lack of independent public service broadcasting was a major contributing factor to the absence of balanced political debate in the lead up to the recent parliamentary elections, as mentioned by the International Election Observation Mission. Hardly any progress has been made in adopting the necessary public service broadcasting legislation that might meet Council of Europe standards in Azerbaijan, Georgia and Ukraine.
6. In Bosnia and Herzegovina and in Kosovo, public service broadcasting still only operates under regulations imposed from outside by the international community. Adoption of a proper law has been delayed in Bosnia and Herzegovina as a result of internal resistance to structural change and in Kosovo because of attempts to undermine the funding of public service broadcasting.
7. In other countries, laws on public service broadcasting have been adopted but certain provisions and practices contradict European standards. In Armenia, all the members of the Council for Public Radio and Television are appointed by the President of the Republic. It remains to be seen whether TeleRadio Moldova will be able to be independent in its day-to-day operation after two changes in the law in 2003. The appointment of a Serbian Broadcasting Agency has been marred by scandals that are yet to be resolved.
8. More substantial progress has been made in other countries, although problems still remain. Changes in the broadcasting laws, making them more

politically independent and financially viable, have been recommended by the Council of Europe in Bulgaria and “the former Yugoslav Republic of Macedonia”. There are still attempts to change laws in order to make them more suitable for a ruling majority as with the new law on Croatian Radio and Television. Severe financial difficulties are experienced by public service broadcasting in the Czech Republic, Hungary and Slovakia.

9. There is political pressure on public service broadcasting in western Europe too. The BBC was attacked by the British government over its coverage of the war in Iraq. In Greece, Italy, Portugal and Spain, situations variously defined as “political clientelism”, “state paternalism” and *partitocrazia* have prevented the full emancipation of public service broadcasters from direct, “hands-on” political control. Manipulation of information under political influence led to the unprecedented sentencing of TVE for its coverage of the general strike in Spain in June 2002. The politicisation of RAI caused by a unique division of the three Italian channels between the main political parties has been further aggravated by the current government.
10. There is a growing tendency to go beyond hitherto existing forms of public service broadcasting regulation and define its obligations more precisely, often by contracts backed up by accountability reports to parliament, government and/or a regulatory agency. Increasing attention is paid to the financial aspects of the operation of the public service broadcaster. While such moves are to be welcomed in so far as they give public service broadcasting organisations greater stability, they should not be used by governments as an instrument of undermining their financial and statutory situation. Recent government decisions in the Netherlands and France have seriously affected the funding of their public service broadcasters.
11. Governments have been examining possible structural changes that would affect the very nature of public service broadcasting. Privatisation plans have been discussed in Denmark and Portugal and in Italy with the recently proposed broadcasting legislation (the “Gasparri law”), which has since then been referred back to parliament by the President of the Republic. In the UK, there is growing concern at the government’s attitude to the renewal of the charter of the BBC, fuelled by the very public row between the corporation and the government.
12. In a large majority of countries, digital channels are not yet defined in broadcasting legislation. There is also a clear absence of legal provisions concerning Internet activities by public service broadcasting in most countries. This might affect their ability to expand on new platforms.
13. The coexistence of public and commercial media has largely contributed to innovating and diversifying the content offer and has had a positive impact on quality. However, commercial interests are trying to reduce competition from the public sector to a minimum. EU competition law is often used to



attack the systems of funding of public service broadcasting. In this respect, the Assembly welcomes the decision of the European Court of Justice in the *Altmark* case not to regard the fee as state aid but as a compensation for discharging public service obligations. Commercial broadcasters also challenge the possibility for public service broadcasting to expand into new areas and new services. Recent examples include BBC's Internet activities and the plans of the German ARD to turn the Internet into its "third pillar", which had to be abandoned under commercial pressure.

14. Commercial broadcasters also claim that with the shift to multi-channel, on-demand broadcasting offered by digitalisation, the market would be able to cater for all needs and therefore would also fulfil the public service obligations currently assigned to public broadcasting institutions. However, there is no guarantee about the quality and independence of such offer, or that it would be free-to-air, universally accessible and constant over time.
15. It is recognised that there can be an overlap with commercial broadcasting in popular genres. However, the growing commercialisation and concentration of the media sector with the resulting dumbing-down of general quality gives reason, when it is followed by public service broadcasters, to those who criticise the misuse of public money for such purposes. Public service broadcasting is suffering an identity crisis as it is in many instances striving to combine its public service obligations with chasing ratings and the need to secure an audience to justify its "public" character or simply to attract advertising revenue.
16. European countries and the international community in general must become more actively involved in efforts to develop general standards and good practice as guidance for national policies in this area.
17. Therefore the Assembly recommends that the Committee of Ministers:
  - i. adopt a new major policy document on public service broadcasting, taking stock of developments since the Prague Ministerial Conference and defining standards and mechanisms of accountability for the future of public service broadcasting. The forthcoming Ministerial Conference on Mass Media Policy in Kyiv could include the preparation of such a document in its Plan of Action;
  - ii. mobilise the relevant structures of the Council of Europe to ensure proper and transparent monitoring, assistance and, where necessary, pressure, so that member states undertake the appropriate legislative, political and practical measures in support of public service broadcasting;
  - iii. consider specific measures to ensure that public service broadcasting legislation in line with European standards is adopted as soon as possible in Azerbaijan, Georgia, Russia and Ukraine;

- iv. ensure close co-operation with other international organisations in maintaining its standards regarding freedom of expression;
- v. continue to press for audiovisual services to be regarded as more than simply a commodity in the WTO and GATS negotiations;
- vi. endeavour to ensure that the World Summit on the Information Society gives proper recognition to public service broadcasting as an important element of developing the Information Society and at the same time easing the shock of rapid change that it will involve;
- vii. call on the governments of member states to:
  - a. reaffirm their commitment to maintaining a strong and vibrant independent public service broadcasting whilst adapting it to the requirements of the digital age, for instance on the occasion of the next European Ministerial Conference on Mass Media Policy in 2004, take concrete steps to implement this policy objective and refrain from any interference with the editorial independence and institutional autonomy of public service broadcasters;
  - b. define an appropriate legal, institutional and financial framework for the functioning of public service broadcasting as well as its adaptation and modernisation to suit the needs of the audience and the requirements of the digital era;
  - c. design education and training programmes for journalists adapted to the digital media environment.

## **II. Explanatory memorandum**

*by Mr Mooney*

### **I. Introduction**

1. This report was prepared on the basis of a hearing held by the Sub-Committee on the Media (of the Committee on Culture, Science and Education) on 16 October 2003 in Paris with the participation of international organisations, public and commercial broadcasters and NGOs (see appendix) and a discussion of the Committee with the participation of a BBC representative on 19 November 2003 in Liverpool. The rapporteur expresses his gratitude to all participants in these debates. He expresses particular appreciation and thanks to the Consultant Expert, Mr Karol Jakubowicz, Adviser to the Chairman of the National Broadcasting Council (Poland), for his invaluable assistance in the production of the report.
2. A debate about public service broadcasting (PSB) is in reality a debate about the philosophical, ideological and cultural underpinnings of society and about the role of the state and the public sector in meeting the needs of individuals and society as a whole. This, rather than technological

developments, may be the decisive factor in determining the future of PSB. In many European countries PSB is still the major broadcaster and audiovisual producer, performing its proper role defined in the many documents on the subject (see the appendix). The challenge today is how to preserve what has been described as one of the key socio-political and media institutions developed by western European democracies in the 20th century in a form suited to the conditions of the 21st century.

3. We are witness to attempts to turn the clock back. The issue is often debated in terms of the experience of the past, instead of adopting a forward-looking approach. Efforts are being deployed to halt or slow down the necessary evolution and development of PSB and consign it to a position of a niche broadcaster, serving as a complement to commercial broadcasting – in short to turn the European PSB into the American PBS. In those central and eastern European countries where PSB has been established, it has largely been turned into a mouthpiece of the government and parliamentary majority of the day. It is hampered by legislation and a variety of accountability and administrative systems which reduce the PSB organisations' freedom of action, significantly slow down decision-making and have grievous consequences for their ability to deliver their programming in ways suited to contemporary realities. Moreover, with governments and public administration everywhere more and more actively imposing "clear and precise" remits on them, devising accountability systems and exercising close control over the way they spend their money, public service broadcasters are increasingly forced to fit their activities to a Procrustean bed of concepts of PSB created by political and bureaucratic minds. It is, indeed, trapped in a welter of conflicting expectations.
4. The result of this situation has been described by Dave Atkinson (in *Public Service Broadcasting: the Challenges of the Twenty-first Century*, 1997) as follows: "Public television [...] is in the throes of a crisis. It is expected to do better than the private channels in embodying the public service ideal of which it is no longer allowed the monopoly [...], and in order to achieve this it is expected to adopt a mode of operation which no longer distinguishes it from the commercial channels. It is expected to be productive, efficient, capable of generating its own income and able to attract 'consumers'. It is also expected to differ from the private channels in its programming. So it is expected to be similar and different at the same time". As PSB organisations bend over backward to meet these conflicting political expectations, they are hardly in a position to hold a steady course and perform their obligations properly.
5. Abandoning PSB, or condemning it to slow asphyxiation, would be an act of grave irresponsibility, a historical mistake – all the more so because (as we will argue below) PSB has a major role to play also in the 21st century. Imagination, an ability to take a long-term view, and a sense of responsibility for preserving the values of European societies are all required to develop policies serving to support PSB and provide adequate and secure financing

for it. The goal is to help it retain its distinctiveness as it transforms itself to address audiences in ways suited to their needs and sensibilities, to adjust to a highly competitive, globalised and increasingly commercialised audio-visual market, and to take advantage of possibilities offered by modern technology. The additional task in central and eastern Europe is to assist civil societies in their quest to turn PSB into a civil society institution, rather than an adjunct to the political elite.

6. While it is not possible to “harmonise” concepts and policies on PSB, the international community must become more actively involved in these efforts and develop general standards as guidance for national policies in this area.

## ***II. Public service broadcasting: a brief overview***

7. Public service broadcasting is a product of stable, mature democracy. Democracy and PSB reinforce each other, but a democratic context is still a prerequisite for genuine PSB to emerge, because otherwise its crucial feature – the ability to operate at arm’s length from the government and power elite – would not be possible. That is what sets it apart from state/government broadcasting which is subordinated to some government department, operates by the rules of the civil service and seeks to further and justify the activity of government. PSB could in fact be treated as a benchmark of the nature of the political system: its genuine independence, impartiality and pluralism are unthinkable without the existence of a healthy democracy and a strong civil society.
8. PSB is a product of Europe, though it has emerged also in some Commonwealth countries (Canada, Australia, New Zealand), as well as in the United States, where it was introduced in its present form in the 1960s as a marginal complement to commercial broadcasting.
9. One can distinguish three main waves of PSB development. It was originally born in some European countries before World War II, beginning in 1926 with the BBC, an independent public corporation with a public service remit, then understood in part as playing a clearly paternalistic and normative role in the country’s life. In some other western European countries (e.g. France or Italy), erstwhile state broadcasting organisations began to be transformed into public service broadcasters in the 1960s and 1970s, when sweeping social and political change had deprived direct state control and management of broadcasting of all its legitimacy and made it indefensible. In some European countries, as in West Germany after the Second World War, Spain, Portugal and Greece in the 1970s, and in central and eastern Europe after 1989, emergence of PSB in the context of a media system change was part and parcel of broader political change, typically transition to democracy after an authoritarian or totalitarian system.

10. And finally public service broadcasting is a product of both stability and extensive change. Some of its features and obligations have remained constant over time, but the way PSB is defined, organised, structured and financed varies greatly from country to country. PSB is, after all, a product of national media policy, according to the needs and traditions of particular countries (the principle of subsidiarity is clearly and emphatically recognised in this respect). In addition, political, social, cultural and technological change has brought about, and will continue to promote, far-reaching change in the way public service broadcasting operates and is delivered to the public.

#### *Features of public service broadcasting*

11. Arthur Miller has said that a good newspaper is a nation talking to itself. Similarly PSB is a means for the community to express, discuss and sift through the issues and matters that are important and meaningful for it. To perform this function, it must achieve and retain a significant share of voice and meaningful presence in the social, public and cultural debate and communication. PSB is also a means for the community to invest in the production and mediation of pluralistic programming, without regard for its market value. The central unchanging feature of public broadcasting is that by definition it is a service for the individual and for society, enhancing, developing and serving social, political and cultural citizenship and contributing to social cohesion. Public service broadcasting must be a force to enable the effective working of a pluralist democracy and serve as a watchdog of the authorities. It must also include media content which preserves and develops cultural diversity, identity and culture – not just “high culture”, but culture generally. It has an important educational role to perform. At the same time, it is accepted that PSB broadcasters have a comprehensive mission to deliver a wide range of programming in order to address society as a whole. Hence, overlap with commercial broadcasting in popular programming – sport, comedy, drama, news and current affairs – is seen as natural and acceptable.

12. The PSB broadcasters’ role is to provide media content with the following characteristics:

- universality of content, understood as both universality of basic supply on generalist channels (including mass-appeal, entertainment programming), which in the foreseeable future will continue to be central to what public service broadcasters offer to the public, and universality across the full portfolio of services, some of them specialised or tailored for specific audiences, adding up to a more extended and comprehensive range of services;
- universality of access, today signifying presence on all significant media and platforms (that is those with significant penetration), including terrestrial, satellite, cable, and broadband networks, but also the ability

to deliver a “personalised public service” in the online and on-demand environment;

- editorial freedom, and independence from both political ties and commercial bias (while at the same time PSB naturally operates within parameters set by legislation);
  - high quality of services and of output, aspiring, in each type of content or service, to constitute a benchmark of quality and professionalism. PSB must offer the audience new, original, first-run programming developed for that audience and within its cultural context, resonating with themes, characters and references taken from its historical or contemporary reality.
13. Another constitutive feature of public service broadcasting is its accountability to the public – in some cases directly (e.g. by means of “Statements of Promises”, or similar documents spelling out the broadcaster’s commitments to the audience), and mostly indirectly, via a supervisory body, designed to represent the interests of society in general and charged with the task of overseeing the operations of the organisation. Forms of formalised accountability (reports, audits, execution of licence obligations, etc.) to the broadcasting regulatory authority or parliament are being developed in more and more countries into detailed “service contracts”.
  14. Most European PSB organisations have a mixed funding system which may involve any combination of a number of sources of funding: “public funding” (including broadcasting/licence fees paid by viewers/listeners; grants from the state budget and other sources of public funding), and “commercial funding” (concession fees paid by commercial operators; radio/television advertising; radio/television sponsorship; subscription fees for pay services; other commercial revenue). Proportions of revenue from particular sources vary widely (see the appendix). Since “funding influences content”, the choice of the funding scheme must be seen as an important way of influencing the activities of public service broadcasting organisations, and, in particular, the content of their programme services.
  15. The broadcasting fee is the traditional means of funding for public service broadcasting, and it is often regarded as the most appropriate source of funding. It exists in most European states; exceptions are Spain, Luxembourg and (as far as television is concerned) Portugal. In the Netherlands, the Parliament has decided to replace the traditional broadcasting licence fee by a special levy as a supplement to income tax. The broadcasting (licence) fee is known as “solidarity funding” of PSB. Due to the fragmentation of audiences as a result of multiplication of channels, and differences in audience share and reach of different broadcasters, it is impossible to specify a proportion below which a universal broadcasting fee would be unjustified. However, it is clear that if a majority of the potential audience never watches or listens to a particular programme service, the justification for the fee becomes tenuous.

16. Revenue from the broadcasting fee is stable and secure, predictable, less volatile than other means of funding; it reduces dependence on advertising revenue and on state allocations; the broadcasting fee establishes an additional link between public broadcasting organisations and viewers and listeners; in most countries, public acceptance of the broadcasting fee is relatively high. However, such revenue is also static (the number of radio/television households is no longer increasing significantly), with a very limited potential for growth; increases in the level of the broadcasting fee may be unpopular and politically difficult to achieve; the need to adapt the fees periodically may create dependency on state institutions, unless adequate procedures guarantee objective and independent decision-making; state-aid rules of the European Union may create complications and uncertainty; the collection may be difficult to organise, with an important evasion rate; political and social acceptance of the broadcasting fees may decrease over time. The collection of the broadcasting fee is usually linked to the possession of a receiver, but in some countries (e.g. Switzerland), this has been extended to the ability of receiving television programming whatever terminal (television set, computer screen etc.) a person may use.
17. As for advertising and sponsorship revenue, public broadcasters are often subject to restrictions which are tighter than the general rules. Restrictions may include the prohibition of sponsorship for certain programme categories (e.g. children's programmes, documentaries, religious programmes) and limitations on sponsorship credits (e.g. limited duration, no animation). Exceptionally, public broadcasters are even subject to a general ban with very limited exceptions (e.g. the British BBC, the Finnish YLE). Such commercial revenue helps maintain the competitiveness of public service broadcasting for all programme categories, in particular as far as the acquisition of programmes and transmission rights is concerned. The fact that such commercial revenue is derived from a broadcasting service, or is used to fund it, does not, however, mean that the broadcasting service itself is of a commercial nature.
18. There is a consensus in Europe that public service broadcasting needs an appropriate, secure funding framework, and that public funding is an integral part of public service broadcasting systems. This has been confirmed by political and legal texts from both the Council of Europe and the European Union. The reality, as we will see below, is often very different. Neglecting to ensure such a framework is one of the main sins of omission committed by policy-makers, with direct consequences for every aspect of public service broadcasting.

#### *The rationale for PSB*

19. The rationale for the existence of PSB has so far grown and evolved over the years in three distinct stages. Originally, the role of the monopoly PSB

broadcaster was to provide “communication welfare” by offering what the German Constitutional Court has called a “basic supply” (“Grundversorgung”) of information and other broadcasting content to which the audience is entitled. In short – to provide all genres of programming for all groups of the audience, in order to satisfy every need.

20. With the emergence of the first generation of commercial broadcasters (typically offering generalist channels), this rationale was supplemented by the obligation to provide a quality alternative to commercial broadcasting and to redress market failure by providing content those broadcasters found commercially unrewarding. Incidentally, de-monopolisation and competition had a salutary effect for PSB, leading to its modernisation. PSB broadcasters had to adapt to the social and cultural change and abandon their elitist and paternalistic approach to their audience.
21. With the emergence of multi-channel broadcasting and of a second generation of commercial broadcasters (many of them offering thematic channels, or a wide range of radio formats), the situation changed again. At least on big markets (though this is certainly not true of many of the smaller western European markets), commercial channels may now provide many elements of “basic supply” content which may also meet minority needs. However, this content is often available for additional payment or on thematic satellite channels, reaching minuscule audiences. Thus, the rationale for PSB – while retaining many elements from the first two stages – has had to be redefined and extended once again. The PSB’s function of correcting “market failure” need no longer mean only provision of genres and programme types which are not available elsewhere, but also the provision of such content as free-to-air universally accessible radio and television.
22. Although PSB today no longer defines the market by itself, it can play a vital role in influencing it. It can keep audience demand for high-quality programming alive in the market. This “virtuous circle”, by encouraging commercial broadcasters to emulate programme genres and formats successfully pioneered by public service broadcasters, enriches the diversity of overall supply of programming and raises quality. As the private sector expands, maintenance of PSB thus acquires growing importance as an instrument of state media policy designed to shape the broadcasting landscape as a whole.
23. As the situation – in media and generally – changes and evolves, so does the rationale for PSB and the role it is expected to play. We will see below that new elements are being added.

*New Zealand: experiencing the lack of PSB*

24. What happens when that mechanism is absent has been experienced by New Zealand. In 1989-1999, Television New Zealand was required to



maximise profits and return substantial dividends to its primary shareholder, the government. During that time, there were no obligations on broadcasters in respect of quality thresholds or local content; no restraints on advertising levels and sponsorship deals; and no limits on foreign ownership of television. As a result, the mix of commercial and public service objectives shifted very much to favour commercial imperatives. The responsibility for residual “public service” elements of radio and televisions was given to New Zealand On Air, a funding agency which commissioned “PSB programming” from both commercial and public broadcasters.

25. New Zealand has come to regret the abandonment of public service objectives in television, and the neglect of the medium as a forum for national cultural and social debates. In its 1999 election manifesto, the Labour Party promised to shift TVNZ away from the commercial imperatives to clearer “public service” and “citizenship” purposes. As a result, a Television New Zealand Charter was adopted in May 2001.
26. In December 2001, the New Zealand Minister of Broadcasting stated: “New Zealand’s small population does not allow us to emulate other countries that enjoy fully subsidised public television. We can aim, though, to achieve as much as possible of the indigenous and diverse content and sense of public service that characterize public broadcasters at their best. We can look now to rejoining the mainstream of developed nations in recognizing the importance of publicly owned television as a cultural medium, and as a means by which we inform ourselves as citizens. We have for too long let purely commercial considerations dominate the fortunes of what should always have been a principal cultural asset. That time is coming to an end”.

#### *Some models of PSB*

27. Different models of PSB can be distinguished, depending on the criteria applied. According to a structural criterion, three organisational models of PSB can be found to exist:
  - integrated structures, as in the United Kingdom, Spain and Italy, where the BBC, RTVE and RAI control every area of public audiovisual activity;
  - federated structures by region, such as the German system, which is derived from the integrated model and reflects the country’s political organisation, in which the Constitution delegates responsibility for cultural matters to the Länder;
  - fragmented structures, as in France, where each branch of the audiovisual sector is controlled by one or more separate public operators.
28. In terms of the different forms of PSB links to the political world, we may distinguish:

- formally autonomous systems: Mechanisms exist for distancing broadcaster decision-making from political organs (as in Britain, but also Ireland and Sweden);
  - “politics-in-broadcasting”: Governing bodies of broadcasting organisations include representatives of the country’s main political parties and social groups affiliated with them – as in Germany, Denmark, Belgium;
  - “politics-over-broadcasting”: State organs are authorised to intervene in broadcaster decisions – as in Greece and Italy, and France in the past.
29. According to an accountability criterion, the old “Autonomy Model” of PSB is being replaced in many countries by a new “Controlled Service Model”. As a result, self-regulation by public service broadcasters is being replaced by supervision of PSB performance by the regulator or other bodies, often within a system which ties financing to well-defined performance targets and strategic as well as business plans.
30. A report on PSB in Europe, published by the French Conseil Supérieure d’Audiovisuel (CSA) in 1998 (“La télévision publique en Europe”, *La Lettre*, No. 111, December 1998) uses yet another set of criteria to distinguish two main models of public service broadcasting in the five countries under consideration:
- “Anglo-Saxon” (the UK and Germany)
  - “Latin” (France, Italy and Spain).
31. The “Anglo-Saxon” model involves considerable independence of PSB broadcasters, rooted in tradition in the UK and in the constitution in Germany. Moreover, in both countries PSB broadcasters have long received sufficient funding and were thus able to avoid being drawn into direct competition with commercial broadcasters. That allowed them to retain their distinctiveness and to remain the point of reference in the broadcasting landscape. Still, the application of the *proporz-system* in both Germany and Austria has long meant that also in those countries political parity between main parties had to be preserved in the appointment of top and middle management of public service broadcasting organisations.
32. In the “Latin” model, PSB had long been under political tutelage, as illustrated by the *lottizzazione* system in Italy (with the three television channels of RAI controlled by three major political parties), or by the fact that in Spain the Director-General of RTVE is still appointed directly by the Cabinet. Moreover, the funding of PSB in countries representing this model has long been insufficient, resulting in the permanent destabilisation of the public sector, once commercial broadcasting appeared. As an example, the accumulated debt of the Spanish RTVE will reach €6.6 billion this year. Portuguese PSB has had a debt of nearly €2 billion which it took the Portuguese State six years to repay. “Chronic underfinancing of the public sector has turned

it [in the three countries] into a ward of the State – says the CSA – and one must ask whether in some cases this has not made it possible to preserve the old tutelage”. The coverage of the general strike in Spain in 2002 by public television TVE, seen as taking the government’s side, provoked huge public criticism and resulted in a court sentence against TVE for manipulation of information. The politicisation of RAI in Italy was further aggravated under the Berlusconi government.

33. The “Anglo-Saxon” model could be extended to other western European countries, including particularly Scandinavian ones. In turn, the “Latin” model could be extended to Greece and Portugal where, as in Italy and Spain, situations variously defined as “political clientelism”, “state paternalism” and *partitocrazia* have prevented the full emancipation of public service broadcasters from direct, “hands-on” political control. central and eastern Europe, another example of this, is discussed below.

### ***III. The transition from state monopoly to PSB in the new democracies***

34. On the face of it, PSB has made considerable headway in post-Communist countries, having been introduced, at least formally, in 17 countries. 10 remaining ones (Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan) seem to offer little prospect of the emergence of PSB in the foreseeable future.
35. One of the conditions for Azerbaijani membership in the Council of Europe was the transformation of State TV into an independent public service broadcasting organisation. A draft law to this effect has been on the Parliament’s agenda for more than a year. The Azerbaijani authorities claim that for constitutional reasons, appointments to the board of the public broadcasting organisation have to be made by the president himself. Nevertheless, the draft law foresees an appointment procedure where candidates will be nominated by civil society and screened by a panel of experts which makes recommendations to the president. However, it still remains unclear whether the draft law is intended to keep a state broadcasting organisation in parallel with the new public service structure. The situation of state broadcasting in Azerbaijan is all the more acute since gradually all commercial channels have been brought under government control, as evidenced by the campaign before the presidential elections in October 2003.
36. In Georgia, the former president had announced that State Radio-TV was to be transformed into a public service organisation by the end of 2005, that is after the end of his term. However, the Broadcasting Law was not adopted as planned in previous legislation by the end of 2003. It is to be hoped that the new president and new Parliament will be committed to adopting the Broadcasting Law and supporting the transformation of the State TV into a real public service broadcaster.

37. No positive developments have occurred in Russia since the latest Assembly report on freedom of expression in the media in Europe (Doc. 9640) which regretted that "There is still no law on broadcasting in Russia, which exposes broadcasters to the whims of the authorities". The State Duma elections on 7 December failed to meet many international standards, according to the International Election Observation Mission, mainly because of lack of media independence. The control of the authorities over the national broadcasting media is also largely responsible for the information blackout in Chechnya.
38. Ukraine actually has a Law on Public Television and Radio Broadcasting, adopted in 1997, which provides for public radio and television to be established by a resolution passed by Parliament. It has never been adopted, however, and there seems little chance of that happening in the near future. Recently, the Parliament finally started working on amendments to the present broadcasting law which could grant greater independence of the governing bodies and chief executives of the State Radio and Television. These developments are to be encouraged, as long as they live up to Council of Europe standards. The State Radio and Television would also need serious restructuring as, according to some sources, they are left with hardly any more than 3% audience.
39. In Kosovo, the Establishment of Radio Television Kosovo (RTK), issued by the Special Representative of the UN Secretary-General, called into being "Radio Television Kosovo as the public service broadcaster in Kosovo". However, progress towards adopting new legislation on the Independent Media Commission, and subsequently on PSB, has been extremely slow due to the inability of the international community to reach consensus concerning demands made by commercial broadcasters that RTK be deprived of advertising revenue and be financed by licence fee revenue and appropriations from the Kosovo Consolidated budget. Given the small population of Kosovo, that solution would certainly result in severely inadequate financing for RTK. As of December 2003, there have been some signs of progress. RTK signed a contract with KEK (the electric utility company) for the collection of licence fees together with the electricity bills. A new draft law on the Independent Media Commission and broadcasting could be on its way.
40. In some cases, although legislation on PSB formally exists, it hardly complies with any Council of Europe standards. In Armenia, for instance, serious deficiencies in the legal framework hinder the development of the organisation towards independence. The Council of Europe has been pushing for amendments to the Radio and TV law but the Armenian authorities have responded that in order to change the current practice, according to which the president of the republic appoints all 5 members of the Council of Public TV and Radio at his own instigation (the current chairman of the council is former head of the president's office), the constitution has to be changed first. A temporary solution, pending constitutional reform, might consist

in laying down in law an obligation for the president to publicly advertise free places on the council so that anybody can apply, which would make appointments more transparent. The Council of Europe has proposed that such a provision be incorporated into the draft amendments to the law that are at present under discussion in the Armenian National Assembly.

41. In other cases, state authorities have failed to implement the provisions of newly adopted legislation:

- as in Moldova in 2002-2003, where there was inadequate follow-up to a 2002 law ostensibly transforming Radio-Television Moldova into a public service broadcaster, and separate legislation was needed at the end of 2003 (see paragraph 42);
- as in Serbia in 2003, where the appointment of the broadcasting authority (whose job it is to appoint the governing board of the PSB organisation) was conducted in violation of the law;
- or as in Croatia in 2003, where Parliament delayed (conveniently in advance of a general election) the appointment of the supervisory body of the public service broadcaster under a new law (see paragraph 43).

42. These situations illustrate the need for stability of democratic institutions as a prerequisite of PSB emergence. They also sadly outline the limits of international persuasion and assistance with the drafting of new broadcasting legislation which may then be honoured more in the breach than in the observance. For instance, PSB in Bosnia and Herzegovina was enforced through decision of the office of the High Representative (OHR). However, the resistance within the broadcaster to the envisaged reform obliged the European Commission to temporarily suspend its support. It is now hoped that the appropriate legislation will be drafted promptly following an Agreement of main principles for PSB signed in November by the prime ministers of the three entities. Another example is Moldova, where the law on Tele-Radio Moldova was changed twice in 2003 but it still does not live up entirely to Council of Europe standards, especially as far as the designation of the Supervisory Council of RTM is concerned. The second change, which provided for the liquidation of the old state company replacing it by a public one, is also controversial as there are fears that this change could be used in order to get rid of unsuitable journalists. The recent suspension of the *Buna Seara* talk show is not an encouraging sign.

43. Moreover, broadcasting or PSB laws have been changed in post-communist countries when they failed to guarantee political control over PSB organisations. One case in point is Croatia, where the PSB law of 2001 (which provided for the Broadcasting Council of Croatian Radio-Television to be made up mostly of people designated directly by civil society organisations) was replaced with a new law in 2003 in which the Broadcasting Council is, at least on paper, appointed by Parliament. Also in Bulgaria, a new broadcasting law presented by the ruling coalition was largely suspected to aim at

replacing the Council for Electronic Media and the directors of the national radio and television. The bill had to be withdrawn following severe criticism of certain of its provisions by Council of Europe and European Union experts. All this has delayed the adoption of a new law which is judged as necessary by the European institutions.

44. In many cases the introduction of PSB in post-communist countries has produced a hybrid, an organisation structured like a public service broadcaster, but in reality serving as an extension of the current parliamentary majority (hence the term “parliamentary broadcasting” sometimes used to describe them). This has been called a veritable “re-nationalisation” of these broadcasting organisations. The International Federation of Journalists has devoted special reports to the situation in Hungary, Czech Republic and Bulgaria in 2001, and Serbia in 2003: “in all of these cases – states the organization – the IFJ found itself confronting governments and political groups that were reluctant to give-up influence over media that were supposed to be public according to the law”. Complaints about dominance of Polish TV by government (see Doc. 9640) persist despite improvements. In “the former Yugoslav Republic of Macedonia”, according to a report on media in South-Eastern Europe prepared by the Media Task Force of the Stability Pact for South-Eastern Europe (November 2003), “The public broadcaster MRTV is even more under political control. The Director-general is elected by parliamentary majority and high positions within MRTV are divided on the basis of agreements among the ruling coalition partners. The management changes after each election.” “The present legislation does not provide sufficient independence of the regulatory body, nor for the editorial, institutional and managerial independence of the public broadcaster”.
45. Still, it would be unfair to single out these countries alone: “media wars” for control of PSB have been so fierce practically everywhere (perhaps with the exception of Estonia) that little pretence of independence or impartiality remains. A Hungarian author, Mihaly Galik, has accordingly written that “introduction of public service broadcasting has failed” in his country – because the country’s political culture leaves no room for independent, apolitical public service broadcasting. A Slovenian scholar, Slavko Splichal, has coined a phrase “Italianisation of the media” to describe the entire process.
46. Lack of independence of PSB organisations may result to some extent from the fact that in many post-communist countries the legal system does not provide for independent public corporations, but at best for “public institutions” or “state companies”, directly or indirectly subordinated to parliament or the government, as their “founder”. Also, members of supervisory boards and directors-general/members of boards of management are usually political appointees (see the appendix for some examples). However, also in western countries members of supervisory boards are appointed by political bodies (parliaments or governments). By comparison, there are probably

more cases in post-communist countries than in western European ones of at least a part of the composition of the supervisory body being designated by civil society organisations. Still, it could hardly have been expected that PSB organisations could in some way be detached from politics in young democracies with inherently unstable political system.

47. In any case, most new public broadcasting organisations in post-communist countries are in a state of crisis. It could be said that many of these organisations are empty shells, designed on paper to operate as PSB broadcasters but largely incapable of doing so. This can be ascribed to haphazard media legislation; political pressures; the weakness of civil society; traditional and badly designed organisational and management structures; frequent management and leadership crises, lack of funds and programming know-how; small television and advertising markets in most of the countries concerned; self-censorship of journalists and programme-makers; inadequate dedication of the staff to PSB values, including political impartiality and detachment, concern for the public interest, non-commercialism, high professionalism and high quality, etc.
48. In practically all post-communist countries, commercial stations appeared before PSBs were created. Accordingly, the latter had to compete head on with commercial stations even as they were trying to reform themselves. In Hungary, the decision was taken in the Broadcasting Law of 1995 to shift one of MTV's two terrestrial channels onto a satellite to make room for a commercial channel. Two strong commercial television channels, both with significant foreign involvement, were licensed in the first round of licensing. MTV, already the victim of bitter "media wars" (and of a system of governance which for long periods of time, as indeed in Hungarian public radio, proved incapable of appointing the president, leaving the organisation rudderless), has never recovered from this change which left it powerless in the face of overwhelming competition.
49. Moreover, it has proved impossible to develop a managerial culture required to downsize the organisations, reduce staffing, cut costs and promote cost-effectiveness and efficiency. Labour laws prevent easy dismissal of personnel and in any case most attempts to carry through reform have become bogged down in political conflicts.
50. Another source of problems is inadequate funding. In many countries it has proved impossible to introduce a licence fee system; hence PSBs are financed from the state budget and advertising. In some countries, e.g. Hungary, the licence fee system has been eliminated (as an election promise which was kept when the party in question did win the election), leaving an already bankrupt public television and severely under-financed public radio almost completely at the mercy of the state budget. Elsewhere, as in Estonia, public television has already given up advertising and public radio is to follow suit under an arrangement, imposed by politicians under

pressure from commercial broadcasters, whereby commercial stations are to contribute to their upkeep (via the state treasury) in return for a monopoly on advertising. With small populations and small advertising markets in most post-communist countries where PSB has been introduced, the result is severe financial difficulties, as exemplified by the situation of Hungarian, Slovak or Czech PSB broadcasters, to name just a few. The only exception is Polish Television (with a 50% share of both the audience and of the television advertising market), but the fact that nearly 70% of its budget comes from advertising revenue means that its daytime and prime-time programming is strongly commercialised.

51. All in all, it has to be admitted that the introduction of PSB in post-communist countries has amounted to an attempt to establish a media institution born in a completely different historical time and in altogether different social, political, cultural and technological circumstances. "Transplanted" media (or indeed social or democratic) institutions can hardly operate properly without the requisite social, political and cultural context. The overall result of this combination of circumstances could be called a lack of social embeddedness of public service broadcasting in post-communist countries, depriving it of its natural social habitat and cultural context.
52. Civil society has on occasion taken to the streets in a number of post-communist countries as a sign of protest against political control of, or interference into, broadcasting, as in the case of Rustavi-2, a private television station in Georgia in October 2001, that of the NTV station in Moscow in March 2001, when between 10,000 and 20,000 Muscovites rallied in Pushkin Square holding signs that read "We want our NTV", that of Czech public TV in 2000/2001, or of state radio and television in Moldova in 2002. However, what is really required is a long-term of consolidation of democracy and the emergence of the political culture of mature democracy, together with economic growth. All that will, some time in the future, create the conditions needed for PSB to come into its own in post-communist countries.
53. That, however, also depends on what happens in western Europe.

#### ***IV. Public service broadcasting in western European countries***

54. Western European PSB is in the throes of a serious identity crisis for three main reasons:
  - none of the original social, cultural and technical circumstances in which PSB was born still remain; the chief original elements of the rationale for PSB existence (spectrum scarcity, etc.) are no longer valid today. PSB is further undermined by ideological change (circumstances are not favourable to suggesting measures that depend on involvement of the state), and socio-cultural ones (changing needs and expectations of the audiences and the individuals who compose them);



- de-monopolisation of broadcasting and the emergence of multichannel radio and television first deprived PSB of its monopoly on the audience, and then on “PSB content”, at the same time forcing it into a competition for audiences and programming as well as, in many cases, advertising revenue;
- with a change of focus and orientation of media policies (now more oriented to economic goals), and under pressure from the commercial sector, many governments are reorienting their policies vis-à-vis PSB, failing to provide vital support and long-term security.

55. PSB has gone through a number of critical junctures in its history. The difference today is that it longer seems to be able to set, or seriously influence, the agenda or terms of the debate concerning its vital interests. More than that, it largely seems unable take part in this debate in a forceful, active, persuasive way.

*Efforts by commercial broadcasters*

56. It has to be admitted that the abolition of the state monopolies on broadcasting and the introduction of the present dual (public/commercial) system has had a beneficial effect on the media as a whole. Competition has stimulated innovation, allowed much greater variety and spurred the search for higher quality. This has been particularly obvious in central and eastern Europe. However, as the commercialisation of the media sector is reaching unprecedented levels under the effects of the global economy, PSB is increasingly becoming a rival in the eyes of those whose survival depends on profit.

57. A concise example of the position of commercial broadcasters can be seen in the memorandum “Broadcasting and Competition Rules in the Future EU Constitution – A View from the Private Media Sector”, submitted to the European Convention in May 2003 by a number of German and EU-wide associations and unions of private media. After pointing to the “Growing Similarity between Public and Commercial Broadcasters” (“Public and commercial broadcasters offer increasingly similar content”; “Public and commercial broadcasters fulfil increasingly similar social and market functions”), the memorandum claims that public broadcasters enjoy a number of privileges, which “can lead to considerable distortions of competition to the detriment of private broadcasters and other media players”; particularly when public broadcasters expand into the online sector and into e-commerce; the TV production business, or into cross-border digital satellite television. The memorandum concludes by calling for “fair competition between public and commercial media” and argues against introducing the 1997 Amsterdam Protocol No. 32 on the System of Public Broadcasting (the only EU legal document which expressly states that the existence of

PSB is compatible with the Treaty) into the new Constitutional Treaty as unnecessary.

58. Another example concerns the plan of the VPRT, the association for German commercial broadcasters, to take their case against public broadcasters to Brussels. The VPRT believes that ARD – Germany's biggest public broadcaster – should have its €55 million bid for top-level football rights outlawed. The bid would see football back on a public channel for the first time in 14 years but the commercial channels say ARD should not be allowed to use licence fee money to outbid commercial rivals. Earlier the VPRT complained to Brussels that the public broadcasters – ARD and ZDF – should not be allowed to subsidise online ventures through the licence fee. The VPRT seeks to reduce the licence fees, tighten taxation arrangements and block the Internet activities of the public service broadcasters.
59. ARD also had to abandon its plans to turn the Internet into “a third pillar”, alongside its traditional radio and television services. The KEF (the committee advising heads of governments of the German Länder who have control over national broadcasting fees paid by all radio and TV users) supported the point of view of commercial media and announced in 2002 that ARD should not spend its profits on additional web services that are not essential to support its core programming.
60. Similar developments have unfolded in the United Kingdom, among other countries, where commercial media companies were reported in September 2003 as planning to ask the government for tough restrictions to be placed on the BBC's internet activities, including a cost ceiling on its Internet budget and a demand that it provide links to the news services of its competitors. This was in response to a BBC-commissioned report by KPMG, which argued that the corporation was not damaging its rivals' internet services. The plan was to ask the government to restrict the BBC's use of its website to promote programmes, magazines and services.
61. Also in the UK, the Conservative Party announced in August 2003 that the party would switch off a swath of the BBC's digital services, including its website and the youth channel BBC3, if it won the next general election. The party's culture spokesman said he was “not persuaded” of the case for a public service website. The Conservative Party has also called for divesting the BBC of its commercial arm, BBC Worldwide (whose profits account for close on 25% of the total revenue of the BBC), and believe the BBC should cut back on wide areas of its activities where it competes with commercial broadcasters.
62. Commercial broadcasters have for a long time tried to use EU competition law for their purposes. Over the years, they have lodged numerous complaints with the European Commission in connection with state aid provisions in the EU Treaty, relating either to financing schemes, or to

thematic channels (Kinderkanal and Phoenix in Germany, BBC News 24 in the UK) launched by public broadcasters, claiming, *inter alia*, that use of licence fee money for such purposes was incompatible with the Treaty and that the launching of such channels amounted to foreclosure of markets. The Commission has rejected practically all such complaints, most recently those against Italy and Portugal.

63. The Amsterdam Protocol of 1997 and the European Commission's subsequent communication on the application of state aid rules to public service broadcasting of 2001 were designed to resolve the question of the compatibility of PSB with "the principles of fair competition and the operation of a free market". However, they have only really opened the floodgates to further complaints and challenges to both public service broadcasting itself, and to the EU legislation on the subject.
64. However, a ruling of 24 July 2003 by the European Court of Justice in the *Altmark* case seems to offer hope of bringing more clarity to this EU competition law issue. According to this and other ECJ rulings, public funding cannot be regarded as state aid under Article 87 of the EC Treaty where such funding compensates for the services provided by the recipient undertakings in order to discharge public service obligations. Only public funds granted to a PSB broadcaster above and beyond the cost of discharging the remit can be recognised as state aid.
65. Following the *Altmark* decision, the European Commission suggested that it would have to be taken into account in the further refinement of the 2001 Communication on the application of state aid rules to public service broadcasting. This may help resolve a long-standing issue hanging over public service broadcasters in EU member states.
66. As a result of efforts by the private sector, it is no longer clear:
  - whether PSB should be allowed to change and evolve beyond its traditional technologies and programme profiles or ways of delivering programming to the public;
  - whether a special regulatory regime, in keeping with its special nature as a social, cultural and educational institution, should continue to be applied to it, or whether nothing but competition law is really needed;
  - and indeed, whether one really needs public service broadcasting institutions in order to have public service broadcasting. This approach, promoting a "distributed public service" model of PSB, was once accepted also by the European Commission, seems now to be ruled out by its stress on the entrustment of clearly defined public service obligations to particular entities.

67. There is no question that the authorities, parliaments and European organisations are under considerable pressure from some quarters to answer “no” in each case. More than that, it is also bringing practical effects.
68. This points to a more profound reason for the growing opposition to PSB: the legitimacy of this typical product of the Welfare State is questioned also for purely ideological, one might even say dogmatic reasons. As a result, what is presented as an exception to the “normal” market arrangements today may easily be seen as an anomaly tomorrow, and a useless throw-back to a long-gone era the day after tomorrow – all the more so if the evolution and modernisation of PSB are prevented by the very people and bodies which are promoting this view of public service broadcasting. This would amount to a self-fulfilling prophecy: if PSB could be prevented from modernising, it would become a relict of the past.

### *Media policy and PSB*

The following trends can be noted in current debates and action by governments and parliaments on public service broadcasting in European countries:

- There is a growing tendency to go beyond hitherto existing forms of PSB regulation and lay down the obligations of public service broadcasters also in other documents. There are initiatives to define PSB obligations more precisely, often by contracts, and follow up with accountability reports to Parliament and/or a regulatory agency. This is the situation in at least 12 countries (Finland, Norway, Latvia, Turkey, Denmark, Luxembourg, Britain, Poland, Netherlands, Portugal, Switzerland and Italy). Considerations about a “Public Service contract” or the like are topical both in countries with long traditions for PSB and rather late introduction of private competition (like Norway, Denmark, Netherlands, Switzerland) and in some of the newer PSB countries (such as Poland or Latvia).

Public service broadcasters often see this as an additional burden, and an imposition, but it is also true that if the PSB regulatory framework is to form an exception to the general market- and competition-oriented media regulation, then there must be a clearly defined conception of such broadcasting.

- Basic discussions and structural decisions impacting on the very nature and indeed existence of PSB organisations.
70. “Contracts” take the form either of outright licences to broadcast, e.g. in the Netherlands, or as “programming licence”, or indeed of contracts or authorisations of some sort (e.g. France, the Flemish Community of Belgium). One can say that the more recent legislation concerning these “contracts” is, the more attention is paid to the financial aspects of the fulfilment of programming obligations and generally of the operation of the PSB broadcaster.

71. For example, amendments to the French Freedom of Communication Act No. 86-1067 of 30 September 1986 adopted in 2000 provided for “agreements in respect of objectives and means” (*contrats d’objectifs et de moyens*) to be concluded by the government for 3 to 5 years with each PSB company. A financial accountability system has also been created as concerns observance of the agreement. Another case in point is the 5-year “management contract” concluded between the Flemish Community of Belgium and the Flemish Radio and Television Company (VRT).
72. We might also mention here the Application for Licence Fee Increase of the Irish public broadcaster RTE to the Minister for Communications, Marine and Natural Resources in 2002. It amounts to a full programme of activity and business plan. Its acceptance, and adoption of the proposed Public Service Broadcasting Charter, is designed in effect to supplement broadcasting legislation and constitute something coming close to a “service contract”. In addition, the Application contains a commitment to develop a new accountability system, involving very detailed reporting on programme and financial performance, as well as the establishment of an Audience Council, with effect from mid 2003, and the publication, on an annual basis, of a Statement of Commitments, promises to the audience that can be measured at year-end.
73. These solutions, while designed to offer PSB organisations financial stability and to end the debate on PSB by providing both a detailed definition of its obligations and precise accountability systems, can also – if and when used for this purpose – stifle PSB organisations or give governments strong instruments of affecting their situation. Such was the case in the Netherlands where the replacement of the licence fee system by financing via the state budget from a surcharge on the income tax was used by a subsequent government to cut funding for PSB (see paragraph 74). Also the finances of France Télévisions were seriously affected when the government of Prime Minister Raffarin decided not to implement the decision of the previous government to provide a sizeable grant out of the state budget to FT to develop new digital services, even though that grant had been included in the *contrat d’objectifs et de moyens*.
74. As for structural measures, it was announced in Portugal in May 2002 that public television would be liquidated and replaced with a new entity, left with one domestic channel. It is also to launch a new regional channel and a RTP Memoria channel, drawing largely on RTP’s archives. A new “civic” channel is to be established, originally operated by RTP, but later by a consortium of various partners who would also have access to RTP’s production facilities. Also commercial broadcasters are to perform public service obligations. The effect of this new solution is uncertain. In Spain, draft legislation is being prepared according to which the concept of public service broadcasting as such is to be weakened. In April 2003, proposals were announced for privatisation of the news department of the regional Spanish public broadcaster in

Valencia, Canal 9, and there were fears that the channel as a whole would be privatised. In the Netherlands, the government announced plans in 2003 for an annual cutback of 80 million euros in four years. In Denmark, the liberal-conservative government has announced plans to privatise TV2. In Italy, the Berlusconi government has secured adoption by Parliament of a law on the privatisation of RAI, though it was later vetoed by the President of Italy.

75. In the UK, the Labour government has seemed determined to maintain the licence fee system and the BBC in its present form at the time of the Royal Charter renewal in 2006. However, on 15 January 2003, Culture Secretary Tessa Jowell was reported as warning that the BBC would have to justify the licence fee when its charter comes up for renewal in 2006. Downing Street sources are now saying that a radically new funding arrangement had not been ruled out, and that Ms Jowell's remarks that scrapping the licence fee was improbable "have been misinterpreted". Of course, one has to wait for the results of the charter renewal process itself to see how it will affect the BBC in practice.
76. No matter how all these measures and plans – especially of a structural nature – should be interpreted, their accumulation in a short period of time seems to indicate that a certain threshold may have been crossed in policy orientations vis-à-vis public service broadcasting and that even the most radical moves, which once would have appeared unthinkable, can no longer be entirely be ruled out, now or in the foreseeable future.

## **V. PSB and new technologies**

### *Three stages of technological development*

77. Here is one amongst many definitions given by different authors give to these stages:
  - (i) the "limited channel-flow world", in which the viewer or listener is allowed a small number of programme streams or channels from which to 'catch' the programmes as they "flow" by; (ii) "the multiple channel flow world" in which the viewer or listener is allowed a much larger number of channels from which to catch media as they flow by. This world is enabled by the technologies of cable, satellite, and recently, digital compression, and assisted by electronic programme guides (EPGs); (iii) "the on-demand (neither channel, nor flow) world", in which the viewer or listener is now able to choose from a range of individual media offers and when he wants. The viewer or listener becomes his/her own programme scheduler, though predetermined channel flows will still be present for those who want them. Some media content will need to be available at particular times, such as sports events, so we will still have available the power of the "shared moments", but most will be there when and where we want them. The technology of the Internet, and super-versions of today's

home Internet connections – broadband networks, will finally provide this world. Internet today is the fledgling version of this full service, no waiting and on-demand world.

78. It is important to realise that the three stages are not consecutive in the sense that one will take abruptly over from the other. In fact, some European media consumers are already today using all three ways of consumption. Moreover, the precise timescales for the transitions between the different stages is impossible to predict, and will vary in different parts of Europe, due to differences in economic climates, tastes, population sizes and existing infrastructures. Not all parts of Europe will enjoy the same kind of channel offer or time-scale for the enlargement of services. There may also be different patterns for radio and television. Still, across the new eras, the content delivered will progressively include more “multimedia”. The services may also make more use of the technical capacity available for the viewer to interact with the programmes via his remote control.

#### *PSB and regulatory responses to the new technologies*

79. Despite the objections of some (see paragraphs 57, 59, 61), it is usually accepted, though not always formally and in legal instruments, that no principle can be opposed to public channels conducting their activities in new types of broadcasting, digital technology and the Internet, and in the creation of new content and interactive services. In fact, that they are needed to guarantee participation by everybody in the advantages of the digital revolution and to promote widespread take-up of that technology. It is also accepted that special attention must be paid to guaranteeing the presence and visibility of the public service in digital packages, programme guides or browsing systems.
80. Though wherever digital terrestrial broadcasting is introduced PSB organisations are usually given a multiplex of their own, in a large majority of countries digital (theme) channels are not defined in the legal remit (see Marcel Betzel, *Programme performance of public service broadcasting and its mission in the digital age*, presented at the 17th EPRA Meeting, Naples 8-9 May 2003). Besides the UK only in Spain (including Catalonia) digital programmes/activities are explicitly mentioned in the remit. In some countries digital channels can be regarded to be part of the PSB remit because reference is made to new technological developments in which PSB should take part if necessary or desired. This is the case for Finland, the Netherlands, Flanders and Portugal. In France, three projects in the field of digital terrestrial TV will in near future become part of the *cahier des charges*. In Germany public service broadcasters are authorised to transmit their (analog) programme services digitally and are also authorised to create additional programme services using digital technology. There are two digital platforms (ARD DIGITAL and ZDF.VISION) which are run by public service broadcasters.

81. In all European countries, public service broadcasters are engaged in different Internet activities. Remarkably, there is a clear absence of legal provisions concerning Internet activities by PSB in most countries. Denmark, Spain and Austria are the only countries where the current remit states explicitly the role of PSB in Internet. In some countries Internet can be regarded to be part of the PSB remit because reference is made to new technological developments in which PSB should take part. This is the case for the Netherlands, Flanders, Catalonia, Portugal.
82. As already noted, the Internet services of PSB in Germany are surrounded by controversy. ARD and ZDF may legally offer media services primarily with programme-related content, but advertising and sponsoring are not allowed. Their activities go beyond these content restrictions, however. Believing they must prepare for the future convergence of television and Internet as part of their basic broadcasting services, they offer free-of-charge services such as live chats, E-commerce, SMS services as well as a news service financed by a commercial partner (T-Online). This development is viewed as distorting competition by those outside public service broadcasting.
83. The development of the new technologies faces PSB organisations with hard choices, also because of the costs involved. According to the EBU Digital Strategy Group, they need to make a conscious and planned move to become “multimedia”, rather than “single media” organisations, producing scalable media products that can be used for multiple delivery platforms. At the same time, public broadcasters must retain the basic feature of universality – of access and programming – in order to retain their relationship to the audience and to perform the cultural and social role of public broadcasting. Therefore, public service broadcasters must retain their generalist channels as their priority in the multimedia environment. Choice of media content will be greater in future, and generalist channels will inevitably have a smaller share audience. However, as already noted, willingness to continue serving the general public, including particularly late adopters of new technologies, is a fundamental test of the public service nature of PSB. Public broadcasters should, nonetheless, take advantage of new technologies to strengthen their existing programming – for example by adding new enhanced services to the existing channels and programmes.
84. For non-traditional delivery platforms (Internet, broadband, UMTS) public service broadcasters should decide which to support case by case. Some of these delivery mechanisms open useful opportunities for public service broadcasting, including for alliances.
85. In the future, media policy will face the issue of whether to reinvent PSB for the Internet age, for example as PSCP – “public service content provision”. This could take the form of “public service” Internet sites, or of



EPGs/navigation systems creating “virtual channels” by offering access to “PSB content” on the great variety of programme offers.

## **VI. The debate on the future of PSB**

### *Three approaches*

86. Three main schools of thought may be distinguished in this debate:
- “Pure Public Service”, combining two approaches: (i) that of supporters of what they call true, unadulterated public service broadcasting, free from any admixture of commercialism and popular, mass-appeal programming, (ii) and that of the commercial sector and of some political forces;
  - the net effect of the implementation of both varieties of the “Pure Public Service” approach would be the positioning of PSB as a complement to commercial broadcasting, dedicated to redressing market failure by providing content commercial broadcasters cannot broadcast profitably;
  - “New Tasks for a New Age”; a number of new functions to be performed by PSB in the 21st century.

### *The “Full Portfolio” model of PSB*

87. The “Full Portfolio” approach calls for extending the concept of public service broadcasting:
- in a technological sense (“presence on all platforms”, or “on all significant platforms”);
  - in terms of its relationship to its audience (e.g. provision of a “personalised public service” via on-line delivery);
  - in terms of content and types of activities: in addition to terrestrial free-to-air generalist mass-audience channels performing the basic public service and to free-to-air specialised channels complementing the generalist ones by offering a thematic service or serving a particular minority or social group, PSB organisations should offer Internet portals, web-sites and on-demand services offering free public service content. The law should also allow them to offer pay-TV channels and potentially engage in other commercial activities, serving as a source of additional revenue and fully regulated by competition law and fair trading rules.
88. Many elements of the “Full Portfolio” approach have won the support of international organisations, including the Council of Europe (see the appendix), the European Broadcasting Union (e.g. in *Media with a Purpose. Public Service Broadcasting in the Digital Era*, a 2002 report of the EBU Digital Strategy Group), and of the European Union. A vision of PSB operating in conformity with EU competition law distilled from a number of documents

(Tongue Report *The Future of public service television in a multi-channel digital age*, 1996; *Resolution on the role of public service television in a multi-media society*, European Parliament, 1996; Amsterdam Protocol, 1997; *Report from the High Level Group on Audiovisual Policy*, 1998; Resolution concerning PSB, Council and representatives of Member States, 1999; *Communication on the Application of State Aid Rules to Public Service Broadcasting*, 2001) can be summed up as follows:

- PSB is directly related to the democratic, social and cultural needs of society and media pluralism;
- Comprehensive mission of PSB: wide range of programming in order to address society as a whole;
- Suitable balance of entertainment, culture, spectacles and education; natural overlap with commercial broadcasting in popular genres – sport, comedy, drama, news and current affairs;
- PSB can legitimately seek to reach wide audiences;
- PSB important in promoting new audiovisual and information services and the new technologies;
- PSB organisations may legitimately compete on the market as long as public funding is not used to distort competition.

#### *Quality and distinctiveness*

89. In a recent article in the UK “Observer” Magazine, the Chairman of the independent production company Endemol UK and Director of Channel 4 Peter Bazalgette wrote: “There remain persuasive reasons for intervening with public service broadcasters such as the BBC and Channel 4 to ensure a range of interests are catered for. But technology is now putting power in the hands of viewers – they cannot and will not be dictated to ever again. Death to cultural totalitarianism. Let a thousand programmes bloom”.
90. Indeed, commercial broadcasters point at the fact that with digitalisation they are now able to offer an extraordinary range of programming and cater for all tastes and needs through specialised programmes and services – in other words, there is “programme convergence” between the public and commercial sectors. An even more serious argument working against PSB is dumbing-down of quality. It is indeed justified to use public money in order to offer programmes of the sort of “Big Brother” and “Who wants to be a millionaire?”
91. The approach which defines PSB solely in terms of the programmes genres it offers is outdated. At issue is not the mere presence of “PSB genres” in the programme schedule, but also their quality, their availability at all times of the day, ease of access to them, lack of additional payment for their reception. Other aspects of distinctiveness include a high proportion of original and

first-run production and a high proportion of domestic and European works. PSB must stand out as a broadcaster which offers works produced for its own audience, resonating with issues and references familiar to members of that audience and keeping them in touch with their own country, its culture, history and tradition. By the same token, it widens choice and complements the market through the pursuit of public service purposes.

92. In short, if the values, principles and ideals which PSB originates from, and which it stands for (including also non-commercialism, service to the civil society and democratic accountability), are represented in a very clear manner in its programming, in the way it is organised and operates, then its distinctiveness will be obvious for all to see.
93. Moreover, growing competition is most likely to change the present situation of a degree of "programme convergence" between PSB and the commercial sector. As noted by the British Independent Television Commission (in ITC Consultation on Public Service Broadcasting, 2000), "neither Channel 3 nor Channel 5 in the UK would probably be able to deliver PSB in the longer term, well beyond digital switchover": "If its market position erodes significantly, ITV's commitment to fund the less popular programmes in the PSB mix may diminish and some support from other sources may be necessary. ...". Thus competitive pressures may leave the British audience, and even more so audiences in other countries, with a much narrower range of sources of "PSB content" than so far, at least as concerns generally accessible generalist channels.

## **VII. Conclusions and recommendations**

### *Council of Europe*

94. The Parliamentary Assembly of the Council of Europe has, over the years, adopted a number of recommendations which contained, among other things, important statements on public service broadcasting and the responsibility of the state for creating favourable legal, institutional and financial conditions needed for PSB to be able to perform its obligations. These are:

Recommendation 748 (1975) on the role and management of national broadcasting

Recommendation 1067 (1987) on the cultural dimension of broadcasting in Europe

Recommendation 1147 (1991) on parliamentary responsibility for the democratic reform of broadcasting

Recommendation 1407 (1999) Media and democratic culture

Recommendation 1506 (2001) Freedom of expression and information in the media in Europe

Recommendation 1589 (2003) Freedom of expression in the media in Europe.

95. Various bodies of the Council of Europe have produced a variety of documents (see the appendix) bearing on the subject of PSB in the digital era and in the Information Society.
96. Some 10 years after the 4th European Ministerial Conference on Mass Media Policy in Prague, it is time for the Council of Europe to produce a new major policy document on PSB, taking stock of developments since then and defining standards to apply in the coming years. The forthcoming Ministerial Conference on Mass Media Policy in Kiev could include the preparation of such a document in its Plan of Action.
97. Council of Europe bodies should closely monitor the situation of PSB in all member states and react at an appropriate level when principles of PSB independence, autonomy and impartiality are disregarded or violated.
98. The Council of Europe should continue to work closely with the European Union so that its freedom of expression standards and human rights approach are reflected in the EU's activities. If the EU makes "stability of democratic institutions" a condition of entry, then it should specify what this means in practice in relation to PSB and require candidate and member states to conform to this standard as closely as to any single market directive.
99. The Council of Europe should also support the ongoing work towards the preparation of an international instrument on cultural diversity, having regard to the unique contribution of PSB in promoting it. It should support the European stance in the WTO and GATS negotiations regarding audiovisual services which should not be considered purely as a commodity. Any liberalisation of the audiovisual market would intensify market pressure on PSB to a level which these organisations might not be able to withstand.
100. The Council of Europe should endeavour to ensure that the World Summit on the Information Society gives proper recognition to the issue of PSB as an important element of developing the Information Society and at the same time easing the shock of rapid change that it will involve.

#### *Member states*

101. Public service broadcasting in Europe needs a clear direction and a framework for the proper implementation of its remit. Policy and the legal, institutional and financial framework should be developed on the basis of extensive analysis of contemporary circumstances. Media policy concerning PSB should serve the public and national interest, and not any sectoral political or economic interests.

102. The situation of fledgling PSB organisations in central and eastern European countries requires special effort. It is not enough to expect them to conform to general European standards. For instance appointment of members of a PSB supervisory body by Parliament in an established democratic country with a highly developed political culture is a different process from the same procedure in an unconsolidated democracy. Appointment or nomination of members of broadcasting regulatory authorities and of supervisory and managerial bodies of PSB should, whenever possible, be taken out of the hands of politicians and entrusted to civil society and professional bodies. Though in highly politicised societies this procedure is not without its risks, it reduces the direct power of politicians over PSB. the development of civil society and rule of law as the only elements of a democratic system capable of driving forward the consolidation of democracy and maturation of political culture. This applies to PSB as much (or even more) as to any other field of life. Equally important are efforts to assist the professionalisation of journalists and other programme makers.
103. Digital technology magnifies the possibilities of PSB to perform its obligations. There is no justification for limitations on their use. The remit of PSB should come close to the “Full Portfolio” model, though commercial activities of PSB organisations may be unnecessary if funding is adequate to their needs. There must be clear realisation that PSB cannot perform its obligations properly without appropriate and secure funding.
104. It is no longer possible to isolate PSB from the market. Digital technology changes the value chain in the audiovisual sector and requires that PSB broadcasters become involved also in elements of the value chain other than programme production and channel assembly. Also, in the digital world, more and more delivery networks and digital gateways will be controlled by commercial entities. PSB organisations will have to enter into co-operation and alliances with such entities or they may find they are cut off from important segments of the audience. As long as core programme activities of PSB organisations are properly non-commercial and devoted to implementing the remit, additional commercial and economic activities are – assuming fair trading rules are observed – less likely to introduce the commercial logic into programming decisions than advertising or sponsorship. In order to operate on a global market dominated by a small number of global conglomerates, PSB organisations should be encouraged and facilitated in developing forms of international co-operation.

#### *Public service broadcasters*

105. There is no public service broadcasting without public service broadcasters – that is staff and management dedicated to the pursuit of PSB goals. It ultimately depends on programme makers whether a PSB organisation will indeed perform a public service.

106. Public service broadcasters are overwhelmed by the speed of change and by the vicissitudes of broadcasting policy, as well as the pressure of the commercial sector and indeed by twists and turns of international (especially EU) policy vis-à-vis PSB.
107. Present circumstances require them to be active: both in fighting off any attempts to impose political control on their organisations, and in developing and presenting a clear vision of how PSB should change to accommodate to new realities. This activity is less intense than it should be. As individuals and especially through their organisations and unions, broadcasters should by a very active partner in the current process of change.
108. Still, the primary responsibility rests with policy-makers and management: they cannot expect broadcasters to dedicate themselves to public service without creating conditions to make that possible and give real life to the values and principles of PSB.

## ***Appendix I***

### ***The mission of public service broadcasting (selected definitions and documents)***

#### *1. Broadcasting Research Unit, London (1985)*

The Broadcasting Research Unit in a special publication set out to define “those main elements of public service broadcasting as it has evolved in Britain” and came up with the following list:

Universality: Geographic – broadcasting programmes should be available to the whole population;

Universality of Appeal – broadcast programmes should cater for all interests and tastes;

Minorities, especially disadvantaged minorities, should receive particular provision;

Broadcasters should recognize their special relationship to the sense of national identity and community;

Broadcasting should be distanced from all vested interests, and in particular from those of the government of the day;

Universality of Payment – one main instrument of broadcasting should be directly funded by the corpus of users;

Broadcasting should be structured so as to encourage competition in good programming rather than competition for numbers;

The public guidelines for broadcasting should be designed to liberate rather than to restrict the programme makers.

## *2. The European Broadcasting Union (1993)*

Only public service broadcasting can offer at the same time:

- programming for all;
- a basic general programme service backed up by thematic channels;
- a forum for democratic debate;
- unrestricted public access to events of significance;
- a reference standard for quality; a spirit of innovation; extensive original production; a showcase for culture;
- a contribution to reinforcement of the European identity and of its cultural and social values;
- a driving force in technological research and development.

## *3. 4th European Ministerial Conference on Mass Media Policy, Council of Europe (1994), Resolution No. 1*

Participating states agree that public service broadcasters, within the general framework defined for them and without prejudice to more specific public service remits, must have principally the following missions:

- to provide ... a common reference point for all members of the public and a factor for social cohesion and integration of all individuals, groups and communities. ...;
- to provide a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed;
- to broadcast impartial and independent news, information and comment;
- to develop pluralistic, innovatory and varied programming which meets high ethical and quality standards, and not to sacrifice the pursuit of quality to market forces;
- to develop and structure programme schedules and services of interest to a wide public while being attentive to the needs of minority groups;
- to reflect the different philosophical and religious beliefs in society, with the aim of strengthening mutual understanding and promoting community relations in pluriethnic and multicultural societies;
- to contribute actively ... to a greater appreciation and dissemination of the diversity of national and European cultural heritage;

- to ensure that the programmes offered contain a significant proportion of original audiovisual production, especially feature films, drama and other creative works;
- to extend the choice available to viewers and listeners by also offering programme services which are not normally provided by commercial broadcasters.

4. *European Parliament, "Resolution on the Role of Public Service Television in a Multi-Media Society" (1996) (Excerpt)*

PSB is a fundamental player in the public sphere with a remit to:

- offer a wide range of quality production in all genres to the whole population in their respective Member States,
- reflect and support the cultures of Europe's nations and regions through a wealth of original productions,
- encourage understanding of the non-European cultures and ethnic groups present in the Union, transmitting the notion of shared experience in diversity,
- set quality standards in popular programmes followed by mass audiences,
- serve minority interests and cater for all different sections of the population,
- provide unbiased and fully independent information, both in news coverage and in-depth factual programming, capable of earning the audience's trust and of representing a reference point in the rapidly expanding information market,
- play a major role in encouraging the public debate that is vital for the proper functioning of democracy and provide a forum for debate for all groups and organisations in society,
- ensure that the general population has access to events of general public interest, including sports events,
- pioneer innovative programme types, genres and services,
- encourage audiovisual creation and the expression of new talents particularly by providing broadcasting opportunities for independent producers,
- lead the way in applying the full potential of new audiovisual technology such as terrestrial and satellite-based digital transmission, audiovisual services and CD-ROM to public policy areas such as education, health and government information,
- ensure, on the basis of the principle of democratic access to the new media, that where access to new technology is not available to individuals these new services are made readily accessible to the community at large within public institutions and public places.



5. *European Union, "Protocol On the System of Public Broadcasting in the Member States" (1997) (Excerpt)*

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. ...

6. *Independent Television Commission Consultation On Public Service Broadcasting, London (2000)*

A current ITC definition of a PSB channel would be one which brings together most or all of the following elements:

- wide range of programmes catering for a variety of tastes and interests, taking scheduling into account;
- high quality in terms of technical and production standards, with evidence of being well resourced and of innovation and distinctiveness, making full use of new media to support television's educational role;
- catering for minorities (cultural, linguistic and social) and other special needs and interests, particularly education including schools programmes and provision for disabled people;
- catering for regional interests and communities of interest, and reflecting the regions to each other;
- reflecting a national identity, being a "voice of the nation", the place where people go on national occasions (particularly true of the mass audience channels BBC1 and ITV);
- containing a large amount of original productions made specifically for first showing in the UK, reflecting the national cultures by making full use of UK-wide talents and creativity;
- in general demonstrating a willingness to take creative risks, challenging viewers, complementing other PSB channels and those which are purely market driven;
- strong sense of independence and impartiality, authoritative news, a forum for public debate, ensuring a plurality of opinions and an informed electorate;
- universal coverage, that is, 99% of the UK population;
- limited amounts of advertising (a maximum of seven minutes per hour, averaged across the day) as against the maximum of nine permitted to cable and satellite broadcasters, and set out in the EU Directive on Television without Frontiers;
- affordability that is either free at the point of delivery or at a cost which makes it accessible to the vast majority of people.

## Appendix II

Revenues of selected public service television broadcasters:  
breakdown by main sources of revenue

	BBC 2002	ZDF 2001	ARD 2001	FR2 2001	FR3 2001	RTVE 2001	SVT 2002	MTV 2001	HRT 2001	ETV 2003
<b>Public funds</b>	<b>74.6</b>	<b>84.9</b>	<b>82.9</b>	<b>57.6</b>	<b>68.4</b>	<b>8.7</b>	<b>93.0</b>	<b>41.9</b>	<b>58.6</b>	<b>71.4</b>
Broadcasting fee	68.0	-	82.9	57.6	68.4	-	93.0	15.9	51.5	-
<b>Commercial revenue</b>	<b>24.4</b>	<b>15.1</b>	<b>15.7</b>	<b>38.7</b>	<b>31.2</b>	<b>87.0</b>	<b>5.3</b>	<b>5.5</b>	<b>41.4</b>	<b>-</b>
Sale of programme rights	4.6	1.0	-	-	-	11.5	3.1	-	-	-
Merchandising	8.9	-	-	-	-	0.8	-	-	-	-
PayTV	1.2	-	-	-	-	-	-	-	-	-
Other	9.7	4.7	9.6	4.0	9.5	1.4	1.0	-	6.6	-
<b>Other revenue</b>	<b>0.9</b>	<b>4.7</b>	<b>-</b>	<b>3.7</b>	<b>0.4</b>	<b>4.3</b>	<b>1.7</b>	<b>52.6</b>		<b>28.6</b>

*Source: Economy of the European Audiovisual Industry (2003), Yearbook, Vol. 1.*  
Strasbourg: European Audiovisual Observatory, except ETV (Estonia). RTVE and HRT (Croatia) publish only data for the entire organisation. MTV – Hungarian Television.

## Appendix III

### Methods of appointment of PSB supervisory and management bodies in post-communist countries

Appointment of Governing/Supervisory Bodies of Public Broadcasters

	Government	Parliament	President	Regulatory Authority	Other	Possibility of political dismissal
Albania		Yes				No
Armenia			Yes			Yes
Czech Rep.		Yes				Yes
Hungary		Yes			Yes (civil soc. orgs.)	Yes
Poland	1 member			8 members		No
Romania		Yes				
Slovak Rep.		Yes				Yes
“the former Yugoslav Republic of Macedonia”		Yes (7 members)			Yes (4 members appointed by staff)	Yes

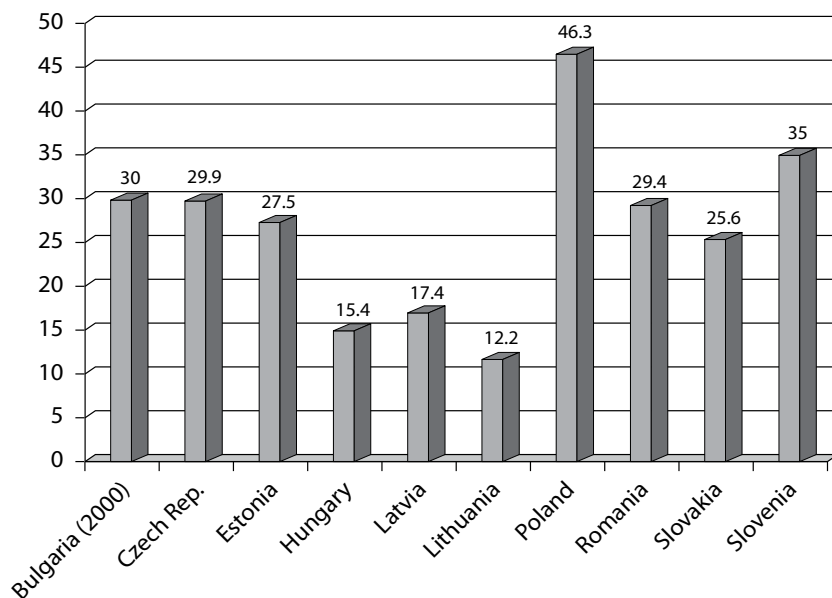
## Appendix IV

### Audience shares of selected public television stations

Western PSB Television Stations – IDATE

	2000	2001	Stations
	%		
France	42.3	41.7	France Television, ARTE
Germany	43.1	43.3	ARD, 3rd programmes in the Länder, ZDF, ARTE
Italy	47.3	46.9	RAI 1, 2, 3
Japan	16	15	NHK
Spain	49.3	49.6	RTVE + autonomous channels in particular regions
UK	48.5 (BBC – 38)	48 (BBC – 38)	BBC 1+2, Channel 4
USA	3	3	PBS

Audience Share of PSB TV Stations in Selected Post-Communist Countries (2002) – EBU



## Appendix V

*Selected Data on PSB TV Programming in central and eastern European Countries (2001) – %*

Channel	Country	Share of culture in airtime	Share of education in airtime	Programming	
				Own (est.)	Acquired (est.)
TVP1	Poland	12.4	4.6	60	40
TVP 2		5.9	3.4		
ROM	Romania	14.8	3.7	55	45
TVR		6.3	4.7		
CT 1	Czech Rep.	11.6	2.4	64	36
CT 2		15.5	4.9		
MTV 1	Hungary	19.6	1.9	80	20
MTV 2		22.1	4.9		
STV 1	Slovakia	5.5	1.3	75	25
STV 2		10.2	2.7		
HRT 1	Croatia	8	4.3	65	35
HRT 2		7	0.5		
HRT 3		2.1	-		
RTVSLO 1	Slovenia	8.5	7.4	45	55
RTVSLO 2		2.8	0.1		
MKRTV 1	"the former Yugoslav Republic of Macedonia"	4.1	6.1	72	28
MKRTV 2		5.1	6.7		
MKRTV 3		4.1	6.1		
ETV	Estonia	5.6	1.6	61	39
LTV	Lithuania			80	20

Source: EBU Members TV Programming. Geneva: EBU, October 2002.

*Public television channels: share of own production*

<b>Country</b>	<b>Public broadcaster</b>	<b>Share of own production in first-run programming</b>	<b>Share of own production in airtime</b>
		%	
Czech Republic	CT	65.6	32.1
Croatia	HR	66.5	40.8
Estonia	ETV	61.9	36.8
Hungary	MTV	79.2	39.4
Lithuania	LTV	79.6	61.9
“the former Yugoslav Republic of Macedonia”	MKRT	73.8	41.5
Poland	TVP	61.2	42.9
Romania	TVR	54	31.9
Slovakia	STV	74	38.4
Slovenia	RTVSLO	45.7	26.1

Source: Strategic Information Service, EBU, 2002.

## **Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society<sup>11</sup>**

*(Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles that are their common heritage;

Recalling the commitment of member states to the fundamental right to freedom of expression and information, as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Recalling the importance for democratic societies of a wide variety of independent and autonomous media, able to reflect the diversity of ideas and opinions, and that new information and communication techniques and services must be effectively used to broaden the scope of freedom of expression, as stated in its Declaration on the freedom of expression and information (April 1982);

Bearing in mind Resolution No. 1 on the future of public service broadcasting adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, December 1994);

Recalling its Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting and its Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting, as well as its Declaration on the guarantee of the independence of public service broadcasting in the member states (September 2006);

Recalling Recommendation 1641 (2004) of the Parliamentary Assembly of the Council of Europe on public service broadcasting, calling for the adoption of a new major policy document on public service broadcasting taking stock of recent technological developments, as well as the report on public service broadcasting by the Parliamentary Assembly's Committee on Culture, Science and Education (Doc. 10029, January 2004), noting the need for the evolution

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11. The present recommendation was developed by the Steering Committee on Media and New Communication Services on instructions from the Committee of Ministers in response to Recommendation 1641 (2004) of the Parliamentary Assembly of the Council of Europe on public service broadcasting, calling for the adoption of a new major policy document on public service broadcasting. Karol Jakubowicz was actively involved in drafting the recommendation.

and modernisation of this sector, and the positive reply of the Committee of Ministers to this recommendation;

Bearing in mind the political documents adopted at the 7th European Ministerial Conference on Mass Media Policy (Kyiv, March 2005) and, more particularly, the objective set out in the Action Plan to examine how the public service remit should, as appropriate, be developed and adapted by member states to suit the new digital environment;

Recalling the UNESCO Convention on the protection and promotion of the diversity of cultural expressions (October 2005), which attaches considerable importance to, *inter alia*, the creation of conditions conducive to diversity of the media including through public service broadcasting;

Conscious of the need to safeguard the fundamental objectives of the public interest in the information society, including freedom of expression and access to information, media pluralism, cultural diversity, and the protection of minors and human dignity, in conformity with the Council of Europe standards and norms;

Underlining the specific role of public service broadcasting, which is to promote the values of democratic societies, in particular respect for human rights, cultures and political pluralism; and with regard to its goal of offering a wide choice of programmes and services to all sectors of the public, promoting social cohesion, cultural diversity and pluralist communication accessible to everyone;

Mindful of the fact that growing competition in broadcasting makes it more difficult for many commercial broadcasters to maintain the public value of their programming, especially in their free-to-air services;

Conscious of the fact that globalisation and international integration, as well as the growing horizontal and vertical concentration of privately-owned media at the national and international levels, have far-reaching effects for states and their media systems;

Noting that in the information society, the public, and especially the younger generations, more and more often turn to the new communication services for content and for the satisfaction of their communication needs, at the expense of traditional media;

Convinced therefore that the public service remit is all the more relevant in the information society and that it can be discharged by public service organisations via diverse platforms and an offer of various services, resulting in the emergence of public service media, which, for the purpose of this recommendation, does not include print media;

Recognising the continued full legitimacy and the specific objectives of public service media in the information society;

Persuaded that, while paying attention to market and competition questions, the common interest requires that public service media be provided with adequate funds for the fulfilment of the public service remit as conferred on them;

Recognising the right of member states to define the remits of individual public service media in accordance with their own national circumstances;

Acknowledging that the remits of individual public service media may vary within each member state, and that these remits may not necessarily include all the principles set out in this recommendation,

Recommends that the governments of member states:

- i. guarantee the fundamental role of the public service media in the new digital environment, setting a clear remit for public service media, and enabling them to use new technical means to better fulfil this remit and adapt to rapid changes in the current media and technological landscape, and to changes in the viewing and listening patterns and expectations of the audience;
- ii. include, where they have not already done so, provisions in their legislation/regulations specific to the remit of public service media, covering in particular the new communication services, thereby enabling public service media to make full use of their potential and especially to promote broader democratic, social and cultural participation, *inter alia*, with the help of new interactive technologies;
- iii. guarantee public service media, via a secure and appropriate financing and organisational framework, the conditions required to carry out the function entrusted to them by member states in the new digital environment, in a transparent and accountable manner;
- iv. enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions;
- v. ensure that universal access to public service media is offered to all individuals and social groups, including minority and disadvantaged groups, through a range of technological means;
- vi. disseminate widely this recommendation and, in particular, bring to the attention of public authorities, public service media, professional groups and the public at large, the guiding principles set out below, and ensure that the necessary conditions are in place for these principles to be put into practice.



## **Guiding principles concerning the remit of public service media in the information society**

### ***I. The public service remit: maintaining the key elements***

1. Member states have the competence to define and assign a public service remit to one or more specific media organisations, in the public and/or private sector, maintaining the key elements underpinning the traditional public service remit, while adjusting it to new circumstances. This remit should be performed with the use of state-of-the-art technology appropriate for the purpose. These elements have been referred to on several occasions in Council of Europe documents, which have defined public service broadcasting as, amongst other things:
  - a) a reference point for all members of the public, offering universal access;
  - b) a factor for social cohesion and integration of all individuals, groups and communities;
  - c) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;
  - d) a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals;
  - e) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.
2. In the information society, relying heavily on digital technologies, where the means of content distribution have diversified beyond traditional broadcasting, member states should ensure that the public service remit is extended to cover provision of appropriate content also via new communication platforms.

### ***II. Adapting the public service remit to the information society***

- a. A reference point for all members of the public, with universal access offered*
3. Public service media should offer news, information, educational, cultural, sports and entertainment programmes and content aimed at the various categories of the public and which, taken as a whole, constitute an added public value compared to those of other broadcasters and content providers.
4. The principle of universality, which is fundamental to public service media, should be addressed having regard to technical, social and content aspects.

Member states should, in particular, ensure that public service media can be present on significant platforms and have the necessary resources for this purpose.

5. In view of changing user habits, public service media should be able to offer both generalist and specialised contents and services, as well as personalised interactive and on-demand services. They should address all generations, but especially involve the younger generation in active forms of communication, encouraging the provision of user-generated content and establishing other participatory schemes.
6. Member states should see to it that the goals and means for achievement of these goals by public service media are clearly defined, in particular regarding the use of thematic services and new communication services. This may include regular evaluation and review of such activities by the relevant bodies, so as to ensure that all groups in the audience are adequately served.

*b. A factor for social cohesion and integration of all individuals, groups and communities*

7. Public service media should be adapted to the new digital environment to enable them to fulfil their remit in promoting social cohesion at local, regional, national and international levels, and to foster a sense of co-responsibility of the public for the achievement of this objective.
8. Public service media should integrate all communities, social groups and generations, including minority groups, young people, old persons, the most disadvantaged social categories, persons with disabilities, while respecting their different identities and needs. In this context, attention should be paid to the content created by and for such groups, and to their access to, and presence and portrayal in, public service media. Due attention should be also paid to gender equality issues.
9. Public service media should act as a trusted guide of society, bringing concretely useful knowledge into the life of individuals and of different communities in society. In this context, they should pay particular attention to the needs of minority groups and underprivileged and disadvantaged social categories. This role of filling a gap in the market, which is an important part of the traditional public service media remit, should be maintained in the new digital environment.
10. In an era of globalisation, migration and integration at European and international levels, the public service media should promote better understanding among peoples and contribute to intercultural and inter-religious dialogue.
11. Public service media should promote digital inclusion and efforts to bridge the digital divide by, *inter alia*, enhancing the accessibility of programmes and services on new platforms.

*c. A source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards*

12. Member states should ensure that public service media constitute a space of credibility and reliability among a profusion of digital media, fulfilling their role as an impartial and independent source of information, opinion and comment, and of a wide range of programming and services, satisfying high ethical and quality standards.
13. When assigning the public service remit, member states should take account of the public service media's role in bridging fragmentation, reducing social and political alienation and promoting the development of civil society. A requirement for this is the independent and impartial news and current affairs content, which should be provided on both traditional programmes and new communication services.

*d. A forum for public discussion and a means of promoting broader democratic participation of individuals*

14. Public service media should play an important role in promoting broader democratic debate and participation, with the assistance, among other things, of new interactive technologies, offering the public greater involvement in the democratic process. Public service media should fulfil a vital role in educating active and responsible citizens, providing not only quality content but also a forum for public debate, open to diverse ideas and convictions in society, and a platform for disseminating democratic values.
15. Public service media should provide adequate information about the democratic system and democratic procedures, and should encourage participation not only in elections but also in decision-making processes and public life in general. Accordingly, one of the public service media's roles should be to foster citizens' interest in public affairs and encourage them to play a more active part.
16. Public service media should also actively promote a culture of tolerance and mutual understanding by using new digital and online technologies.
17. Public service media should play a leading role in public scrutiny of national governments and international governmental organisations, enhancing their transparency, accountability to the public and legitimacy, helping eliminate any democratic deficit, and contributing to the development of a European public sphere.
18. Public service media should enhance their dialogue with, and accountability to, the general public, also with the help of new interactive services.

*e. An active contributor to audiovisual creation and production and to a greater appreciation and dissemination of the diversity of national and European cultural heritage*

19. Public service media should play a particular role in the promotion of cultural diversity and identity, including through new communication services and platforms. To this end, public service media should continue to invest in new, original content production, made in formats suitable for the new communication services. They should support the creation and production of domestic audiovisual works reflecting as well local and regional characteristics.
20. Public service media should stimulate creativity and reflect the diversity of cultural activities, through their cultural programmes, in fields such as music, arts and theatre, and they should, where appropriate, support cultural events and performances.
21. Public service media should continue to play a central role in education, media literacy and life-long learning, and should actively contribute to the formation of knowledge-based society. Public service media should pursue this task, taking full advantage of the new opportunities and including all social groups and generations.
22. Public service media should play a particular role in preservation of cultural heritage. They should rely on and develop their archives, which should be digitised, thus being preserved for future generations. In order to be accessible to a broader audience, the audiovisual archives should, where appropriate and feasible, be accessible online. Member states should consider possible options to facilitate the accomplishment of such projects.
23. In their programming and content, public service media should reflect the increasingly multi-ethnic and multicultural societies in which they operate, protecting the cultural heritage of different minorities and communities, providing possibilities for cultural expression and exchange, and promoting closer integration, without obliterating cultural diversity at the national level.
24. Public service media should promote respect for cultural diversity, while simultaneously introducing the audience to the cultures of other peoples around the world.

***III. The appropriate conditions required to fulfil the public service remit in the information society***

25. Member states should ensure that the specific legal, technical, financial and organisational conditions required to fulfil the public service remit continue to apply in, and are adapted to, the new digital environment. Taking into account the challenges of the information society, member states should be free to organise their own national systems of public service media, suited

to the rapidly changing technological and social realities, while at the same time remaining faithful to the fundamental principles of public service.

*a. Legal conditions*

26. Member states should establish a clear legal framework for the development of public service media and the fulfilment of their remit. They should incorporate into their legislation provisions enabling public service media to exercise, as effectively as possible, their specific function in the information society and, in particular, allowing them to develop new communication services.
27. To reconcile the need for a clear definition of the remit with the need to respect editorial independence and programme autonomy and to allow for flexibility to adapt public service activities rapidly to new developments, member states should find appropriate solutions, involving, if needed, the public service media, in line with their legal traditions.

*b. Technical conditions*

28. Member states should ensure that public service media have the necessary technical resources to fulfil their function in the information society. Developing a range of new services would enable them to reach more households, to produce more quality contents, responding to the expectations of the public, and to keep pace with developments in the digital environment. Public service media should play an active role in the technological innovation of the electronic media, as well as in the digital switchover.

*c. Financial conditions*

29. Member states should secure adequate financing for public service media, enabling them to fulfil their role in the information society, as defined in their remit. Traditional funding models relying on sources such as licence fees, the state budget and advertising remain valid under the new conditions.
30. Taking into account the developments of the new digital technology, member states may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, member states may consider allowing public service media to collect remunerations. Member states may also take advantage of public and community initiatives for the creation and financing of new types of public service media. However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society. When developing new funding systems, member states should pay due attention to the nature of the content provided in the interest of the public and in the common interest.

*d. Organisational conditions*

31. Member states should establish the organisational conditions for public service media that provide the most appropriate background for the delivery of the public service remit in the digital environment. In doing so they should pay due attention to the guarantee of the editorial independence and institutional autonomy of public service media and the particularities of their national media systems, as well as organisational changes needed to take advantage of new production and distribution methods in the digital environment.
32. Member states should ensure that public service media organisations have the capacity and critical mass to operate successfully in the new digital environment, fulfil an extended public service remit and maintain their position in a highly concentrated market.
33. In organising the delivery of the public service remit, member states should make sure that public service media can, as necessary, engage in co-operation with other economic actors, such as commercial media, rights holders, producers of audiovisual content, platform operators and distributors of audiovisual content.



## The role and future of public service media with regard to e-democracy

*Presented during Workshop 5: e-Democracy from the Grass Roots, Council of Europe Forum for the Future of Democracy, Madrid, Spain, Municipal Congress Centre, 15-17 October 2008.*

The Parliamentary Assembly of the Council of Europe has called public service broadcasting “one of the key socio-political and media institutions developed by western European democracies in the 20th century” and “a vital element of democracy in Europe”. At the same time, it said PSB was under threat, “challenged by political and economic interests, by increasing competition from commercial media, by media concentrations and by financial difficulties. It is also faced with the challenge of adapting to globalisation and the new technologies”.

Therefore, the Assembly stated that the challenge today is how to preserve public service media (PSM) “in a form suited to *the conditions of the 21st century*” (emphasis added – K.J.).

What I want to discuss today is precisely the meaning of the term “the conditions of the 21st century” in relation to PSM generally and specifically in terms of its democratic performance. On this basis, I will seek to outline how PSM should change – indeed redefine itself – to survive and flourish in the 21st century.

I use the word “survive” advisedly. Thomass (2007) has correctly noted that if PSM is still to be around in the 2020s to celebrate its 100th birthday, it must renew itself in the meantime (see also Bardoel, d’Haenes, 2008). The following comment by OFCOM (2004: 4) refers to the UK situation, but could be applied more broadly: “by the end of this decade, the existing ecology for the provision of public service broadcasting will be under real threat. Ongoing changes in society, in the way people consume media and watch television, in the competitive forces facing the existing main networks, will conspire to mean that the current arrangements for securing the provision of public service broadcasting will be *inadequate to ensure the maintenance* – let alone the strengthening – of PSB” (emphasis added – K.J.).

### ***The future of public service media***

We need a veritable Copernican revolution in our understanding of how public service is to be performed and delivered in the media in the future. Practically the entire societal, media and technological context within which public service broadcasting was born has changed fundamentally since then. Because of the digital revolution, “practically every institution that our society is based on, from the local to the supranational, is being rendered obsolete” (Rosetto, 2008). Nevertheless, what we might call the “incumbent” or “legacy” concept of PSM has displayed considerable staying power. Policy and regulatory frameworks for



PSM have equally displayed considerable inertia and resistance to change. As a result, in some cases PSM inhabits what might be called a time warp: it is still defined, and in many cases organised, in line with ideas inherited from the past which have an ever smaller purchase on the reality surrounding PSM today and require its fundamental change. Without it, PSM will be increasingly irrelevant and unable to perform its functions.

### ***Technological change***

Let us begin with the most obvious need for change, technological innovation which has crucially transformed the media. At a general and political level, there seems to be universal agreement in Europe on the principle that public service media should be free to use the new technologies, though competition concerns are still raised within the European Union. The Council of Europe led the way with the adoption in January 2007 of the Committee of Ministers of Recommendation CM/Rec(2007)3 on the remit of public service media in the information society, stating in part: “Convinced therefore that the public service remit is *all the more relevant in the information society* and that it can be discharged by public service organisations via diverse platforms and an offer of various services, resulting in the emergence of public service media” (emphasis added – K.J.). That was a historic step, in that 47 European countries formally supported a technology-neutral approach to public service content provision by other platforms than just broadcasting, even going so far as to suggest a new name for it, consistent with this approach. The Recommendation clearly advocates a technology-neutral approach: “the public service remit ... should be performed with state-of-the-art technologies appropriate for the purpose;” PSM should use “new interactive technologies” and should be “present on significant platforms.”

However, while many countries may grudgingly allow PSM organisations to branch into the new technologies, that is not enough. They should actively support, fund and oblige PSM organisations to do so, treating the Internet and other new technologies as a legitimate and fully-fledged area of programme activity, and not only as auxiliary service vis-à-vis broadcasting activities. Otherwise PSM will miss the new technology bus, as more and more users over time switch to broadband networks for most of their media consumption.

A shorthand way of presenting the technology-neutral definition of the remit is to say that “PSM = PSB + all relevant platforms + Web 2.0”, involving generalist and thematic programme services, as well as what is known as “personalised public service” via the Internet.

### ***Internal reform***

In order to be capable of meeting the challenge of technological change, PSM organisations should reform themselves and their production process into what is known as the “functional or multimedia orientated structure”. In this case, content is born digital and stays digital: programme production is not

separated according to channels or media, but according to programme genres, and should be ready to be used on different distribution channels – radio, television, the Internet, etc. The advantages of this structure include the synergies of resources and talent for programme production, cross-fertilisation of ideas, and greater scope for cross-departmental usage of programme content that is carried by several channels or services and across multiple delivery platforms to a variety of new combined receivers for different user situations.

Another element of change is, of course, the rise of the commercial sector and – with digitalisation and convergence – the appearance of many intermediaries and digital gateways between the content provider and the audience. PSM organisations – once vertically-integrated, self-contained and self-reliant organisations – must be prepared to operate in this environment and potentially co-operate with commercial partners.

The Council of Europe recommendation reaffirms the role of PSM as an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage. To serve this role well, PSM should evolve from a content producer, aggregator and disseminator into a cultural industry, so it can more effectively promote domestic audiovisual production by maintaining a high share of original domestic works in airtime; make optimal use of audiovisual archives by launching new channels; promote the growth of the programme industry and the development of audiovisual culture and production in the country as a whole.

### ***Adjusting to social and cultural change***

More generally, PSM must respond and adjust to social and cultural change (see OFCOM, 2004) affecting use of, and attitudes to, the media. Below, we list some of these processes of change and the way PSM should respond:

- the levelling of social divisions (rising affluence, educational standards, growth of middle class), resulting in major changes in the mass audience as traditionally understood. It is no longer willing to accept the role of passive receivers of content, nor will they accept old-style paternalism of “the voice of authority” approach from the PSM;
- individualisation and fragmentation, also in media consumption, replacing the group experience. Hence the need for individualised and personalised modes of communication, using the new technologies;
- growth of social networks and political disengagement. The desire for networking is revealed in the success of online community tools and chat rooms. Trust in authority has declined. The same may apply to the media which can no longer take the trust and respect of the audience for granted. This calls for a change in the relationship between PSM and the audience into one of partnership and dialogue, so that there is a greater sense of “public ownership” of PSM;

- a sense of entitlement: a trend toward access and inclusion in which service users have rights which exist by virtue of citizenship. The “cultural entitlement” agenda: the idea that individuals should have roughly the same opportunities of access to creative and cultural opportunity, regardless of where they live. All this has fundamentally changed the relationship between the media and their audiences and added many more voices to the process of mediated, society-wide or even global communication. To meet those needs, PSM should open up to dialogue with, involvement and user-generated content contributed by, the audience, and establish other participatory schemes. PSM should address all generations, but especially involve the younger generation in active forms of communication.

Broader processes of change include globalisation and international integration. They, too, require a redefinition of the PSM programme remit. One example is the role assigned to PSM as a “reference point for all members of the public; a factor for social cohesion and integration of all individuals, groups and communities”. In interpreting these tasks, we must – in the conditions of the 21st century – remember the need for intercultural dialogue within and between peoples and societies; and the fact that the nation-state is no longer the adequate, or the only, frame of reference for individuals.

The Council of Europe White Paper on “Intercultural dialogue” defines intercultural dialogue as “an open and respectful exchange of views between individuals, groups with different ethnic, cultural, religious and linguistic backgrounds and heritage on the basis of mutual understanding and respect”. PSM should certainly be a forum for this dialogue, so it cannot create a single reference point for the entire public. Secondly, PSM should strive to create a sense of affinity and understanding with the people of other countries in the region, especially if the country in question is involved in some international integration scheme, and promote acceptance of, and respect for, cultural diversity worldwide.

Another issue concerns social cohesion and integration. A new obstacle to this has appeared in the form of the digital and broadband divides. If PSM is to serve the cause of social cohesion and integration, at it has always done, then in the conditions of the 21st century this must also include contributing to overcoming the digital divide. One of the public tasks of the BBC is to “build digital Britain”. Other PSM organisations should assume a similar obligation.

### ***Resisting ideological pressure***

To conclude this short list of conditions that PSM must face in the 21st century, we must also mention the result of the ideological evolution of European societies, that is, the neo-liberal revolution, gathering pace since the 1980s, and undercutting both the rationale for public intervention into the media and, in many cases, individual acceptance of the role of PSM as a product of collectivistic societal arrangements, offering a role for public institutions to look after individual welfare.

Neo-liberalism, of course, puts its faith in market forces, in the conviction that the law of supply and demand will create mechanisms of satisfying all the communication needs of all groups of society. An additional argument here is that the Internet and all the new communication services offer “limitless choice”, so PSM is no longer necessary. At best, PSM is accepted as a mechanism for redressing market failure. This is the so-called “monastery” model of PSM as a niche broadcaster, a cultural and educational ghetto, offering content commercial broadcasters cannot broadcast profitably.

The irony of the situation is that with growing competition in the media landscape, market failure is actually becoming more of a threat to quality in the media. In broadcasting, it is clear that faced with cut-throat competition commercial generalist channels are reducing their public service commitments (as in the United Kingdom), and the share of high-quality programming. Paradoxically, PSM is regaining monopoly on “public service content”, on original content produced for the domestic audience, and on full value, mass audience generalist programme services.

Very recently, the European Parliament adopted a resolution on concentration and pluralism in the media in the European Union, pointing out that “the development of the media system is increasingly driven by profit-making and that, therefore, societal, political or economic processes, or values expressed in journalists’ codes of conduct, are not adequately safeguarded”. Also, that “experience shows that the unrestricted concentration of ownership jeopardises pluralism and cultural diversity and whereas a system purely based on free market competition alone is not able to guarantee media pluralism”. The European Parliament also noted that “the proliferation of new media (broadband internet, satellite channels, digital terrestrial television, etc.) and the varied forms of media ownership are not sufficient in themselves to guarantee pluralism in terms of media content”.

Therefore, the resolution stated that “public audiovisual services are essential to enable people to familiarise themselves with cultural diversity and to guarantee pluralism” and called on the member states “to support high-quality public broadcasting services which can offer a real alternative to the programmes of commercial channels and can, without necessarily having to compete for ratings or advertising revenue, occupy a more high-profile place on the European scene as pillars of the preservation of media pluralism, democratic dialogue and access to quality content for all citizens”.

Ideological dogmas are not easily changed or overcome, but there is overwhelming evidence that commercialisation, commodification and tabloidisation of privately-owned mass audience media is reducing, rather than extending, the range and quality of content available to the public. This is why Jürgen Habermas, the distinguished German philosopher, has made his famous call for public subsidies for quality newspapers as the lifeblood of the public debate and the public sphere, at a time when they are threatened with takeover by financial investors interested only in cutting costs and driving up profits.

## **Public service media and e-democracy**

### ***E-democracy: a cure for the ills of democracy?***

The Council of Europe has an extensive *acquis* on democracy (*Reflections on the future of democracy in Europe*, 2005; Pratchett, Lowndes, 2004; Oakley, 2003; Kayhan, 2003), but equally on its weaknesses and shortcomings.

A 2007 Council of Europe Parliamentary Assembly report on the state of democracy in Europe (Gross, 2007) notes with great concern the following developments:

- the increasing feeling of political discontent and disaffection among citizens, which is well illustrated by a declining turnout at elections;<sup>12</sup>
- a growing disappointment or indifference towards politics, especially among the young generation;
- loss of confidence in democracy and a growing gap between political institutions and citizens;
- the dysfunctioning of some political institutions in many countries: political parties have partly lost their capacity to be a link between citizens and state; representativeness of parliaments is all too often questionable; basic principles of democracy such as separation of powers, political freedoms, transparency and accountability are widely perceived, and sometimes rightly so, as being insufficiently implemented or not implemented at all.

In its Resolution 1547 (2007) on the state of human rights and democracy in Europe, the Parliamentary Assembly also comments on the role of commercial media in democracy, noting that “in many cases [they] tend functionally to replace political parties by setting the political agenda, monopolising political debate and creating and choosing political leaders, [and this] is a matter of concern. Media are too often primarily business-driven institutions and, by prioritising their business interests over the service to the citizens and democracy, inevitably contribute to the distortion of democracy. The role of the media in setting political agendas, transmitting political debates and forming opinions about political leaders underlines the importance of independent, pluralist and responsible media for a democratic society”.

Among the necessary responses to this crisis is the fact that “the traditional institutions of representative democracy should open themselves to more citizen participation in order to overcome their own shortcomings and to reintegrate those citizens who are concerned with their dysfunctioning”. Therefore, “thought

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12. In another Council of Europe publication, the phenomenon was described as “citizens’ alienation from politics and growing distrust vis-à-vis their representatives are fostered by what citizens perceive as a cognitive distance from the elite. This has engendered feelings of powerlessness, needlessness, and even helplessness with regard to politics. This distance is further compounded by an apparent lack of transparency with regard to the political processes” (Trechsel, 2005: 48).

could usefully be given as to whether traditional systems of representative democracy need to *take more account of the rapid changes in communications and access to information leading to the evolution of systems of direct democracy*" (emphasis added – K.J.).

A cure for the ills of democracy is therefore seen in the report in "digital democracy" defined, for example, as "the exchange of ideas and opinions as part of the democratic process by means of the Internet" (Butcher et al., 2002), or "e-democracy," defined, for example, as "the use of information and communications technologies and strategies by 'democratic sectors' within the political processes of local communities, states/regions, nations and on the global stage" (Clift, 2003).

Another definition of e-democracy may actually be more useful:

E-democracy is a means for disseminating more political information and for enhancing communication and participation, as well as hopefully in the long run for the transformation of the political debate and the political culture. Participants in the field of e-democracy include civil society (organized and non organized), the administration, politicians and—to a lesser extent—the economy. (Coleman, Norris, 2005)

However, can e-democracy by itself cure the ills of democracy, or indeed create a new model of democracy? This seems to be doubtful. For one thing, as the European Parliament's resolution on concentration and pluralism in the media in the European Union points out "while the internet has greatly increased access to various sources of information, views and opinions, it has not yet replaced traditional media as a decisive public opinion former". More importantly, however, democracy is about the formation of the common will of the *demos*, so two questions have to be considered:

1. To what extent can electronic democracy contribute to the interactive constitution of a common will of the *demos*?
2. And to what extent can it contribute to constituting the *demos* as a community?

Digitally facilitated referendum democracy, which is what e-democracy could amount to, is a direct democracy of isolated individuals and not of interacting citizens. And it is this interaction which is the necessary precondition for constituting a *demos* with a collective will. Through electronic networks citizens are approached separately, without a shared debate. This direct democracy lacks the mechanisms of common consideration and working out compromises acceptable to the majority that are inherent in representative democracy. This may result in the disorientation of individuals and further fragment societies, weakening a sense of responsibility to others. A fragmented public can hardly contribute to interactively constituting a common will of the *demos*. For these reasons, interactive will-formation by members of the *demos* through Internet communication is unlikely. As Barber (1998) has put it, ICTs "clearly disadvantage deliberation and the pursuit of common ground and undermine the politics of democratic participation.

[They] cannot help in the pursuit of national, common and civic identity and without these forms of association, democracy itself becomes problematic.”

Dahlgren (2003) argues that by facilitating the emergence of multisector online public spheres, the Internet is creating disparate islands of political communication and has the effect of dispersing what has been a relatively unified public sphere of the mass media into many separate public spheres, undercutting a shared public culture and the integrative function of the public sphere. This threatens to undercut a shared public culture and the integrative societal function of the public sphere, and hampers the formation of collective political will and may well foster intolerance among separate “voluntary communities.” This trend towards fragmentation and increasing dispersion may be harmful in terms of the democratic potential of the ICTs.

Therefore, one has to agree that technology is an enabler not the solution. Integration with traditional, “offline” tools for access to information, consultation and public participation in policy making is needed to make the most of ICTs. The online provision of information is an essential precondition for engagement, but quantity does not mean quality. Active promotion and competent moderation are key to effective online consultations.

By the same token, e-democracy is not about replacing representative with direct, ICT-mediated democracy: rather, it is about the emergence of a hybrid form of direct-representative democracy – facilitating public debate, the birth of new political movements, and citizen involvement in the work of institutions of democracy:

e-democracy would promote enhanced participation in ICT-assisted deliberation processes. Note that this does not translate to direct democracy with instant referendums on every imaginable question. Rather it would foster an enhanced representative democracy, enriched with stronger citizen control of the deliberation and decision-reaching process and engagement in it. (Kyriakou, 2005: 74)

### ***PSM, democracy and e-democracy***

Public service broadcasting has always been about serving democracy. It has had a “fundamentally democratic thrust” in that it made available to all virtually the whole spectrum of public life and extended the universe of discourse. Its whole purpose has been to introduce social equality in access to information and all other content and to provide a forum for public debate.

Nevertheless, it was a system based on unequal and asymmetrical relations between broadcasters and the audience. In this system of representative communicative democracy, power accrued “to the representatives, not those whom they represent”, and it created “participation [in political life] without involvement” (Scannell, 1989: 163-164). In addition, the original model of PSM was based on an unequal, asymmetrical relations between the audience on the one hand, and

broadcasters, cultural elite and the state on the other. Bardoel (2007: 49-50) notes that many PSB institutions have kept the people and civil society at a distance, while politics and the government served as the preferred partner in the past. That was legitimated by social divisions and stratification at the time. Today, this is not acceptable. At the same time, the role of PSM in democracy is becoming more important than ever, given that:

there is a considerable risk concerning the media's ability to carry out its functions as a watchdog of democracy, as private media enterprises are predominantly motivated by financial profit; whereas this carries the danger of a loss of diversity, quality of content and multiplicity of opinions, therefore the custody of media pluralism should not be left purely to market mechanisms. (European Parliament, resolution on concentration and pluralism in the media in the European Union)

In the conditions of the 21st century, the traditional PSM service to democracy is no longer enough.

First of all, the polity within which the democratic process now incorporates both the national and the supranational level, with many functions of the state taken over by international organisations and with many global problems having to be tackled by the international community, rather than by particular nation-states alone. Hence, PSM should extend its service to democracy in ways shown in Table 1.

**Table 1. Old and new tasks of PSM in relation to political citizenship and democracy**

Traditional tasks of PSB	Additional tasks of PSM
<ul style="list-style-type: none"> <li>- Serve democracy at local, regional, national level;</li> <li>- Represent civil society vis-à-vis the authorities;</li> <li>- Provide a forum for public debate;</li> <li>- Serve as a government watchdog.</li> </ul>	<ul style="list-style-type: none"> <li>- Inform citizens of the work of international organisations;</li> <li>- Contribute to creating a public sphere and elements of a civil society at the regional, continental and global levels;</li> <li>- Serve as a watchdog for international and global organisations;</li> <li>- Develop social capital and a sense of community and co-responsibility for the nation-state at a time when cyberspace allows individuals to participate in virtual communities and become detached from their own societies and nations.</li> </ul>

Adapted from Jakubowicz, 2008.

According to the European Parliament's resolution on concentration and pluralism in the media in the European Union, "public audiovisual services are essential for democratic opinion-forming". Given the increasing fragmentation of the audience, due to the rising number of commercial stations on different



platforms, PSM has a fundamental role to play as potentially the only remaining electronic medium of fully fledged public debate and political will formation on societal scale needed for the democratic process.

That, however, is only the beginning of the PSM contribution to the democratic process. Given the malaise of democracy described above, more is required of all the institutions of democracy to reinvigorate the democratic process and stimulate popular democratic participation.

Consideration of ways of doing that has identified three priorities:

- electoral processes: enhancing turnout and inclusion;
- parties: promoting fairer funding and internal democracy;
- citizen involvement: supporting civic education and direct democracy (Lowndes, 2005).

The last area in particular is one where PSM can make a particularly effective contribution, *inter alia* by becoming involved in promoting empowerment and participation and thus ultimately e-democracy.

Four obligations of the media in general, and of PSM in particular, in promoting democracy can be deduced from normative theories about media-society relations (Carpentier, 2007: 159). They assume different degrees of audience activity:

**Table 2. Old and new tasks of PSM in relation to political citizenship and democracy**

Obligation	Audience role	Old or new?
The informative and control obligation	Audience as passive recipients of information, observers of how media perform watchdog role on their behalf	Old
The representation obligation		
– Representation of the political	Audience as spectators of the political process	Old
– Representation of the social	Audience as various social groups and sub-groups being represented	
	Groups involved in creating representations of themselves, or speaking on their own behalf	Old/New *
The forum obligation	Audience as active participants in public debate	New
The participatory obligation	Audience as active participants in operation of media, content production or provision, media management, but also as participants in social networking and public life	New

Adapted from Carpentier, 2007. \* Some limited forms of active self-representation by social groups in PSM have been tried in the past.

If the media are to promote civic involvement, it is obvious that the forum and participatory obligations acquire special importance. In the conditions of the 21st century, however, this cannot serve the purpose of e-democracy if PSM is prevented from entering the field of new communication services and is forced to concentrate on traditional broadcasting services. That is why Ian Kearns (2003) has called for a redefinition of traditional public service broadcasting: “Social and technological change means facing the challenge of renewal – from public service broadcasting to public service [online] communications the entire Public Service Communications community needs to move away from the broadcast paradigm of content delivered to a mass public and toward the usage and participation paradigm of the network age”.

By involving its audiences and users in different online participatory and networking schemes, PSM could help overcome the cultural and organisational barriers to greater online citizen engagement in the democratic process, as well as political, participatory, organisational and technological obstacles to the success of e-democracy (Coleman, Norris, 2005). To this end, PSM should undergo an evolution from a mainly transmission mode to a proper communication mode, and engage in partnership with civil society. Participatory schemes and services encourage citizens to become users rather than viewers of content: active participants who produce, modify, comment on, judge and repurpose content rather than act as the passive recipients of broadcast information and entertainment (Chitty, 2007).

Table 3 illustrates how the new technologies can be used to promote user participation in PSM, also as a way of extending its democratisation.

**Table 3. New technologies in promoting participation by civil society**

<b>Methods of PSM democratisation</b>	<b>Description</b>	<b>Selected examples</b>
Feedback	Email correspondence with programme makers and executives; instantaneous reaction in blogs and on websites	
Access	Online communities and social networking sites built around programmes and series	
Access to airtime, participation in programme development	User-generated content	A website established by Channel 4 allows users to generate, upload and view four-minute documentaries.

Participation in the organisation and management of PSM	Multistakeholder approach with NGO and civil society participation, online communication	BBC News editors maintain a blog “The Editors” ( <a href="http://www.bbc.co.uk/blogs/theeditors/">www.bbc.co.uk/blogs/theeditors/</a> ), because “The BBC wants to be open and accountable ... this site is a public space where you can engage with us as much as the medium allows. We’re happy for you to criticise the BBC ... and to ask serious, probing questions of us – we’ll do our best to respond to them.” <sup>13</sup>
Participation in the formulation of communication policies	Multistakeholder approach with NGO and civil society participation, online communication	The British regulatory authority OFCOM has established the “Ofcom PSM Review blog” ( <a href="http://ofcomPSMreview.typepad.co">http://ofcomPSMreview.typepad.co</a> ) as part of its review of public service broadcasting – “for people to debate the issues in the review”.

In their online services for the younger generation, PSM could also use video games to good advantage, as:

gaming may foster civic engagement among youth. Several aspects of video game-play parallel the kinds of civic learning opportunities found to promote civic engagement in other settings. Simulations of civic and political action, consideration of controversial issues, and participation in groups where members share interests are effective ways, research finds, for schools to encourage civic participation. These elements are common in many video games. In addition, many games have content that is explicitly civic and political in nature. SimCity, for example, casts youth in the role of mayor and requires that players develop and manage a city. They must set taxes, attend to commute times, invest in infrastructure, develop strategies for boosting employment, and consider their approval rating. (Kahne, Middaugh, Evans, 2008: 7)

The participatory culture created by video games and other forms of digital media offers many opportunities for young people to engage in civic debates, to participate in community life, to become political leaders – even if sometimes only through the “second lives” offered by massively multiplayer games or online fan communities. Here, too, expanding opportunities for participation may change their self perceptions and strengthen their ties with other citizens.

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13. Another example is the BBC’s invitation to the public to help redesign [bbc.co.uk](http://bbc.co.uk). The BBC announced a competition to invite ideas for the redesign of [bbc.co.uk](http://bbc.co.uk) for the Web 2.0 era. Entrants were encouraged to integrate content-sharing sites such as photo site Flickr, video site YouTube and blog search tool Technorati.

This can serve their empowerment which comes from making meaningful decisions within a real civic context. Civic participation requires more than knowledge of how institutions work and how people participate in them. It requires an interest in and commitment to participation, which can be developed, for example, through discussions of social issues and volunteer work to address those issues. Young people can thus develop confidence in their own abilities to act as leaders, practise articulating their own point of view, debate issues, and help others in their own communities. This can help turn them into people who individually and collectively engage in democratic society in order to identify and address issues of public concern through acts of voluntarism, organisational involvement, and electoral participation (Kahne, Middaugh, Evans, 2008; see also Lenhart, Kahne, Middaugh, Macgill, Evans, Vitak, 2008).

After Lowe (2008), we may identify five main forms of PSM services that support citizens' democratic needs and promote participation.

1. Information
2. Facilitation
3. Collaboration
4. Democratisation
5. Mobilisation

These services are described briefly below, based on Lowe's analysis.

### ***Information***

Provision of information is still a crucial element of PSM service to democracy. PSM news is unique in casting an equally critical eye on economic actors as well as political actors, due to their non-profit status, in so far as public funding and editorial independence are secure. Where commercial media lead news provision there is worrisome neglect and avoidance of highly relevant issues.

On-demand archives of previously broadcast material present an aspect of great importance in this category of PSM services. Such service links radio and television programmes, national cultural and social heritage, in both current and historic terms, with on-demand services via company websites.

The idea should be to organise content that is currently in the news in combination with documents and other materials to give users robust opportunities to develop a deeper understanding beyond the transitory surface story. BBC Radio 4, the radio talk and current affairs channel in the UK, produces the *Today* programme which is a good example, in this case linking radio and the Internet ([www.bbc.co.uk/radio4/today](http://www.bbc.co.uk/radio4/today)). The *Today* website is the legacy of an earlier popular programme strand called *The Great Debate* (1999-2003) which provided dialogue about news items especially focused on civic issues. The *Today* version features an issue of the day, typically related to national or international political

concerns that affect Britain. The online site includes an archive of past issues and an overview of the issue currently under debate. *Today* offers participants opportunity to influence the radio programme's substance and approach via their questions and input, and by suggesting issues for future programmes.

Radio Slovenia offers a useful example that illustrates PSM effort to provide a distinctive service within traditional broadcast media and not only in the new media context. In *The Europe in Person!* programme strand the producers search out people across Europe who give voice and personality to the rich variety and ordinariness of life in Europe today. The programme works to lower boundaries in perceptions by crossing borders in representation. Much emphasis in the 12-15 minute features is focused on the person's views on Europe and ideas about different European societies.

### **Facilitation**

A range of services are offered by PSM companies that enable individuals to explore a variety of issues and topics in order to learn new things of personal relevance. These services facilitate deepening of insight and securing enlightenment in ways that are educative rather than educational.

The election engine system is a common example in PSM. The election engine enables citizens to discover which candidates most closely represent their personal views and interests. Candidates fill out a questionnaire which users later fill out as well and then click on a dialogue button. The "machine", which is a software programme, compares the user's answers to each of the candidates standing for election and reveals the "distance" between the user and the candidates. The site offered by the Finnish PSM operator, YLE, for parliamentary elections is a good example of this type of facilitation: ([www.yle.fi/vaalit/2007/vaalikone](http://www.yle.fi/vaalit/2007/vaalikone)).

A different angle is evident in an online service offered by Slovenia's RTV – *Odprti kop* ([www.rtvlo.si/odprtikop](http://www.rtvlo.si/odprtikop)). Translated as "Data-mining", the service enables each individual user to investigate topics of personal interest to learn about issues in the news or relevant to the public sphere. This is essentially a specialised search engine programme that functions on the basis of closed captioning subtitles and video streams.

Another unique example is provided by DR, the Danish public service media company, which has been developing online games with a distinctly public service character. In 2006 DR hosted a competition and the top four winners are available at [www.dr.dk/Spilkonkurencen](http://www.dr.dk/Spilkonkurencen). *Værdikampen* ("the battle between values") is related to a controversial political issue in Denmark (the right-wing government declared war on progressive values). Players learn what the values are about and where they personally stand in relation to them. Another game establishes a dilemma and two players work through the implications. Other games encourage users to analyse political spin in publicity clips and statements.

Another relevant example of game-oriented play in PSM efforts to facilitate insight and enlightenment is from Latvia's Latvijas Televizija ([www.ltv1.lv/lat/forums](http://www.ltv1.lv/lat/forums)). Topical questions are posed online and people participate in offering answers. The results are assessed and provided as summary information. The answers open new opportunities for discovery. One recent topical question was "what kind of Latvia do you want to live in 25 years from now?"

A final example is the Citizenship Assimilation Test that was a national television show produced by Teleac/NOT, the educational public broadcasting foundation in the Netherlands. People participated at home via the Internet in taking the national test immigrants must pass as a requirement for Dutch citizenship ([www.nationaleinburgeringtest.nl](http://www.nationaleinburgeringtest.nl)). Dutch citizens got a clear idea of what the government has defined as essential to become a citizen, and with what necessary understanding of Dutch values and culture. The test was so popular that more than a million visitors took it in 2005. The results raised so much reaction that Teleac/NOT forwarded the thousands of responses to the responsible ministry and have kept the site live. The interesting thing is that a majority of Dutch participants failed to pass. The programme and the site generated public debate on the meaning and usefulness of this type of exam.

### ***Collaboration***

Social networking services offered by PSM companies integrate broadcast and online services in connection with user-created content of thematic interest. They are of keen importance for constructing democratic discourse.

A fascinating development is underway at ARTE, the Franco-German PSM operator. In ARTE radio ([www.arteradio.com](http://www.arteradio.com)) this PSM provider applies the creative commons licensing approach to all the content. Especially interesting is the open platform nature of the enterprise. Listeners are producers submitting material which is posted on the site. ARTE offers the space and the contents are posted with the ambition of building a community partnership between user-created content producers and ARTE radio's own work and production.

A related example of a PSM web 2.0 production in association with television and using archive material, was the BBC's Creative Archive project in 2006 (<http://creativearchive.bbc.co.uk>). Participants could access archived BBC materials specifically designated for their use in personal productions. This experiment was on the cutting edge of what is often referred to as "remix culture" and was very popular. It will be interesting to see how this type of exciting collaborative approach can be developed further for promoting individual participation both in and through the media.

### ***Democratisation***

As discussed, the role of PSM is not only in promoting individual participation with regard to a specific issue or in a particular situation, as important as that is. The role of PSM is also of broader importance in supporting the on-going

project of democratisation which nurtures perspectives, routines and involvements that construct democracy in society.

The best current example of what PSM is doing here is in the *Why Democracy?* project ([www.whydemocracy.net](http://www.whydemocracy.net)). *Why Democracy?* is a collaborative production of public service broadcasters from across Europe and around the world. These include the BBC (UK), DR (Denmark), YLE (Finland), ZDF (Germany), SBS (Australia), SABC (South Africa), ARTE (France) NHK (Japan) and many more. This is about growing public interest and stimulating public involvement in democracy today. This initiative is supported by the EBU (EuroVision), the Danish Film Institute, the Ford Foundation, Sundance Institute in the USA, and many others. In October 2007, 10 one-hour films that focus on contemporary democracy were broadcast in what is reportedly the world's largest ever factual media event. These can now be viewed online and there is ample opportunity to join in dialogue and debate. More than 40 broadcasters are participating with an estimated audience of 300 million viewers. Each participating broadcaster will produce a locally-based season of film, radio, debate and discussion to tie in with the global broadcast of the *Why Democracy?* documentary films. This will result in 20 short films dealing with personal, political and rights issues around the theme "What does democracy mean to me?"

It is important to observe that the funding and production represent a viable example of civil society organisations working co-operatively via PSM. Given the scope and scale of this initiative, it simply would not be possible without the institutional framework provided by PSM with its emphasis on democratic culture and practice.

There are many PSM projects of smaller scale, ongoing practice, and domestic emphasis as well. Among the most important of these are various programme strands offered for children. All such programmes and online services feature news and information designed to nurture an appreciation for democracy. A good example is *Logos!*, a daily production of the German PSM operator, ZDF. This programme provides news for children with lots of explanation and background information at a language level appropriate for children's understanding, and in a way that is suitable to their interests. Users can see a stream podcast of "logo" in the ZDFmediathek section at [www.zdf.de](http://www.zdf.de). Research has found that adults also use the service because the producers present complicated things in ways that are easy to understand.

### ***Mobilisation***

This category focuses on services that assist citizens in personal efforts to be activist with regard to social movements and involvement. One very good example is provided by the BBC.

The BBC's Action Network ([www.bbc.co.uk/dna/actionnetwork/](http://www.bbc.co.uk/dna/actionnetwork/)) service provides advice and tools to people who want to run campaigns on (mostly) local concerns. Action Network producers leverage the BBC's television and

radio networks to publicise the range of self-organising groups who are using its database to store documents and communicate via messages and email alerts. The service maintains distance from the government and is careful not to endorse particular campaigns or be directly involved.

### **Conclusion**

We can identify three main models of the creation of public service broadcasting, or of the transformation of state broadcasting into public service broadcasting:

1. paternalistic – as in the UK, where PSB was originally born in 1926 in the form of the BBC, an independent public corporation with a public service remit, understood in part as promoting public enlightenment, playing a clearly normative role in the country's cultural, moral and political life, and as promoting "the development of the majority in ways thought desirable by the minority" (Williams, 1968: 117);
2. democratic and emancipatory – as in some other western European countries, where erstwhile state broadcasting organisations began to be transformed into public service broadcasters in the 1960s and 1970s, a time when state (government) control of the then monopoly broadcasters could no longer be justified or claim legitimacy, and a way was sought to associate them more closely with the civil society and turn them into autonomous PSB organisations;
3. systemic – as in west Germany after the Second World War, Spain, Portugal and Greece in the 1970s, and in central and eastern Europe after 1989, when change of the broadcasting system was part and parcel of broader political change, typically transition to democracy after an authoritarian or totalitarian system.

Historically speaking, there has thus been growing, though limited, association of public service media with democracy and civil society. In the conditions of the 21st century, the time has come to take the next step and reconstruct PSM into a platform for open societal communication. This would be a radical departure from the traditional model of paternalistic top-down communication and truly encourage partnership and participation between PSM and civil society.

This would open a new stage in the history of public service media and complete the evolution of PSM, which can be presented as follows:

- 1920-1930s: State radio or paternalistic PSM
- 1960-1980s: Democratic-emancipatory evolution of PSM: closer ties with civil society
- 2000-2015: PSM and the civil society: partnership and participation



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## **Part III. Human rights in the information society**



# Human rights and regulation of the media and new communication services in the information society

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## ***I. Information society and human rights: the inter-relationship***

The term "information society" refers to a situation where information and communication technologies are integrated in industrial production and information dissemination in all fields. As a result, information becomes a source of income generation; employment is found mostly in the information sector; information is used to create knowledge.

Thus, to comprehend information society fully, we must use five analytical criteria: technological, economic, occupational, spatial and cultural.

The technological definition of the information society highlights the huge innovations in technology. The key innovations being technological advancements in information creation, processing, storage and transmission that have impacted the application of information and communication technologies in every sphere of society. Some of these technologies include computer technology and telecommunications technologies, which have revolutionised the socio-economic milieu of modern society.

The economic definition attempts to analyse the information industries in the context of their importance to economic activity in general, and of their contribution to the Gross National Product (GNP) and the economic viability of a nation.

The occupational definition highlights occupational change as a basis for a new form of society. The point here is that there is an emergence of the information society when the preponderance of occupation is found in information work.

The spatial definition emphasises the role and importance of information networks, which connect locations and consequently impact on the organisation of time and space. The effects of these networks and the reordering of time and space can be seen in four inter-related elements in the transition to an information society:

- information comes to occupy centre stage as the "key strategic resource" on which the organisation of the world economy is dependent;
- computer and communications technologies provide the infrastructure which enable information to be processed and distributed;

- there has been a rapid growth of the “tradeable information sector” – the economy in services such as the new media (satellite broadcasting, cable, video) and online databases;
- the growing “informatisation” of the economy is facilitating the integration of national and regional economies.

Finally, the cultural definition points to the extraordinary increase in information in social circulation and how it affects the pattern of our everyday lives.

As far as the media and information and communication technologies (ICTs) are concerned, the technological process underpinning their evolution into the infrastructure of the information society is that of convergence, that is, the merging of all types of information into a common digital form. Convergence is the take-over of all forms of media by one technology: digital computers, capable of handling multimedia content. The computing power of information technology invests the digital media with the ability to collect, process, store and distribute content potentially without any restrictions. Digitisation additionally makes possible signal compression, reprocessibility of content as data, text, audio, video and its transference across distribution networks. This changes or eliminates constraints which until now have limited communication, such as bandwidth, interactivity and network architecture. All this leads to the ability of different network platforms to carry essentially similar kinds of services, as telecommunication networks provide distant people with connectivity and access to content anywhere.

The key aspect of convergence is “interoperability” between the various terminals or devices (cellular telephones, organisers, notebooks, desktops, home servers, PCs and TV set) and networks used to access information, communication, education, entertainment, commerce and value-added services (GSM, UMTS, telephone lines, DSL and cable).

While traditionally the Internet is seen as the epitome of the information society, in reality it is broadband networks in their various forms, providing access to the Internet and other sources of content and channels of communication, which will really deliver on the promise and potential of the information society (see Table 1).

The main features of fully developed convergent digital communication which will be the prevalent mode of communication in the information society can be described as follows:

- Interactivity: interchangeable sender/receive roles;
- pull technology (non-linear, on-demand communication and access to content, that is “take what you want, when you want it”) gradually replaces push technology (linear communication: “take what you are given, when it is available”);

- asynchronous communication: content can be stored and await the user's decision to access it, ultimately doing away with traditional linear-time delivery of content in electronic media (unless it is wanted or needed);
- individualisation/personalisation (customisation): both the sender and the user are able to guide communication flows in such a way that the sender can address individual users with content selected according to different criteria, or users can select content from what is on offer;
- portability of terminals and mobility: the ability to receive content while on the move, as well as the ability to receive specific, time-sensitive and often location-sensitive information);
- disintermediation (elimination of intermediaries, for example, media organisations, as anyone can offer information and other content to be directly accessed by users and receivers) and "neo-intermediation" (emergence of new intermediaries, especially on the Internet, capable of offering new services or packaging content in new ways);
- development of new payment and micro-payment systems (moving from credit cards to "click and pay", required to sell non-tangible goods over the Internet);
- "anyone, anything, anytime, anywhere" – the ultimate goal of access to anyone from any place and at any time, and to all existing content stored in electronic memory.

**Table 1. Broadband pipelines into the home**

<b>Type</b>	<b>Technology</b>	<b>Typical supplier</b>
DSL (Direct Subscriber Line)	Boosting the bandwidth of traditional copper wire telephony networks.	Traditional incumbent "telco" telephony suppliers; ISPs offering competitive service using the telco's infrastructure.
Cable	Coaxial cables, which have a higher bandwidth than copper wires but lower than optical fibre.	Cable TV suppliers offering an expanded range of services including telephony and broadband.
Fibre-to-the-home (FTTH)	Optical fibre directly to the home.	Telco, cable and other telecom infrastructure players.
Satellite	Wireless links to geostationary satellites, currently at lower broadband speeds; Very Small Aperture Terminal (VSAT) technology enables small satellite terminals to be used to offer lower cost and more flexibly located links.	Specialist satellite communications companies.



WiFi (Wireless Fidelity)	Wireless local area networks based on the IEEE 811 Ethernet protocol.	Commercial Wireless Internet Service Providers (WISPs); not-for-profit communitarian networks.
Fixed wireless	Microwave line-of-sight links to fixed locations.	Specialist telecommunications suppliers.
Third generation (3G) mobile	Mobile phones, likely to be limited to lower broadband speeds.	Mobile telephone companies with 3G licences.
Powerlines	Electric powerlines adapted to carry broadband.	Electric utilities; intermediate service agents.

Source: Dutton W. H., Eisner Gillett S., McKnight L. W., Peltu M., *Broadband Internet: The Power to Reconfigure Access*, Oxford Internet Institute, University of Oxford, August 2003, [www.oii.ox.ac.uk/resources/publications/OIIFD1\\_200308.pdf](http://www.oii.ox.ac.uk/resources/publications/OIIFD1_200308.pdf).

Incidentally, this shows how many more types of economic entities than today may come to treat content distribution as part of their business, potentially becoming involved also in its production.

As noted above, the impact of the convergent ICTs on society will be all-embracing. The World Summit on the Information Society (WSIS) Declaration of Principles states that:

Information and Communication Technologies (ICTs) have an immense impact on virtually all aspects of our lives. The rapid progress of these technologies opens completely new opportunities to attain higher levels of development. The capacity of these technologies to reduce many traditional obstacles, especially those of time and distance, for the first time in history makes it possible to use the potential of these technologies for the benefit of millions of people in all corners of the world.

From a human rights perspective, a number of questions require consideration in this respect:

1. Are human rights affected by ICTs (providing convergent digital communication) and the development of the information society in general, and if so, which of them are particularly affected, and how?
2. Is the impact profound enough to call for a re-evaluation of human rights as defined and interpreted so far?
3. Will the current human rights protection system continue to be adequate and effective in the new circumstances?

The view that the ICTs have both a positive and negative impact on human rights can be said to predominate in the debate. Janusz Symonides<sup>14</sup> argues that:

1. On the one hand, “the new information technologies have a rather positive impact on human rights”, such as the right to education, the right to participate in cultural life; the right to benefit from scientific progress;
2. On the other hand, “among the rights which are endangered in cyberspace are the right to privacy and the right to protection of the moral and material interests resulting from any scientific, literary or artistic production”; also – the rights and interests of copyright holders.

For their part, Benedek and Pekari<sup>15</sup> point out that some human rights will, in their view, be particularly affected, and these are:

- The right to privacy (Article 12 Universal Declaration of Human Rights, Article 17 International Covenant on Civil and Political Rights);
- The freedom of expression and the right to information (Article 19 Universal Declaration of Human Rights, Article 19 International Covenant on Civil and Political Rights);
- The right to participate in cultural life, that is the right to intellectual property (Article 27 Universal Declaration of Human Rights, Article 15 International Covenant on Economic, Social and Cultural Rights).

Benedek and Pekari go on to say that data protection, intellectual property rights and media-related standards are currently of great concern to policy-makers, who encounter major problems in finding adequate regulations meeting economic as well as social responsibilities.

According to the Office of the UN High Commissioner for Human Rights,<sup>16</sup> development of an equitable, participatory, democratic information society which benefits all requires the respect of all internationally recognised human rights and fundamental freedoms. However, it points out, certain international human rights enshrined in the Universal Declaration of Human Rights deserve special attention. These are:

- Freedom of expression and right to seek, receive and impart information (Article 19);
- Prohibition of discrimination (Article 7);
- The right to privacy (Article 12);

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14. Symonides J., “New human rights dimensions, obstacles and challenges”, in: Symonides J. (ed.) *Human rights: new dimensions and challenges*, Ashgate (published jointly with UNESCO), Dartmouth, 1998.

15. Benedek W., Pekari C., *Human rights in the information society*, Institute For International Law and International Relations, University of Graz, no date.

16. See Background note on the information society and human rights, Office of the UN High Commissioner for Human Rights, Geneva, October 2003.

- Intellectual property rights (Article 27):
- The right to a standard of living, adequate for the health and well-being of himself and of his family (Article 25, paragraph 1);
- The right to education (Article 26).

Much of the literature supports the view that the ICTs have either a quantitative or a qualitative impact on the human rights system.

As for the quantitative impact, the effect that ICTs have is seen as magnifying the impact of either human rights protection, or of their violation, since the ICTs can facilitate either type of action, that is, produce multiplier effect by means of their potentially global reach and their instantaneous speed of communication.

As for the qualitative impact, we must also consider the possibility that the information society and the ICTs are probably capable of changing the social, technological and legal circumstances in which current definitions of human rights were developed. This might require a redefinition or reinterpretation of at least some human rights. Moreover, if predictions about the emergence of a “web lifestyle” are anything like near the mark, what this will mean is that enjoyment of many human rights, as indeed the performance of many everyday activities and pursuits, will increasingly require the use of ICTs. In addition, ICTs can make such a difference and offer so many more possibilities of exercising particular rights (for example, freedom of expression or the right to education) that they can raise enjoyment of these rights to a much higher level. As a result, limited or no access to, or use of, ICTs spells deprivation in the full exercise of human rights.

We may thus hypothesise that there exist four main forms of ICT impact on human rights:

1. Quantitative impact: ICTs “add a new dimension” (multiplier effect as concerns impact or consequences) to already existing violations of human rights, or – conversely – to their exercise or protection;
2. Qualitative impact: ICTs create “new forms of delinquency” and “new forms of crime” and – conversely – new forms of human rights exercise and protection;
3. Sometimes qualitative impact results in a redefinition of a human right, primarily by adding cyberspace as a new universe for their exercise;
4. ICTs extend and enrich ways in which human rights are exercised so much that one can speak of “ICT-enhanced human rights”; by the same token, they exacerbate societal and global divisions by excluding individuals, groups and regions from among those who can take advantage of these opportunities.

Human rights are certainly affected by ICTs and the development of the information society in one of the four ways listed above. The full extent of this impact is yet to be revealed, as ICTs spread and develop and the information society

emerges in full form, Still, it is already clear that with some exceptions most human rights are affected in one way or another.<sup>17</sup>

Table 2 provides a tentative typology of the forms of ICT impact on human rights. In some cases (prohibition of slavery and forced labour and protection of property are provided here as examples), impact may be both qualitative and quantitative.

**Table 2. ICT impact on human rights (European Convention on Human Rights)**

<b>Form of ICT impact</b>	<b>Articles of the Convention</b>
Quantitative impact (multiplier effect)	Article 4 – Prohibition of slavery and forced labour Article 6 – Right to a fair trial Article 8 – Right to respect for private and family life Article 14 – Prohibition of discrimination Protocol No. 12, Article 1 – General prohibition of discrimination Protocol 1, Article 1 – Protection of property
Qualitative impact	Article 4 – Prohibition of slavery and forced labour Article 7 – No punishment without law Protocol 1, Article 1 – Protection of property
Redefinition of a human right, primarily by adding cyberspace as a new universe for its exercise.	Protocol No. 1, Article 3 – Right to free elections Protocol No. 4, Article 2 – Freedom of movement
ICT-enhanced human rights	Article 10 – Freedom of expression Article 11 – Freedom of assembly and association Protocol 1, Article 2 – Right to education Protocol No. 4, Article 2 – Freedom of movement

This typology is very preliminary in nature and further analysis is required to arrive at a more precise understanding of the impact of ICTs on human rights.

At this stage, it would be an exaggeration to say that the impact has been profound enough to call for a general re-evaluation of human rights as defined and interpreted so far. A considerable body of piecemeal work has already been done to respond to various changes in the human rights system brought about

17. For a more extensive and detailed examination of this impact, see, for example, Jakubowicz K., Human rights and the information society: a preliminary overview IP1(2004)47, A working paper for the Preparatory Group on Human Rights and the Rule of Law in the Information Society, Integrated Project 1 “Making Democratic Institutions Work”, IP1 Secretariat, Strasbourg, 7 September 2004.

by ICTs.<sup>18</sup> Nevertheless, it is already clear that the current human rights protection system will need to be significantly developed and adjusted to be fully adequate and effective in the new circumstances.

## ***II. Media, ICTs and human rights in the information society: the policy response***

In broad outline, the policy response in this field should be fourfold:

1. policies designed to ensure the development of the information society should serve at the same time to promote the enhancement of democracy, human rights, freedom of expression and information and the rule of law; this requires, in part, the extension and adjustment of the legal framework to the new technologies, that is, to respond to new forms of crime and violations of human rights made possible by them and to develop standards for all Internet actors (to be applied mainly by means of self- and co-regulation). Any regulatory measures which may be taken with regard to the media and new communication services should respect and promote the fundamental values of pluralism and diversity, respect for human rights and non-discriminatory access;
2. given the enormous impact of the ICTs on human and social life, as well as the fact that they will mediate more and more human activities, including the exercise of human rights, the primary objective should be to seek to extend the benefits of the ICTs to everyone by promoting inclusion in the information society, that is, by ensuring an effective and equitable access for all individuals to the ICTs, skills and knowledge, including media education;
3. e-inclusion should be promoted in ways that enable all individuals to take advantage of new opportunities to exercise human rights, especially the ITC-enhanced human rights;
4. at the same time, intensive efforts should be undertaken to protect individuals against new and intensified forms of human rights violation through the use of the ICTs.

The Council of Europe has listed<sup>19</sup> four broad areas on which such efforts should concentrate. They are: human rights and sustainable development; democracy and citizenship; creating trust by the rule of law; cultural diversity and educational empowerment.

The Council of Europe has also identified<sup>20</sup> a series of issues of primary importance in this context. They are as follows:

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18. The work of the Council of Europe in this area is summed up, for example, in *Democracy, human rights and the rule of law in the information society*. Contribution by the Council of Europe to the 2nd Preparatory Committee for the World Summit on the Information Society, Strasbourg, 7 December 2002.

19. See Political message from the Committee of Ministers to the World Summit on the Information Society (WSIS), CM(2003)87 final, Strasbourg, 24 June 2003.

20. See *Democracy, human rights and the rule of law in the information society*, op. cit.

Human rights and fundamental freedoms in the information society:

- ensuring that freedom of expression and information is fully respected with regard to Internet content with any restrictions not going beyond what is necessary in a democratic society;
- preparing and applying effective legal instruments to combat cybercrime and ensure the protection of personal data;
- establishing a framework of self-regulation or co-regulation as opposed to outright state regulation;
- finding the right balance between the protection of intellectual property rights and the legitimate public interest in affordable access to information and cultural products.

Improving communication between public authorities and the citizen:

- multi-channel access to official information, social services and justice;
- connected, accountable and transparent public institutions;
- e-enabled representation (e-voting) and citizen participation in the shaping of public policies;
- strengthening local and regional democracy in the information society.

E-inclusion:

- bridging the digital divide by remedying existing access, skills and trust deficits;
- ICT-powered teaching and life-long learning in the information society;
- media education and Internet literacy for all as essential conditions for citizenship and social inclusion;
- using ICT's full potential to improve the quality of life of the elderly, the chronically ill, and people with disabilities.

### ***III. Regulation of the media and new communication services in the information society***

By transforming the media and forms of communication, convergence requires a profound revision of the old regulatory approach, based – as in the European Convention on Transfrontier Television and the Television Without Frontiers directive – on the difference between mass communication (“programme services embodied in transmissions”) on the one hand, and on-demand information society services on the other. The differences between these communications modes become blurred:

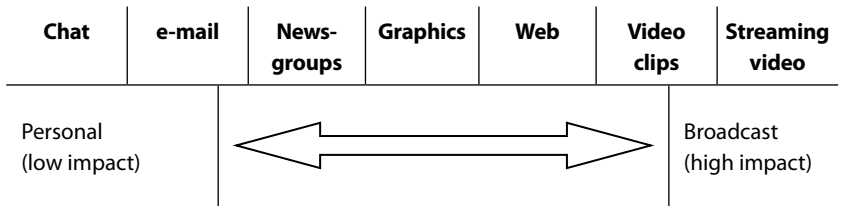
- mass media content may be disseminated to the general public via point-to-point distribution media (such as multiplex broadcasting; broadcasting

over communication satellite; music/information via the phone; bulletin board services on a computer network; broadcasting over the Internet);

- and, conversely, point-to-point (that is, private) communication may be conducted via a mass medium (for example, telephone services over cable TV; video on demand over cable TV; paging services over FM radio).

An excellent example of the different uses to which a single technology can be put is provided by the Internet, as shown in Figure 1.

**Figure 1. Range of material available on the Internet**

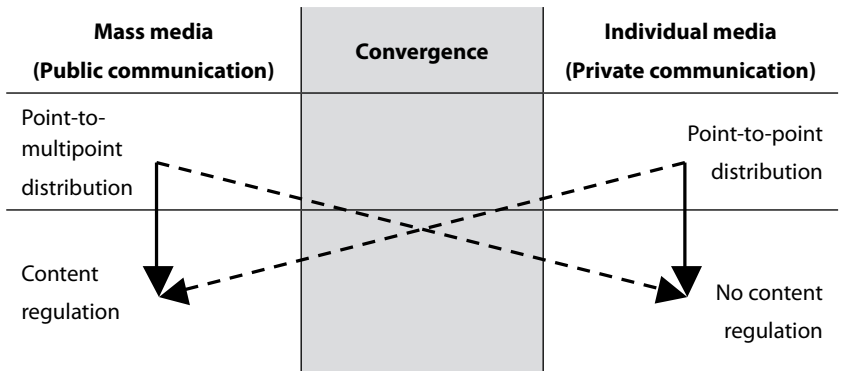


Source: David Mitchell and Mark Armstrong "Broadcasting regulatory mechanisms and the internet", *Intermedia*, Vol. 29, No. 5/6, Dec. 2001.

As a consequence, the distinctions between different public policy objectives, vis-à-vis content and carriage and the regulatory frameworks created to pursue them, are breaking down. The same applies to "vertical regulation", as carriage infrastructure traditionally applied in private communication free from content regulation begins to serve public communication where content regulation applies (or vice versa). After all, an Internet service provider, depending on the service it offers, may be variously categorised as a publisher, journalist, broadcaster or phone company – each of which has been regulated differently and has had different liabilities for content it distributes or transmits.

Figure 2 illustrates the effects of convergence on old, "vertical" regulatory regimes.

**Figure 2. Effects of convergence on regulatory regimes**



Technological developments and convergence are thus progressively calling into question the distinction made between broadcasting and new interactive audiovisual services founded on a technical criterion (“transmission” as a justification for content regulation). This renders the old vertical, technology-specific regulatory order obsolete and ineffective. At the same time, the public policy objectives and general interest considerations which have underpinned the traditional regulatory order have lost none of their validity. Given the “multiplier” effect that the new technologies can produce in magnifying both positive and negative/harmful consequences of electronic communication, ways must be found to extend some forms of regulation also to these new communications services. There is, therefore, a need to develop a technologically-neutral regulatory regime.

The EU’s package of electronic communications directives has achieved that in relation to the networks and services of electronic communications. Now, work on revising both the European Convention on Transfrontier Television and the “Television Without Frontiers” directive is pointing more and more clearly to the need to develop a new model of content regulation in relation to all electronic media. Given the differences between various modes of communication, this calls for horizontal, technologically-neutral, graduated content regulation, involving – where appropriate – self- and co-regulation.

“Horizontal” and “technologically-neutral” means that the regulatory order will cover not just traditional broadcasting, but all electronic media (and in some cases, such as protection of minors and human dignity – also the print media), regardless of the precise nature of the technology used to distribute content.

Of course, this does not mean regulation of all content. That could not be justified. The following features of the mass communication media and their content could be identified as justifying content regulation in its traditional form:

- spread effect – content is addressed to, and received, by an undefined (potentially very large) number of viewers;
- suggestive power in the formation of opinion;
- particular immediacy in the provision of content, especially in the case of live broadcasts;
- simultaneity – both in the sense that content was received in real time, as it was being disseminated, and in the sense that it impacted on, and influenced, large numbers of people at the same time, potentially with great effectiveness.

As noted above, convergent digital communication changes many features of traditional mass communication. It is, however, possible to list some criteria for justifying regulation of a mode of communication and its content:



- the broad effect of an offer/the maximum technical range/possibility of simultaneous reception;
- the relevance of the contents for community life; the variety of subjects; the topicality of subjects;
- the editorial design/structural sequence of contents, which prevents the viewer from switching off or switching to another channel; selection and editing of the contents; live offers;
- the passive nature of the users' behaviour; the ease with which the receiver can be operated;
- the presentation's suggestive power/closeness to reality.

The use of such criteria seems to emerge as a potential way of substituting the concept of transmission as a foundation for a future regulatory regime for "broadcasting" services, though naturally they would need to be carefully defined to provide legal certainty.

Another approach is to develop a definition of "media", regardless of the distribution technology applied in a particular case. For example, Recommendation Rec(2004)16 of the Council of Europe Committee of Ministers to member states on the right of reply in the new media environment defines the term "medium" as referring "to any means of communication for the periodic dissemination to the public of edited information, whether online or off-line, such as newspapers, periodicals, radio, television and web-based news services".<sup>21</sup>

"Graduated regulation" means that different levels of regulation, and levels of detail in regulatory requirements, will apply to different electronic media. For example, as far as the regulation of advertising is concerned, the detailed, often prescriptive, rules applied in the case of traditional broadcasting will – in the case of other electronic media need to be replaced with a "light touch" approach, while continuing to meet public policy objectives such as the protection of viewers/consumers. An example of "graduated regulation" is provided in Table 3.

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21. A similar approach has been adopted in the draft recommendation of the Committee of Ministers on the right of the public to information on major events where exclusive rights have been acquired. A technologically-neutral definition of "a provider of a news service" is proposed, as meaning "any person who offers on a professional basis a news service to the public, in the form of texts, images and/or sounds, whether in return for remuneration or not".

**Table 3. Graduated regulation of broadcasting, media and tele services in Germany**

<b>Broadcasting</b>	<b>Media services</b>	<b>Tele services</b>
Point-to-multipoint Fixed programming schedule	Point-to-point/multipoint Relevant editorial content	Point-to-point No relevant editorial content
TV (and radio) programmes Free TV and Pay TV services	On-demand TV services; Teletext; online magazines and websites	E-commerce transaction services (e.g. online banking) Online databases
<b>High content regulation</b>	<b>Light content regulation</b>	<b>Little content regulation</b>
<ul style="list-style-type: none"> <li>- Licensing requirement</li> <li>- Concentration control</li> <li>- Standards of journalism</li> <li>- Programming quotas</li> <li>- Access rights</li> <li>- Listed events</li> <li>- Advertising restrictions</li> <li>- Sponsoring restrictions</li> <li>- Protection of youth</li> <li>- Right of reply</li> <li>- Privacy (Pay TV)</li> </ul>	<ul style="list-style-type: none"> <li>- Notification requirement</li> <li>- Transparency</li> <li>- Standards of journalism</li> <li>- (Minor) restrictions on advertising &amp; sponsoring</li> <li>- Protection of youth</li> <li>- Right of reply</li> <li>- Liability for content</li> <li>- Privacy</li> </ul>	<ul style="list-style-type: none"> <li>- Notification requirement</li> <li>- Liability for “content”</li> </ul>

Source: Andreas Grünwald, “What future for broadcasting in the digital era?” paper presented during an expert seminar on The European Convention on Transfrontier Television in an Evolving Broadcasting Environment, Strasbourg, 2001.

Self-regulation and co-regulation are relied on more and more for two reasons:

- first, modern ICTs and new communication services often do not – for a variety of reasons (including, for example, jurisdiction) – lend themselves to traditional regulation, enforced by a state body or regulatory authority; thus, combating illegal and harmful content requires the co-operation and involvement of all stakeholders;
- second, “changes in society and the decreasing role played by the State have to be taken into account. Enforcing regulation by state law to support objectives which are in public interest has become more and more ineffective. For one thing, it is becoming more and more difficult to attain these goals, and for another the undesirable side-effects of regulation (that is stopping the progress of the specific branch of industry) are able to cancel out the benefits of regulation”.<sup>22</sup>

22. Schulz W. and Held T., Regulated self-regulation as a form of modern government, study commissioned by the German Federal Commissioner for Cultural and Media Affairs Interim Report, Hans Bredow Institute for Media Research at the University of Hamburg, October 2001, p. 3.

Self-regulation can be described as follows: different players agree to rules regulating their activities and they define and enact codes of conduct (“intentional self-regulation”). Self-regulation may also include the participation of third parties (that is, besides the state and industry) in the process of regulating.<sup>23</sup>

Co-regulation (also known as “regulated self-regulation” or “audited self-regulation”) refers to a situation where self-regulation is supported by traditional regulatory instruments: the state structures the legal framework to enable self-regulation, or intervenes if the objectives are not met by self-regulation, or if there are undesirable side-effects.<sup>24</sup>

Designing the regulatory architecture to create such a system of horizontal, technologically-neutral, graduated regulation requires considerable further work, concentrating on:

1. refining technology-neutral methods of specifying which content delivered by the new technologies should be subject to content regulation;
2. refining the scope and methods of graduated regulation;
3. identifying new market players and their involvement in the process of “broadcast-like” communication, to refine the regulatory regime and apply it to the right players;
4. determining the regulatory architecture capable of extending the scope of existing legal instrumental to the new technologies;
5. more extensive introduction of self- and co-regulation into the regulatory regime.

#### ***IV. Internet governance as a case study of global media and ICT policy making***

“Internet governance” is defined in a paper written for the UN Working Group on Internet Governance, created after WSIS,<sup>25</sup> as: “Collective action, by governments and/or the private sector operators of TCP/IP networks and networking infrastructure, to establish rules and procedures to enforce public policies and resolve disputes that cross multiple jurisdictions”.

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23. For an extensive review of self-regulation see Self-regulation of digital media converging on the internet: industry codes of conduct in sectoral analysis, Programme in Comparative Law and Policy, Centre for Socio-Legal Studies, Oxford University, Oxford, 30 April 2004. See also Group of Specialists on On-Line Services and Democracy, Summary of the replies to the questionnaire on self-regulation and user protection against illegal or harmful content on the new communications and information services, Secretariat memorandum prepared by the Directorate General of Human Rights, April 2002.

24. See Palzer C., “Co-regulation of the media in Europe: European provisions for the establishment of co-regulation frameworks”, IRIS plus, a supplement to IRIS, Legal Observations of the European Audiovisual Observatory, Issue 2002-6, Strasbourg, June 2002.

25. Mueller M., Mathiason J. and McKnight L., Making sense of “Internet governance”: defining principles and norms, Internet Governance Project, The Convergence Center, Syracuse University, <http://dcc.syr.edu/miscarticles/SU-IGP-rev2.pdf>.

As noted in the paper, international governance is already being applied to the Internet in several particular areas. Specifically:

- the Internet Corporation for Assigned Names and Numbers (ICANN) sets policy for domain name dispute resolution, engages in economic and technical regulation of the domain name supply industry, and controls the allocation and assignment of top-level domains and the top of the Internet Protocol address hierarchy. These contractual rules are used to resolve fundamental public policy problems involving domain names and intellectual property rights, privacy, competition policy and resource allocation;
- the Council of Europe’s Convention on Cybercrime deals with criminal offences committed through the use of Internet and other computer networks, such as copyright infringement, computer-related fraud, child pornography and breaches of network security. The Council of Europe has also adopted a Declaration on Freedom of Communication on the Internet;
- the UN Commission on International Trade Law (UNCITRAL) has adopted a model e-commerce law and considers its purpose to “further the progressive harmonisation and unification of the law of international trade,” thus paving the way for Internet-based e-commerce;
- the Hague Conference on International Private Law affects consumer protection and consumer-business and business-to-business transactions over the Internet;
- the World Intellectual Property Organisation (WIPO) in December 1996 concluded two treaties updating copyright and related rights for digital media, which it promotes as “the WIPO Internet treaties.” More recently, WIPO has proposed a treaty creating new forms of protection for broadcast content that could have profound implications for webcasting and Internet multimedia transmissions;
- the Internet’s rapid international diffusion in the 1990s would not have been possible without domestic policies and trade agreements liberalising the provision of “value-added” information services using telecommunication facilities. These agreements preceded the World Trade Organisation (WTO), but were extended and institutionalised by the WTO’s Basic Telecommunication Services agreements. The WTO also promulgated the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement, which treats copyright infringement as a trade barrier and requires WTO members to adhere to minimum standards of protection and enforcement;
- international governance can also be achieved through the unilateral action of strong states. For example, the US Federal Trade Commission has proposed an International Consumer Protection Act focused primarily on transnational law enforcement involving Internet transactions. The US also passed the Anticybersquatting Consumer Protection Act globalising some aspect of US legal jurisdiction over domain name disputes;
- similarly, the European Commission’s competition policy reviews have had and will probably continue to have transnational impact on the Internet.

For example, before clearing the merger of two US companies, WorldCom and MCI, in 1998 the EU required MCI to divest its Internet service provider business. The same transnational impact characterised the EU's Data Protection Initiative.

This confirms that the distinguishing feature of global communications policy making today is that policy is no longer made at any clearly definable location, but across a range of sites. The entire process of globalisation and technological change has been accompanied by important shifts in power relations between major actors: international organisations, nation-states, stateless conglomerations of corporate capital, civil society, etc. Internationalisation and globalisation of media markets, together with transfrontier broadcasting, promote the co-existence on those markets of different policy-making and regulatory structures, as well as legal frameworks, potentially at cross-purposes with one another.

Even more importantly, however, these structures additionally come under the impact of a variety of other forces – social, political, economic, technological and cultural – which may disrupt and change the entire framework of reference within which policy used to be formulated and pursued. The global media order is the ultimate result of the interplay of these forces.

The current situation at the global level has been described as a case of “new medievalism” – a *mélange* of political and legal structures and a clutter of nation-states and regional and local governments; intergovernmental agencies and programmes, as well as intergovernmental structures with sectoral responsibilities like the WTO; and the International Court of Justice and other global institutions seeking to enforce the rule of law.<sup>26</sup> This hotchpotch system of global governance also includes global accords, treaties, and conventions; policy summits and meetings; and new forms of public deliberation and conflict resolution like truth commissions that have a global impact. These interacting and overlapping neo-medieval structures are undoubtedly having the effect of slowly eroding both the immunity of sovereign states from suit and the presumption that statutes do not extend to the territory of other states.

A practical illustration of global media policy making is provided by the global ICT policy environment, consisting of a few groups of actors:

- principal players: International Telecommunications Union (ITU), WTO and ICANN;
- supporting institutions: World Bank Group, World Intellectual Property Organisation (WIPO) and UNESCO;
- new fora and actors: (i) NGOs (concerned with promoting the development of ICT-based networks and services, or focused on the use of ICTs to

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26. See Keane J., “Global civil society?”, in Anheier H., Glasius M., Kaldor M. (eds) *Global civil society 2001*, Oxford University Press, Oxford, 2001, pp. 23-47.

promote sustainable economic, social, cultural and political development); (ii) Business community organisations (BCOs), including national chambers of commerce whose main interest is in promoting policies, regulations and practices that encourage trade and investment between countries, as well as task forces and round tables that address emerging global issues of policy, regulation and development from a private sector perspective; (iii) Hundreds of private sector fora (PSFs) that have been established by ICT enterprises to develop international standards for ICT technology, networks and services; (iv) Legions of academics, researchers, policy advisors and regulatory practitioners who engage in ongoing public discussion, debate and analysis of the basic principles that should guide decision making on international ICT issues.

When ITC policy themes are cross-tabulated with policy issues and global venues for their consideration and resolution, the result is as follows:

**Table 4. Global ICT policy themes, issues and venues**

<b>Policy theme</b>	<b>Policy issues</b>	<b>Global venues</b>
Convergence and digitalisation	Wireless and radio spectrum allocation (new services, harmonisation frequency bands, etc.)	ITU
	Universal access and interoperability – (bottlenecks, essential facilities, anti-trust, emerging standards, etc.)	ITU, IETF, W3C, WTO, GBDe
	Common identifiers (domain names, ENUM, object identifiers, etc.)	ICANN, IETF, WIPO
	Regulatory reform (redefining regulatory spheres, converged agencies, etc.)	Various, including the World Bank and IMF
Networked economy	Consumer protection (cross-border redress and dispute resolution, jurisdiction, etc.)	OECD, ITU, WIPO, UNCITRAL, GBDe
	Electronic contracts and signatures (authentication, standards, model laws, etc.)	UNCITRAL, IETF, W3C, OECD
	Intellectual Property (Copyright, Trademarks, ISP liability, etc.)	WIPO, ICANN, WTO
Global information society	Network security (cybercrime, hacking, critical infrastructures, etc.)	ICANN, ITU, OECD, CoE
	Language and cultural diversity (multilingual domain names, content diversity, etc.)	ICANN, WIPO, ITU, UNESCO, CoE
	Market conditions (ICT for trade, pricing, affordable inputs, credit, taxation, etc.)	WTO, UNCTAD

Adapted from: Implementation Team on Global Policy Participation, *A Roadmap: Global Policymaking for Information and Communications Technologies Enabling Meaningful Participation by Developing-Nation Stakeholders*, G8 Digital Opportunity Task Force, New York, 2002.

The lesser known acronyms are: GBDe – Global Business Dialogue; W3C – World Wide Web Consortium; IETF – Internet Engineering Task Force; UNCITRAL – United Nations Commission on International Trade Law.

Three broad and distinct basic arguments can be identified in the globalisation debate concerning the audiovisual sector and the broader field of cultural industries:

1. One favours far-reaching liberalisation of trade in audiovisual goods and the inclusion of audiovisual in the services negotiations, in which case the audiovisual sector would not be treated as being any different than trade in any other kind of commodity or service.
2. Another view holds that the audiovisual field holds a special position because of its cultural value and should therefore be granted a privilege and an exemption from total liberalisation (which if applied to the audiovisual sector would preclude measures in support of audiovisual industries, such as subventions).
3. There is also a third position which goes beyond the protection of the audiovisual field at the national level and seeks the creation of an international instrument for the protection of cultural diversity as such. This argument is broader than just the audiovisual field and centres on the issue of cultural diversity, which is defined to include all forms of artistic and cultural expression including popular culture, traditional knowledge and practices and linguistic diversity (c.f. the UNESCO Universal Declaration on Cultural Diversity or the Council of Europe's Declaration of the Committee of Ministers on Cultural Diversity). The third position is at present converging around negotiations in UNESCO on a draft convention on the protection of the diversity of cultural contents and artistic expressions.

These differing perspectives emerge out of what has been described as a new "trilateralism" in global communications negotiations and policy-making, that is, the involvement of governments, industry and citizens in the process. Preparations for the Tunis stage of WSIS in 2005 are taking this a step further with "trilateralism" turning into "quadrilateralism": also international organisations (especially those in the UN system) have been invited to join the preparatory process and to take part in the summit alongside the others.

This may raise the issue of the democratic legitimacy of global media and ICT policy making resulting from such a system of global governance. The question may also be asked whether a human rights oriented approach is – as it should be – guaranteed a central role in the process.

In its Political Message to the World Summit on the Information Society (Geneva, 10-12 December 2003), the Council of Europe Committee of Ministers stated: "We, the member states of the Council of Europe, are committed to building societies based on the values of human rights, democracy, rule of law, social cohesion, respect for cultural diversity and trust between individuals and between peoples". The Council of Europe has a duty to persist in its consistent efforts to ensure that these principles, goals, values will be at the centre of global media and ICT policy making.

## Human rights and the information society: a preliminary overview

*Working paper written for the Preparatory Group on Human Rights, the Rule of Law and the Information Society, Strasbourg, 7 September 2004.*

At the global level, the human rights system is embodied in the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (CESCR), and the International Covenant on Civil and Political Rights (CCPR), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families. Also of importance is the Vienna Declaration and Programme of Action adopted by the United Nations World Conference on Human Rights, Vienna, 14-25 June 1993.

At the regional level, mention could be made of such international instruments as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights (ECHR) or the EU's Charter of Fundamental Rights. Human rights are also regulated at the national level.

In its Political Message to the World Summit on the Information Society (WSIS) (Geneva, 10-12 December 2002), the Council of Europe Committee of Ministers reaffirmed the indivisibility and interdependence of all human rights – civil, political, economic, social and cultural – and their ties to the principles of a democratic society, the rule of law and sustainable development. The committee stated: "In the hopes and perils of the transformation to the information society, we are determined to maintain and strengthen all these values".

Also the World Summit itself reaffirmed in its Declaration of Principles the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms, including the right to development, as enshrined in the Vienna Declaration. The declaration reads in part: "We also reaffirm that democracy, sustainable development, and respect for human rights and fundamental freedoms as well as good governance at all levels are interdependent and mutually reinforcing. We further resolve to strengthen respect for the rule of law in international as in national affairs."

However, it would be a mistake to deduce from these documents a static view of human rights. This would assume that the information society has no impact on the interpretation, methods of protection or possibilities of violation of human rights. That is by no means the case. According to the Office of the UN High Commissioner for Human Rights, all the treaties mentioned earlier "contain specific sets of articles which stipulate rights that are directly



affected by the dramatic advances in telecommunications, broadcasting and other forms of ICTs.”<sup>27</sup>

### **1. Information society: some introductory remarks**

The information society is seen by some as a new stage of social development (defined variously as postindustrialism, postmodernism, or an informational mode of development), involving radical change. That cannot but affect the human rights system. A number of processes (social, economic, cultural and technological) that go into the development of the information society are credited by Manuel Castells (see Castells, *The Rise of Network Society*, Blackwell, Oxford, 1996) with promoting the rise of the Network Society, characterised by the following main features and processes:

1. An informational economy in which sources of productivity and competitiveness for firms, regions, countries depend, more than ever, on knowledge, information and the technology of their processing.
2. A global economy in which national, regional and local economies depend ultimately on the dynamics of the global economy to which they are connected through networks and markets. It reaches out to whole planet but in fact for now excludes the majority.
3. The network enterprise is a new form of organisation characteristic of economic activity. It is a network made either from firms or segments of firms, or from internal segmentation of firms.
4. The transformation of work and employment; the flexi-workers. Power relations have shifted in favour of capital with much downsizing, subcontracting and networking of labour, inducing flexibility and individualisation of contractual arrangements. There is a growth of self-employment, temporary work and part-time, particularly for women.
5. Social polarisation and social exclusion – processes of globalisation, business networking and individualisation of labour all weaken social organisations and institutions that represented/protected workers in the information age, particularly labour unions and the welfare state.
6. The culture of real virtuality – the emergence of a similar pattern of networking, flexibility and ephemeral symbolic communication in a culture organised around the electronic media. The media are extremely diverse and send targeted messages to specific segments of audiences and to specific moods of audiences. They form a culture of real virtuality

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27. Background note on the information society and human rights, Office of the UN High Commissioner for Human Rights, Geneva, October 2003. For a general discussion of these issues see also Hurley D., *Pole star: human rights in the information society*. Rights & Democracy (International Centre for Human Rights and Democratic Development), Montreal, 2003; Nicol C. (ed.), *ICT policy: a beginner's handbook*. Association for Progressive Communications, 2003. [www.apc.org/books](http://www.apc.org/books).

in which our symbolic environment is, by and large, structured in an inclusive, flexible, diversified hypertext, in which we navigate every day. The enclosure of communication in the space of flexible media and the media become the essential space of politics.

Though views on the nature of the information society naturally differ, we may assume that wide-ranging change of this nature will affect human rights too.

Also the impact of the ICTs themselves is wide-ranging. The WSIS Declaration of Principles states that: "Information and Communication Technologies (ICTs) have an immense impact on virtually all aspects of our lives. The rapid progress of these technologies opens completely new opportunities to attain higher levels of development. The capacity of these technologies to reduce many traditional obstacles, especially those of time and distance, for the first time in history makes it possible to use the potential of these technologies for the benefit of millions of people in all corners of the world".

The technological process underpinning these developments is that of convergence. Convergence is the merging of all types of information into a common digital form. Convergence of all electrical impulses into digital (that is, their digitisation) is the underlying enabler of digitalisation – a name given by some authors to the much broader socio-cultural phenomenon resulting from digitisation/convergence.

In other words, convergence is the take-over of all forms of media by one technology: digital computers, capable of handling multimedia content. The computing power of information technology invests the digital media with the ability to collect, process, store and distribute content potentially without any restrictions. Digitisation additionally makes possible signal compression, reprocessibility of content as data, text, audio, video and its transference across distribution networks. This changes or eliminates constraints which until now have limited communication, such as bandwidth, interactivity and network architecture. All this leads to the ability of different network platforms to carry essentially similar kinds of services, as telecommunication networks provide distant people with connectivity and access to content anywhere.

The key aspect of convergence is "interoperability" between the various terminals or devices (cellular telephones, organisers, notebooks, desktops, home servers, PCs and TV sets) and networks used to access information, communication, education, entertainment, commerce and value-added services (GSM, UMTS, telephone lines, DSL and cable).

## ***2. Information society and human rights: the inter-relationship***

From a human rights perspective, a number of questions require consideration in this respect:

1. Are human rights affected by ICTs (providing convergent digital communication) and the development of the information society in general, and if so, which of them are particularly affected, and how?

2. Is the impact profound enough to call for a re-evaluation of human rights as defined and interpreted so far?
3. Will the current human rights protection system continue to be adequate and effective in the new circumstances?

A separate question, which remains outside the scope of this analysis, is what kind of governance and legal frameworks are needed to ensure the rule of law, including the implementation and enforcement of human rights, in the information society.

Views on these matters differ profoundly, of course. In the wide-ranging debate on the subject, some consider the ICTs as “technologies of freedom”, while others speak of “tyranny through information”.<sup>28</sup>

In 1999, the Council of Europe Committee of Ministers, in a Declaration on a European Policy for New Information Technologies welcomed the opportunities offered by the new information technologies to promote freedom of expression and information, political pluralism and cultural diversity, and to contribute to a more democratic and sustainable information society, as well as to improve openness, transparency and efficiency at all levels – national, regional and local – of the governance, administration and judicial systems of member states and hence to consolidate democratic stability. At the same time, it stated it was “aware also of the potential risks involved in the use of these technologies for both individuals and democratic society”.

Along the same lines, the Office of the UN High Commissioner for Human Rights has stated: “Information and communication technologies (ICTs) are critical tools for the attainment of a more peaceful, prosperous and just world. However, because of the neutrality of technology, these ICTs also have the potential to perpetuate inequalities and to adversely affect promotion and protection of human rights”.<sup>29</sup>

This approach of noting both the positive and negative impact of the ICTs on human rights can be said to predominate in the debate.<sup>30</sup> Janusz Symonides<sup>31</sup> argues that:

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28. Weeramantry C. G. “Human rights and scientific and technological progress”, in Symonides J. (ed.) *Human rights: new dimensions and challenges*, Ashgate, Dartmouth; UNESCO, Paris, 1998.

29. Background note ..., op. cit. See also Oakley K., *Highway to democr@cy – the Council of Europe and the information society*, Council of Europe Publishing, Strasbourg, 2003, p. 8, for some remarks on the optimistic (“utopian”), pessimistic (“distopian”) and techno-realist stances in the debate about the information society in general.

30. For another example of this approach see also “Democracy, freedom and the Internet: how digital technologies empower or undermine civil liberties” – address by Cappato M. (<http://servizi.radicalparty.org/documents/index.php?func=detail&par=56>) and statement of Grubben M. (<http://servizi.radicalparty.org/documents/index.php?func=detail&par=682>).

31. Symonides J., “New human rights dimensions, obstacles and challenges”, in Symonides J. (ed.) *Human rights: new dimensions and challenges*, Ashgate, Dartmouth (published jointly with UNESCO), 1998.

1. on the one hand, “the new information technologies have a rather positive impact on human rights” such as the right to education, the right to participate in cultural life; the right to benefit from scientific progress;
2. on the other hand, “among the rights which are endangered in cyberspace are the right to privacy and the right to protection of the moral and material interests resulting from any scientific, literary or artistic production”; also – the rights and interests of copyright holders.

For their part, Benedek and Pekari<sup>32</sup> point out that evidently not the whole range of human rights is concerned by the development of the information society; most basic principles, as the prohibition of torture or the right to life, will mean exactly what they meant before. However, some human rights will, in their view, be particularly affected, and these are:

- The right to privacy (Article 12 UDHR, Article 17 International Covenant of Civil and Political Rights [ICCPR]);
- The freedom of expression and the right to information (Article 19 UDHR, Article 19 ICCPR);
- The right to participate in cultural life, that is the right to intellectual property (Article 27 UDHR, Article 15 International Covenant on Economic Social and Cultural Rights [ICESCR]).

Benedek and Pekari go on to say that data protection, intellectual property rights and media-related standards are currently of great concern to policy makers who encounter major problems in finding adequate regulations meeting economic as well as social responsibilities.

Others approach the question of human rights in the information society from a much broader perspective. An International Symposium on the Information Society, Human Dignity and Human Rights, held on the occasion of WSIS, has stated:

The human rights of particular importance to the information and communication society are *freedom of expression and information, freedom from discrimination, gender equality, the right to privacy, the right to fair administration of justice, the right to the protection of the moral and material rights over intellectual creations, the right to participate in cultural life, rights of minorities, the right to education, and the right to an adequate standard of living, including the right to health, the right to adequate food, and the right to adequate housing.* All of these rights belong to the corpus of internationally recognized human rights and should be furthered through the information and communication society. (emphasis added – K.J.)<sup>33</sup>

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32. Benedek W. and Pekari C., Human rights in the information society, Institute For International Law and International Relations, University of Graz, no date.

33. Statement on human rights, human dignity and the information society. International Symposium on the Information Society, Human Dignity and Human Rights. Geneva, 3-4 November 2003. [www.pdhre.org/wsisis/statement.doc](http://www.pdhre.org/wsisis/statement.doc).

This appears to reverse the argument: the question is no longer how the information society affects human rights, but, in the words of the Office of the UN High Commissioner for Human Rights, what should be “the human rights approach to the Information Society”? In its view:

A human rights approach to the Information Society places the promotion and protection of human rights among the *raison-d'être* of the Information Society. Thus, a human rights approach views ICTs not only as a means of exchanging and disseminating information, but as a tool to improve the enjoyment of human rights such as the *freedom of expression, the right to education, the right to health, the right to food and other rights, seeking universal access by all to information and services*. The human rights approach seeks to bring individuals and communities, particularly the disadvantaged, vulnerable and socially excluded, squarely into the Information Society, upholding the *principles of non-discrimination, participation and accountability*. Finally, a human rights approach protects individuals and communities against the transgressions of *the right to privacy, restriction and control of rights and freedoms, and against excesses of the Information Society – in particular by promoting protections against hate and racist messages, child pornography and other abuses of human dignity*. (emphasis added – K.J.)<sup>34</sup>

According to the Office of the UN High Commissioner for Human Rights, development of an equitable, participatory, democratic information society which benefits all requires the respect of all internationally recognised human rights and fundamental freedoms. However, it points out, certain international human rights enshrined in UDHR deserve special attention. These are:

- Freedom of expression and right to seek, receive and impart information (Article 19);
- Prohibition of discrimination (Article 7);
- The right to privacy (Article 12);
- Intellectual property rights (Article 27);
- The right to a standard of living, adequate for the health and well-being of himself and of his family (Article 25, paragraph 1);
- The right to education (Article 26).

In order to avoid too broad an approach, let us concentrate here on specific forms of ICT impact on the human rights system. While much of the debate projects onto the information society issues and concerns inherited from earlier stages of development, the intention here is to isolate those forms of ICT impact on the human rights system that result from the features of the technology itself, or from qualitatively new circumstances typical of the information society as such.

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34. Background Note ..., op. cit.

### **3. Forms of ICT impact on human rights**

The explanatory report to the Convention on Cybercrime notes in paragraph 5 that new technologies contribute to “the emergence of *new types of crime* as well as the *commission of traditional crimes by means of new technologies*. Moreover, the consequences of criminal behaviour can be *more far-reaching than before* because they are not restricted by geographical limitations or national boundaries” (emphasis added – K.J.).

A Council of Europe group of specialists has noted that, “Changing social mores and technologies are giving rise to *new forms of delinquency* ... The boom in new technologies, in particular the Internet, has thus paved the way for *new forms of crime*, also known as cybercrime, including notably sexual exploitation and child pornography, and given *a new dimension* to the practice of trafficking in human beings for the purpose of sexual exploitation”<sup>35</sup> (emphasis added – K.J.).

In other words, we could describe the distinction as being between a quantitative and qualitative impact of the ICTs on the human rights system. As for the quantitative impact, the effect that ICTs have is seen as *magnifying the impact* of either human rights protection, or of their violation, since the ICTs can facilitate either type of action, that is, produce *multiplier effect* by means of their potentially global reach and their instantaneous speed of communication.

Thus, Selian notes that the use of the ICTs in the realm of human rights can be broken down broadly to four main realms whose level and quality of interaction – amongst themselves and with one another – has been vastly heightened as a result of the deployment of communications networks. In her view, individuals, NGOs, national governments, and supranational institutions have all been empowered insofar as they have the means to effectively communicate their stories, agendas, laws and agreements, respectively and with maximum impact.<sup>36</sup>

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35. Final Report of the Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purpose of Sexual Exploitation (EG-S-NT), EG-S-NT (2002) 9 rev., Strasbourg, 16 September 2003.

36. Selian A. N., ICTs in support of human rights, democracy and good governance, International Telecommunication Union, Geneva, 2002.

**Table 1: International entities and ICT applications**

Sectors	ICT Applications
Individuals	Empowered through the use of wireless communication (voice and SMS/data), email, the internet (with access to reporting procedures like the Options Protocol under CCPI), as well as radio/television
Activist NGOs	Empowered through the use of internet, email and wireless communications to contact media, other NGOs, national governments, and supranational governing bodies from all locations; ICTs have facilitated transnational networking as well as fundraising
National Governments	Practise traditional forms of public diplomacy including traditional broadcast (unidirectional media like TV and radio), and utilise networked communications for enhancing transparency and access to laws and national policies
Supranational governing bodies	Use communications to optimise engagement of member states in international organisations, and for consultation with major non-governmental organisations, as well for heightening accessibility of all to international documentation of treaties, accords, agreements and international dispute settlement

At the same time, the ICTs themselves profit to some extent from their use for violating human rights, both in technological terms, as well as in their application for purposes of e-commerce.<sup>37</sup>

As for the qualitative impact, we must also consider the possibility that the information society and the ICTs are probably capable of changing the social, technological and legal circumstances in which current definitions of human rights were developed. This might require a redefinition or reinterpretation of at least some human rights.

Moreover, if predictions about the emergence of a “web lifestyle” are anything like near the mark, what this will mean is that enjoyment of many human rights, as indeed the performance of many everyday activities and pursuits, will increasingly require the use of ICTs. In addition, ICTs can make such a difference and offer so many more possibilities of exercising particular rights (for example, freedom of expression or the right to education) that they can raise enjoyment of these rights to a much higher level. This confers a new privilege on the “haves” (that is, those with access to, and the capacity to use ICTs) and deepens the deprivation suffered by the “have-nots” (limited or no access to, or use of ICTs spells deprivation in the full exercise of human rights).

We may thus hypothesise that there exist four main forms of ITC impact on human rights:

1. quantitative impact: ICTs “add a new dimension” (multiplier effect as concerns impact or consequences) to already existing violations of human rights, or – conversely – to their exercise or protection;

37. See Hughes D. M., “The Internet and sex industries: partners in global sexual exploitation”, *Technology and Society Magazine*, Spring 2000, [www.uri.edu/artsci/wms/hughes/siii.htm](http://www.uri.edu/artsci/wms/hughes/siii.htm).

2. qualitative impact: ICTs create “new forms of delinquency” and “new forms of crime” and – conversely – new forms of human rights exercise and protection;
3. sometimes qualitative impact results in a redefinition of a human right, primarily by adding cyberspace as a new universe for their exercise;
4. ICTs extend and enrich ways in which human rights are exercised so much that one can speak of “ICT-enhanced human rights”; by the same token, they exacerbate societal and global divisions by excluding individuals, groups and regions from among those who can take advantage of these opportunities.

We will seek to verify this below in reviewing those human rights as enshrined in the European Convention on Human Rights which are particularly affected by the emergence of the information society. While a full treatment would no doubt require also an analysis of the positive effects of ICT development, for the purposes of this paper we will concentrate on the real or potential negative effect of the ICTs and the information society on the observance and protection of human rights. Consideration of other international human rights treaties and declarations is outside the scope of this analysis, though of course they, too, formulate rights affected by ICTs and the information society.

#### ***4. Convention for the Protection of Human Rights and Fundamental Freedoms: the impact of the ICTs and information society***

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##### **Article 1 – Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

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The substantive implications of this article depend on whether it is seen as imposing a negative or positive obligation on the Contracting Parties. The explanatory report on Protocol No. 12 to the Convention says in paragraph 24 with reference to Article 1 of that protocol that “While ... positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals”. But then it adds in paragraph 26: “On the other hand, it cannot be totally excluded that the duty to ‘secure’ under the first paragraph of Article 1 [of the protocol] might entail *positive obligations*. For example, this question could arise if there is a *clear lacuna in domestic law protection from discrimination*” (emphasis added – K.J.).

The possibility that there might be a “clear lacuna in domestic [or indeed international] law” regarding protection of human rights in an ICT environment, or in cyberspace, is particularly relevant here. It implies, at the very least, that Contracting Parties (and the international community) have a positive obligation to eliminate such lacunae from the human rights system. By extension, it could also mean that in the case of such a lacuna, states have a positive obligation to



act to protect human rights in the information society. Of course, this obligation also rests on the Council of Europe and other international organisations.

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#### **Article 4 – Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
  2. No one shall be required to perform forced or compulsory labour.
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Of particular relevance here is the issue of trafficking in human beings. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which supplements the UN Convention against Transnational Organized Crime defines “trafficking in persons” as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

The use of the ICTs both facilitates trafficking as defined in the protocol<sup>38</sup> and creates new forms of trafficking – “virtual trafficking for the purpose of sexual exploitation”.<sup>39</sup>

A related area is child pornography and abuse of children on the Internet. The Council of Europe Convention on Cybercrime criminalises various aspects of the electronic production, possession and distribution of child pornography. With the ever-increasing use of the Internet as the primary instrument for trading such material, it was felt that specific provisions in an international

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38. Thus, the Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purposes of Sexual Exploitation notes that “The Internet offers unprecedented advantages, which traffickers have been quick to exploit. The Internet and other types of telecommunication provide the sex industry and individual users with new ways of finding, marketing and delivering women and children into appalling conditions of sexual exploitation and modern-day slavery”.

39. “New technologies and high speed transmission on the Internet enables live video chat, which is used to transmit strip shows, live sex shows, and live Web cams (continuous transmission of live images). These new technologies enhance the capacity of pimps and buyers to sexually exploit women in several ways. The ability of men to buy private interactive sex shows so that they can masturbate in the privacy of their homes or offices, creates a form of online prostitution. Fast transnational transmission of live shows enables traffickers and pimps to exploit women and girls in their home countries where law and/or law enforcement is weak. Women and girls do not have to be trafficked across national borders to provide sexual gratification to buyers and money for pimps.”

(Hughes D. M., “Globalization, information technology, and sexual exploitation of women and children”, *Rain and Thunder – A Radical Feminist Journal of Discussion and Activism*, Issue No. 13, Winter 2001, [www.uri.edu/artsci/wms/hughes/globe.doc](http://www.uri.edu/artsci/wms/hughes/globe.doc)).

legal instrument were essential to combat this new form of sexual exploitation and endangerment of children. Such material and online practices, such as the exchange of ideas, fantasies and advice among paedophiles, play a role in supporting, encouraging or facilitating sexual offences against children. This covers producing child pornography for the purpose of its distribution through a computer system; offering or making available child pornography through a computer system; distributing or transmitting child pornography through a computer system; procuring child pornography through a computer system for oneself or for another; possessing child pornography in a computer system or on a computer-data storage medium.

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#### **Article 6 – Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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Two documents adopted recently by the Committee of Ministers of the Council of Europe (Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings and Declaration on the Provision of Information through the Media in Relation to Criminal Proceedings) list the prerequisites of responsible reporting on criminal proceedings in the media, needed to safeguard and protect this human right (presumption of innocence; respect for the dignity, security and, where appropriate the privacy of victims, claimants, suspects, accused, convicted persons and witnesses as well as of their families; obligation not to recall a former offence of a person, unless it is of public concern or has become of public concern again; duty to avoid prejudicing criminal investigations and court proceedings, as well as prejudicial and pejorative references in their reports on criminal proceedings, where these are likely to incite xenophobia, discrimination or violence; provision of the right of correction or right of reply). They also list the duties of judicial authorities and police services (prevention of prejudicial influence, of prejudicial pre-trial publicity; support for media reporting; protection of witnesses, etc.).

All this is addressed primarily to traditional media, but the ICTs – with their capacity for producing a multiplier effect – should also be bound, where they are engaged in journalistic-like activity, by these principles, as they can inflict irreparable harm by covering criminal proceedings in a way that contravenes them.

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## Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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This is an area where the ICTs produce a qualitatively new situation:

- first by creating the possibility of the emergence of new types of offences, not yet covered by existing law;
- and secondly as regards jurisdiction and the ability to apply a legal framework to a particular instance of violation of human rights (or, indeed, to apply the law as such).

According to a well-known saying, what is illegal off line should also be illegal online. However, online activities may not yet be covered by legal provisions. This point is made, for example, in Recommendation No. R(95)13 of the Committee of Ministers concerning problems of criminal procedural law connected with information technology. The committee notes that in view of the convergence of information technology and telecommunications, “criminal procedural laws of member states often do not yet provide for appropriate powers to search and collect evidence in these systems in the course of criminal investigations” and recommends that “laws pertaining to technical surveillance for the purposes of criminal investigations, such as interception of telecommunications, should be reviewed and amended, where necessary, to ensure their applicability”.

Also, the transient and intangible nature of the Internet, as well as the anonymity and secrecy that communications via the Internet permits, make the identification of the author and/or intended recipient of an illicit communication, as well as the collection of evidence, much more difficult and elusive. Therefore, as noted by the Council of Europe Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purpose of Sexual Exploitation “There is a need to pass legislation to adapt procedural and investigative tools to the specificities of the new technologies”. The difficulty in prosecution of crimes committed over the Internet, the group of specialists goes on, is not so much an absence of specific legislation, but rather a difficulty in applying existing norms to a technology that did not exist at the time the legislation was drafted.<sup>40</sup>

Hence, for example, the adoption in 2001 of the Council of Europe Convention on Information and Legal Co-operation Concerning “Information Society Services”,

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40. Final report of the Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purpose of Sexual Exploitation (EG-S-NT), EG-S-NT (2002) 9 rev., Strasbourg, 16 September 2003.

where Contracting Parties undertake to exchange texts, where practicable by electronic means, of draft domestic regulations aimed specifically at “information society services” and to co-operate in the functioning of the information and legal co-operation system set up under the convention.

The Cybercrime Convention goes further and defines the following offences: illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography and offences related to copyright and neighbouring rights. At least some of them are related to human rights protection. Subsequently, an Additional Protocol to the Convention on Cybercrime criminalised acts of a racist and xenophobic nature committed through computer systems. No doubt further regulation will be required in the future to fill other legal lacunae concerning cybercrime.

As regards the question of jurisdiction, Ulrich Siebert<sup>41</sup> has pointed out that “law enforcement within the Internet must be internationally efficient since it is dealing with perpetrators and data which are not limited to national boundaries”. He points to the need to have harmonised or fairly uniform rules as an indispensable way of dealing with the problem. It is impossible for international services and content providers to take into consideration content regulations existing in all the countries from which the data can be accessed. International harmonisation of laws and the limitation of extra-territorial application of laws appear to be the only workable solution.

Similar considerations prompted the Council of Europe Committee of Ministers to adopt in 1999 a Declaration on a European Policy for New Information Technologies, calling on member states to “adopt national and international measures for the effective investigation and punishment of information technology crimes and to combat the existence of safe havens for perpetrators of such crimes”.

One answer to this is the Convention on Cybercrime. Its explanatory report states in paragraph 6 that it was developed with precisely this challenge in mind: “The new technologies challenge existing legal concepts. Information and communications flow more easily around the world. Borders are no longer boundaries to this flow. Criminals are increasingly located in places other than where their acts produce their effects. However, domestic laws are generally confined to a specific territory. Thus solutions to the problems posed must be addressed by international law, necessitating the adoption of adequate international legal instruments. The present Convention aims to meet this challenge, with due respect to human rights in the new Information Society.”

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41. Siebert U., Legal regulation, law enforcement and self-regulation. A new alliance for preventing illegal and harmful contents on the Internet, University of Würzburg, September 1999.

Another attempt to respond to this challenge led to the adoption of Directive 2000/31/EC of the European Parliament and of the Council of Europe of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on Electronic Commerce).

Still, regulation at the European level is not enough, as criminals will find “virtual havens” beyond Europe, if the same system of law does not apply there.

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### **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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As noted above, this is one of the human rights most endangered by the ICTs.<sup>42</sup> Modern technology provides unprecedented possibilities for massive violations of the human right to privacy. The use of increasingly invasive means of surveillance and of interception of communications, of intrusive profiling and identification and of biometric identification technology, the development of communication technologies with built-in surveillance capacities, the collection and misuse of genetic data, genetic testing, the growing invasion of privacy at the workplace and the weakening of data protection regimes give rise to serious concerns from the point of view of respect for human dignity and human rights.

Many of the new forms of surveillance are indirect, tracing the evidence of activities undertaken by an individual. They involve “dataveillance” – the use of personal information to monitor a person’s activities, and “data retention” – the storage and use of information from communication systems – adding to the ability to map the interaction of groups of people as they communicate.

What this process produces is a “data profile” – a set of information that relates to a person and describes his/her life, work, acquaintances, personal preferences and personal habits. More usefully, by merging information or “data matching”, using the information on more than one subject, it is possible to “map” the interaction of a number of people. This may disclose further useful information, such as how an organisation relates to its supporters. Combining information that gives geographic data, such as the locations of purchases, or mobile phone tracking data, it is also possible to show patterns of collective activity, such as meetings, or travel to a particular location.

Surveillance has exploded, facilitated by advances in information processing, storage, miniaturisation and network bandwidth. What makes all of this possible is:

1. the technological features of the new technologies themselves;
2. their use/abuse for private or commercial purposes;
3. their use/abuse by law-enforcement and other state agencies.

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42. See Dumortier J. and Goemans C., Roadmap for European legal research in privacy and identity management”, Interdisciplinary Centre for Law and ICT (ICRI), K.U.Leuven, December 2002.

### **Features of the new technologies**

One well-known example of this is the ability of mobile phones to reveal previously unavailable information about the user, including location data, with all this implies in terms of possible surveillance and potential invasion of privacy and exercise of other rights.<sup>43</sup> Another well-known example is GPS systems, providing a means to determine a person's location and to monitor their movements.

"Technical surveillance" is made possible by the technical features of telephone communications (due in part to the digitisation of exchanges); the Internet, mobile phones, and computers.<sup>44</sup>

### **Use/abuse of the new technologies for private or commercial purposes**

Some examples of the abuse of the ICTs for private or commercial purposes include:

- cyberstalking;<sup>45</sup>
- the practice of "photo-blogging", that is, posting on the Internet of photographs taken with digital cameras;<sup>46</sup>
- remote and clandestine installation on someone's computer of spyware (software that enables an outsider to obtain information from a computer without the user's knowledge and consent; a more sinister form of spyware

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43. For example, the NGO Privacy International, commenting on a working paper on data retention prepared for an EU Forum on Cybercrime (27 November 2001), notes: "Mobile communications systems reveal more information about an account holder, including location data, which results in an increased amount of data collection. ... Location information can provide details of individuals' movements and activities and with whom they have associated. Such a condition affects not only a user's privacy, but also rights of association, organising and free speech. ... Finally, location data is particularly sensitive because this form of data was not even envisioned in previous years".

[www.privacyinternational.org/issues/cybercrime/eu/pi-euforum-retention.html](http://www.privacyinternational.org/issues/cybercrime/eu/pi-euforum-retention.html).

44. See Nicol, *op. cit.*, pp. 111-14 for a discussion of methods of technical surveillance; see also Hurley, *op. cit.*, pp. 25-27 for a discussion of "identifiability" as a key to invasions of privacy via the ICTs.

45. One definition of cyberstalking is: "A group of behaviours in which an individual, group of individuals or organisation uses information technology to harass one or more individuals. Such behaviours may include, but are not limited to, the transmission of threats and false accusations, identity theft, data theft, damage to data or equipment, computer monitoring and the solicitation of minors for sexual purposes. Harassment is defined as a course of action that a reasonable person, in possession of the same information, would think causes another reasonable person to suffer emotional distress." See McFarlane L. and Bocij P, "An exploration of predatory behaviour in cyberspace: towards a typology of cyberstalkers", *First Monday*, [http://firstmonday.org/issues/issue8\\_9/mcfarlane/index.html](http://firstmonday.org/issues/issue8_9/mcfarlane/index.html).

46. Harmon A., "With digital cameras, the world is watching", *International Herald Tribune*, 8 May 2004. [www.iht.com/bin/print.php?file=518970.html](http://www.iht.com/bin/print.php?file=518970.html) and [www.iht.com/cgi-bin/generic.cgi?template=articlesearch.tmpl&dt=articleLocation&location=.](http://www.iht.com/cgi-bin/generic.cgi?template=articlesearch.tmpl&dt=articleLocation&location=)

can steal credit card numbers and passwords, or hijack a user's identity)<sup>47</sup> or adware (programmes that monitor browsing habits and deliver individually tailored advertisements or can overwhelm browsers by changing home pages, redirecting users to affiliated sites and even altering results when the user runs searches at places like Google and Yahoo);<sup>48</sup>

- use of Internet search engines to obtain a profusion of information, amounting to an invasion of privacy;<sup>49</sup>
- a variety of tracking systems used by employers to monitor employee movements and use of working time<sup>50</sup> (in the US, "More than three-fourths of the nation's major companies monitor employee e-mails, Internet connections and computer files, a figure that has doubled since 1997");<sup>51</sup>
- scanning of email and inserting advertisements tailored to the subject of messages reaching particular users, as in the proposed Google Gmail service);<sup>52</sup>
- the use of "cookies" to trace the identities, Internet use patterns and other data about website users and to use them for commercial purposes, or sell them to other companies;<sup>53</sup>
- use of Radio Frequency Identification (RFID) tags (tiny computer chips connected to miniature antennae that can be affixed to physical objects, sending off signals which can be received from a distance, also by hidden receivers), posing such potential dangers as hidden placement of tags; the creation of a global item registration system in which every physical object is identified and linked to its purchaser or owner at the point of sale or transfer; massive data aggregation; and ultimately individual tracking and profiling, used for commercial or surveillance purposes.<sup>54</sup>

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47. Figueiredo J., "Dutch warnings of new internet scourge: 'spyware'". See [www.dmeurope.com/default.asp?ArticleID=2004](http://www.dmeurope.com/default.asp?ArticleID=2004).

48. Fitzgerald T. J. "To foil intruders, install a counterspy", *International Herald Tribune*, 24 April 2004. [www.iht.com/cgi-in/generic.cgi?template=articleprint.tpl&ArticleId=516695](http://www.iht.com/cgi-in/generic.cgi?template=articleprint.tpl&ArticleId=516695).

49. Noguchi Y., "Online search engines help lift cover of privacy", *Washington Post*, 9 February 2004.

50. Maher K., "Big Employer is watching". Dow Jones WebReprint Service, 4 November, 2003.

51. Gertzen J., "More firms monitoring web-surfing workers", *Milwaukee Journal Sentinel*, 17 June, 2003, [www.siliconvalley.com/mld/siliconvalley/6107429.htm](http://www.siliconvalley.com/mld/siliconvalley/6107429.htm).

52. "Google faces Gmail advert limits", 28 May 2004. <http://news.bbc.co.uk/1/hi/technology/3756603.stm>.

53. See, for example, Mayer-Schönberger V., "The Internet and privacy legislation: cookies for a treat?", *West Virginia Journal of Law & Technology* 1.1 (1997).

54. In the most commonly used applications of RFID, the microchip contains an Electronic Product Code (EPC). Typically, the data is sent to a distributed computing system involved in, perhaps, supply chain management or inventory control. See Position statement on the use of RFID on consumer products, 20 November 2003. [www.privacyrights.org/ar/RFIDposition.htm](http://www.privacyrights.org/ar/RFIDposition.htm).

An interesting set of issues is raised by Privacy Enhancing Technologies (PET)<sup>55</sup> which can serve the dual purpose of enhancing the privacy of individuals who might otherwise fall prey to a variety of surveillance techniques (for example, the Global Internet Liberty Campaign believes that anonymity is an important guarantor of free expression and says: "Central to free expression and the protection of privacy is the right to express political beliefs without fear of retribution and to control the disclosure of personal identity." Protecting the right of anonymity is therefore an essential goal for the protection of personal freedoms in the online world),<sup>56</sup> and at the same time of protecting the identity of individuals or other entities engaged in such techniques or in the abuse of the Internet for criminal purposes.

***Potential abuse of the new technologies by law enforcement and other state agencies***

This may include:

- various forms of government surveillance and suppression of the Internet in undemocratic countries;<sup>57</sup>
- various forms of government surveillance for the purposes of struggle against terrorism<sup>58</sup> (the requisite statutory provisions to allow this are known in some countries as the "Snoopers' Charter");<sup>59</sup>
- retention of traffic data for Internet and telephony use for surveillance purposes.<sup>60</sup>

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55. See, for example, Goldberg I., Wagner D. and Brewer E., "Privacy-enhancing technologies for the Internet", [www.cs.berkeley.edu/~daw/papers/privacy-compon97-www/privacy.html](http://www.cs.berkeley.edu/~daw/papers/privacy-compon97-www/privacy.html); Report on the OECD forum session on privacy-enhancing technologies (PETs). Paris, 8 October, 2001. Working Party on Information Security and Privacy, Directorate For Science, Technology and Industry Committee For Information, Computer and Communications Policy, Organisation for Economic Co-operation and Development, DSTI/ICCP/REG(2001)6/FINAL 03-Dec-2001.

56. Dempsey J. X., Weitzner D. J. et al., Regardless of frontiers: protecting the human right to freedom of expression on the global Internet. Global Internet Liberty Campaign. <http://gilc.org/speech/report/>.

57. The Internet under surveillance. Obstacles to the free flow of information online, Reporters Without Borders, Paris, 2003.

58. In the UK, police and other officials are making around a million requests for access to data held by Internet and telephone companies each year, according to figures compiled by the government, legal experts and the Internet industry. The requests include telephone billing data, email logs and customer details, which privacy experts estimate could amount to a billion individual items of data, ranging from credit card numbers to numbers dialled. In addition, government departments such as Customs and Excise, the Scottish Drug Enforcement Agency and the Financial Services Authority are also routinely requesting information on Internet and mobile phone customers. See "Extent of UK snooping revealed", <http://news.bbc.co.uk/2/hi/technology/3030851.stm>.

59. "House of Lords passes 'Snoopers' Charter", Out-Law.com, <http://www.out-law.com/page-4074>.

60. See for example Discussion paper for experts' meeting on retention of traffic data, an informal working paper prepared by the Commission Services. EU Forum On Cybercrime, Brussels, 29 October 2001.



These and other measures taken in combating terrorism and cybercrime have eroded civil liberties and abrogated privacy rights. Hence, it is pointed out, co-operation in the field of criminal investigation must be accompanied by adequate enforcement of civil liberties and independent oversight of data collection.

We will return to a discussion of this issue under Article 15 of the ECHR.

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### **Article 10 – Freedom of expression**

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.
  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.
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The following quotation well describes the positive impact of the ICTs on the ability to exercise freedom of expression: “For the first time since th[e] 1948 proclamation of the international human right to freedom of expression, the citizens of the world have the ability to exercise that right on a truly global basis, ‘regardless of frontiers’. With the advent of the Internet, methods of accessing and disseminating information have been fundamentally changed, with profound implications for individuals, civil society and governments. Like no medium before it, the Internet permits any individual with a computer and a gateway to the Internet to communicate instantaneously with others worldwide”.<sup>61</sup>

However, by the same token, the ICTs also facilitate abuse of the freedom of expression and due to their multiplier effect potentially magnify and extend the impact of the misuse of the Internet, for example, far beyond what an individual or a group could achieve otherwise.

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61. Dempsey J. X., Weitzner D. J. et al., op. cit. For a general overview of the issue, see also Grainger G., “Freedom of expression and regulation of information in cyberspace: issues concerning potential international cooperation principles”, in Fuentes-Camacho T. (ed.) *The international dimensions of cyberspace law*, UNESCO Publishing, Paris; Ashgate, Dartmouth, 2000.

This refers primarily to the spreading of illicit<sup>62</sup> and harmful content on the Internet, for example, "hate speech", defined in Recommendation No. R(97)20 of the Committee of Ministers to Member States on hate speech as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".<sup>63</sup>

The Cybercrime Convention seeks to provide a legal framework for combating such uses of the Internet.

Another set of issues regarding freedom of expression in cyberspace concerns what has been called "the temptation of censorship", exercised both by governments and access- and content-providers "colluding with certain States by accepting self-censorship".<sup>64</sup>

Chris Nicol<sup>65</sup> points out that "Perhaps the greatest obstacle to free expression of views (even views that do not violate laws on hate speech or the promotion of violent or unlawful acts) is the standard contract that users must agree to when signing up for an Internet service. Often we must give up our rights in order to have access to electronic networks".

For example, Microsoft Network's (MSN's) contract gives the operator the right to limit or discontinue access to the service without requiring evidence that the user has committed any unlawful act, or has actually transmitted material that could be deemed defamatory by a court of law. It is Microsoft's

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62. A report on Illegal and harmful use of the Internet, published by the Irish Department of Justice, Equality and Law Reform lists the following types of illegal (illicit) uses of the Internet: (i) National security: terrorist activities; instructions on bomb making; hacking into government computer networks; (ii) Injury to children: child pornography; adult pornography; material depicting extreme violence; child trafficking; advice on anonymous exchange of graphic material; (iii) Injury to human dignity: racial discrimination, incitement to racial hatred; extreme sexual perversion; (iv) Economic security: all types of fraud; instructions on credit card piracy; (v) Information security: malicious hacking; (vi) Privacy protection: unauthorised mailing; interception of personal e-mail; misuse of personal data; unfair obtaining of personal data; (vii) Protection of reputation: libel; (viii) Gambling; (ix) Information on or sale of "controlled drugs"; (x) Intellectual property: copyright infringements of any medium; unauthorised distribution of videos, music, software etc.

63. See also, for example, Knobel M., Combating hate speech on the Internet, paper presented at the European Forum on Harmful and Illegal Cyber-Content: Self-Regulation, User Protection and Media Competence, Strasbourg, 28 November 2001; Whine M., Online propaganda and the commission of hate crime, paper delivered at an OSCE Meeting on the Relationship Between Racist, Xenophobic and Antisemitic Propaganda on The Internet, and Hate Crimes, Paris, 16-17 June 2004.

64. Freedom of expression in the information society, final report on an International Symposium, organised by the French National Commission for UNESCO in partnership with UNESCO, Paris, 15-16 November 2002.

65. See Nicol, op. cit., pp. 98-101.

interpretation of the facts of the case, which is applied without consideration of the specific details and requirements of each. The contract that users must agree to also ensures that any challenges to the terms of the contract must take place in Microsoft's local court: "You hereby irrevocably consent to the exclusive jurisdiction and venue of courts in King County, Washington, U.S.A. in all disputes arising out of or relating to the use of the MSN Sites/Services."

Nicol points out that the ability of a service provider to use its discretion to remove access to services (and hence limit expression), without bothering with legal procedure, is a violation of rights. It allows service providers, whether on their own initiative or following pressure from government or industry organisations, to violate the rights of individuals who wish express their views on the Internet, even when there is no lawfully based reason to curtail their use of that service. This places the control and interpretation of human rights in private hands, outside legislative regulation.

Such practices are facilitated by the technology itself, which makes it possible to filter and block content.<sup>66</sup> Let us note in this connection that the Council of Europe Committee of Ministers has noted, in a 2003 Declaration on Freedom of Communication on the Internet, that "public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries".

A new form of censorship involves the configuration of Internet search engines to block the inclusion of certain websites. Once that is done, access to those sites is effectively blocked off, because Internet users will be unaware of their existence, or at least considerably hindered.

This highlights yet another dimension of the impact of ICTs on the exercise of the rights enshrined in Article 10 of the ECHR, namely that of access to information. Leaving aside efforts by undemocratic governments to block access to information, in cyberspace or elsewhere, two issues related to the ICTs themselves are of importance in this respect: access to infrastructure, which may be impossible because of the digital divide, and the skills necessary to use the infrastructure to gain access to information in cyberspace.

We will deal with the digital divide in connection with Article 14 and Protocol No. 12.

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66. For a description of some of the methods of doing that see Balkin J. M., Noveck B. S., and Roosevelt K., "Filtering the Internet: a best practices model", in Waltermann J. and Machill M. (eds): *Protecting our children on the Internet. Towards a new culture of responsibility*, Bertelsmann Foundation Publishers, Gutersloh, Germany, 1999.

The second issue is that partly that of computer literacy, a necessary requirement for ease of access to information in cyberspace.<sup>67</sup> This could be formulated more broadly, in terms of possible cultural barriers in access to, and use of, ICTs.<sup>68</sup> This is why the Council of Europe Committee of Ministers, in its Political Message to WSIS, suggested that the Action Plan adopted at WSIS should include “drawing up guidelines, in co-operation with the European Ministers of Education, to foster the integration of information and communication technologies in primary and secondary education in Europe. Preparing an educational toolkit on Internet literacy, to enable all members of society to make safe, constructive and creative use of the Internet.”<sup>69</sup>

However, an equally important barrier is linguistic, with most of the information available in just a few languages, with English by far the most prevalent. Unless multilingualism and production of content in all languages are promoted effectively – as called for by the recommendation concerning the promotion of multilingualism and universal access to cyberspace, adopted by the UNESCO General Assembly in 2003, for example – access to a great deal of the information available in cyberspace will be denied to those without the requisite language skills.

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#### **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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This article was subsequently expanded and strengthened by Protocol 12 to the Convention (not yet in force):

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67. Nicol, *op. cit.*, p. 92, provides a good illustration of the practical effects of the lack of “computer literacy” of the right kind: “Microsoft Windows and Office proprietary software comes pre-bundled with most new personal computers and has a market share of just over 90% of the world market. Microsoft’s Word, Excel and PowerPoint products have become synonymous with text documents, spreadsheets and presentations, and are standards for the electronic exchange of information. The ability to use basic Microsoft products is a valuable skill in almost every occupation and often is required by employers. Proponents of Microsoft Windows and Office proprietary software claim that businesses and individuals that cannot use Microsoft Office applications are clearly at a disadvantage in today’s computing environment, because of their widespread use. Training and user support for Microsoft applications is widely available around the world. In addition, the enormous user base makes it easy to find informal help from friends or co-workers”.

68. Hurley (*op. cit.*) highlights this issue in relation to developing countries: “The question will not be whether people can get the box or the information. The challenge, far more difficult than device or data, will be how, for billions of people, to inculcate the skills to enable people to find the information that is useful to them, to absorb it, and to adapt it to their own lives and needs. ... Far more complex than the provision of technological infrastructure is the availability of education that will give people the literacy and critical thinking skills to navigate the sea of information.”

69. Political message from the Committee of Ministers to the World Summit on the Information Society (WSIS), Geneva, 10-12 December 2003, CM(2003)87 final, 24 June 2003.

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## Protocol 12

### Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

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The Office of the UN High Commissioner for Human Rights notes two manifestations of discrimination relevant to the information society: discrimination in Internet content (promotion of racial or religious hatred, gender bias, etc.) – which involves a complex question of balance between the responsibility of the state to prohibit discrimination and the guarantee of freedom of expression – and discrimination in access to ICTs.<sup>70</sup>

This second issue opens up a vast field known under the general rubric of “the digital divide”. It is at the same time a cause and a consequence of the unequal distribution of wealth in the world and within countries and largely replicates and potentially exacerbates traditional social divisions and stratification based on socio-economic and educational criteria – not only between developed and developing countries, but also between regions and societal groups inside developed countries. An OECD publication on the subject defines the “digital divide” as referring “to the gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities. The digital divide reflects various differences among and within countries.”<sup>71</sup>

Writing in 2000, and analysing the digital divide in terms of differences between developed and developing countries, Professor Eli Noam distinguishes three “divides”:

1. The telecommunications connectivity divide. This gap is being closed by investment in infrastructure and by liberalising policy reform. In consequence, the telephone penetration of the developing countries has been improving. Overcoming this gap is thus something that engineers, investors, and governments now know how to do. But progress in telecom connectivity, difficult as it may be, will prove to be the easy part.

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70. Background note on the information society and human rights, op. cit.

71. Understanding the digital divide, OECD, Paris, 2001, p. 5. See also an extensive discussion of the issue in Norris P., *Digital divide? Civic engagement, information poverty and the Internet worldwide*, Cambridge University Press, Cambridge, 2001.

2. The Internet access divide. In 2000, only 3% of Internet computer hosts were domiciled in non-OECD countries. But closing this gap will also prove to be, relatively speaking, an easy task. Once telephone lines exist it is not very difficult to connect a computer or a simple Internet device to them.
3. The e-commerce divide. A critical dimension of the digital divide, in Noam's view, since the Internet will provide another avenue for the North's economic expansion into the South. In this sense, overcoming the first and second divides may exacerbate the third one, as the developed world takes advantage of the spread of the Internet in developing countries to promote its goods and services.<sup>72</sup>

Efforts to measure the digital divide<sup>73</sup> show that in addition to communications infrastructures and availability of access to information networks, the divide among households appears to depend primarily on two variables: income and education. Other variables, such as household size and type, age, gender, racial and linguistic backgrounds and location also play an important role. Other important indicators concern differences in the profiles of countries, individuals and businesses that use, and make the most use of, the possibilities offered by the new information technologies and the Internet.

The consequences of the digital divide are well described in the UN Development Report of 1999: "The network society is creating parallel communications systems: one for those with income, education and literally connections, giving plentiful information at low cost and high speed; the other for those without connections, blocked by high barriers of time, cost and uncertainty and dependent upon outdated information". In other words, what the digital divide brings about is exclusion on a massive scale: "Like poverty, with which it is closely connected, it severely diminishes the capabilities of people to enjoy their human rights ... Unless ICTs are made available on a vast scale to those who are at the losing end of the digital divide, the information and communication society will remain a force of relative impoverishment of large swaths of the world's population and consequently a source of instability and deprivation".<sup>74</sup>

As noted in comments on Article 1, the ECHR mostly embodies negative obligations for states party to it, but may on also embody positive obligations. As the Council of Europe Committee of Ministers stated in the Political Message

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72. Noam E., *The three digital divides*, Columbia University, August 2000. [www.citi.columbia.edu/elinoam/articles/3DIGDIVIDE.htm](http://www.citi.columbia.edu/elinoam/articles/3DIGDIVIDE.htm).

73. Riccardini F. and Fazio M., (Measuring the digital divide, paper presented to the International Association of Official Statistics Conference, London, 27 to 29 August 2002) propose to use two sets of criteria for this purpose: (i) infrastructure readiness (fixed teledensity; mobile teledensity; personal computer density; Internet host density; secure servers density) and (ii) socio-economic enablers to use (Internet access cost; levels of education; computer or digital literacy; ICT penetration: computer and other ICT technologies diffusion on households, business and government; intensity indicators: how much electronic commerce, which sectors, size classes or local areas; regulatory framework).

74. Statement on human rights, human dignity and the information society, op. cit.

to WSIS, "Effective and equitable access to communications services, skills and knowledge is becoming a precondition for full citizenship of individuals. We welcome initiatives for high-quality open-source and public domain software, as a complement to commercial software and a means to wider access. We recognise that public authorities should take positive action to widen access, deepen it by education and advice, and ultimately make it universal".

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### **Article 15 – Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
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The current war on terrorism fully illustrates the consequences of governments and parliaments yielding to the temptation of setting aside the legal safeguards that exist in a democratic state to obtain results in that war, on the grounds that a time of emergency justifies such actions. This is of interest to us here because of the integral involvement of ICTs both in the pursuit of terrorism and in efforts to combat it:

Western democracies are setting a bad example through the panoply of measures intended to censor freedom of expression or to contain it closely. The post-September 11 period had alarming consequences: legislative measures authorizing the surveillance of Internet connections, spying on messages and excessive filtering of sites for pro-terrorist and anti-Western content, but also for pornographic and paedophile content. Measures taken concerning the internet were spoken of as post-September 11 'collateral damage'. Authority had gained the upper hand over freedom of expression. Some States do not hesitate to exert pressure on certain countries to suppress television programmes, appropriating for themselves a right of control outside their borders, and answerable only to their own citizens.<sup>75</sup>

Also the International Federation of Journalists (IFJ) Executive Committee has found that after the events of September 11, 2001, "there have been numerous attempts to manipulate the media message, creating undue pressure on

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75. Freedom of expression in the information society, op. cit. One example that is given in this context is Section 215 of the US Patriot Act. Under it, businesses, organisations or citizens can be compelled by the FBI, if armed with a federal judge's order, to hand over any records the FBI deems relevant to an investigation of terrorism or espionage investigation. If an investigation is based on suspected terrorist bombings, and a federal judge deems the records of a suspect's book purchases on bomb-making a necessary part of the inquiry, a bookstore might very well be required to produce the records. While off-line customers can avoid creating an audit trail by paying cash for their purchases, consumer anonymity is hard to achieve online, where transactions typically involve credit cards and shipping addresses. See Tedeschi B., "In Patriot Act, some online bookstores see Big Brother", *International Herald Tribune*, 14 October 2003. [www.ihf.com/cgi-bin/generic.cgi?template=articleprint.tmplh&ArticleId=113542](http://www.ihf.com/cgi-bin/generic.cgi?template=articleprint.tmplh&ArticleId=113542).

journalists that is potentially damaging to the quality of coverage of the conflict ... there is a worrying rush to legislate on new rules on phone-tapping, police surveillance, encryption technology, detention of migrants, control of the Internet and freedom of movement".<sup>76</sup>

In 2002, the Council of Europe Committee of Ministers adopted Guidelines on Human Rights and the Fight against Terrorism<sup>77</sup> precisely in order to prevent such things from happening. It acknowledged that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society. It also unequivocally condemned all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed. And it reaffirmed states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights.

The guidelines prohibit arbitrariness, require that all measures taken by states to combat terrorism must be lawful and that when a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued, set out criteria for the collection and processing of personal data by any competent authority in the field of state security and for measures which interfere with privacy.

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## **Protocol 1 to ECHR**

### **Article 1 – Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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ICTs make it easy and cheap to copy, modify and disseminate ideas and information in a wide variety of forms, including audio, video and text. The global nature of information networks makes worldwide distribution possible in a matter of seconds.

Thanks to computer technology, information can easily be heard, viewed or exchanged. Technological developments have raised copyright enforcement issues as well, largely because it is more difficult to prosecute offenders now due to the speed of technology changes, the volume of infringement, the difficulty in tracking offences across international borders and the decentralised nature of peer-to-peer networks that copy material.

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76. White A., *Journalism, Civil Liberties and the War on Terrorism*, IFJ, Brussels, 2001.

77. Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002, Council of Europe Publishing, Strasbourg, 2002.



Protection of intellectual property covers patents (including software patents), trademarks (one source of controversy is the relation between trademarks and Internet domain names, that is, whether the domain name registering entity has a proven claim to that name, such as a registered trademark, or their name and the domain coinciding; in many countries, there is no restriction, and anyone can register a domain name that is the same as a company's or a person's name or product) and copyright.

There is, of course, plentiful evidence that the ICTs provide many opportunities to violate copyright. According to a survey of 3 600 Internet users in eight countries, as many as 50% had downloaded copyrighted content in the last year and one in four people online has illegally downloaded a feature film.<sup>78</sup> Downloading and sharing of music is another example of this phenomenon.<sup>79</sup>

A major issue is the controversy over free and open source software on the one hand, and proprietary software on the other. Human rights activists maintain that the right to development and other human rights are thwarted by the costs of information and communications technologies, which are so expensive that they are inaccessible in many developing countries. An international symposium has called for initiatives for high-quality open-source and public domain software and technologically neutral platforms and the development and use of open, interoperable, non-discriminatory and demand-driven standards that take into account needs of users, consumers and the underprivileged. Furthermore, a fixed percentage of spectrum, satellite and other infrastructural bandwidth capacity should be reserved for educational, humanitarian, community and other non-commercial use.<sup>80</sup>

Efforts to enforce and protect intellectual property rights include the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement concluded within the World Trade Organization and the EU Directive 2004/48/EC on the enforcement of intellectual property rights. As noted by Hurley,<sup>81</sup> "the step that would make the biggest sea change tomorrow in intellectual property protection and access to information would be for governments to put the works that they produce into the public domain". There would be two immediate benefits. First, large quantities of information would become freely available, increasing access to information. Governments, by and large, produce political, social services, economic and research information, in other words, the types of information that people need for carrying out their lives, helping others and bettering their own situations. Secondly, governments, by promoting more

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78. Olsen S., Survey: one in four has downloaded an illegal film. CNET News.com, 9 July 2004. <http://news.zdnet.co.uk/business/legal/0,39020651,39160021,00.htm>. See also Schiesel S. "Pirates and hackers roam in the Internet's Wild West", *International Herald Tribune*, 8 May 2004, [www.iht.com/bin/print.php?file=518937.html](http://www.iht.com/bin/print.php?file=518937.html).

79. Gerhard P., "French music downloaders to have internet connection terminated", 16 July 2004, [www.dmeurope.com/default.asp?ArticleID=2342](http://www.dmeurope.com/default.asp?ArticleID=2342).

80. Statement on human rights, human dignity and the information society, op. cit.

81. Hurley, op. cit., p. 36.

access to information, would reframe the debate and send a strong signal to other content providers.

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## **Protocol No. 1 to ECHR**

### **Article 2 – Right to education**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

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On the face of it, ICTs have no direct impact on whether a person can exercise the right to a traditional education. However, ICTs extend access to information and knowledge to such a great extent that they are recognised as invaluable to the realisation of the right to education. In other words, this is a case where lack of access to ICTs amounts to serious discrimination in terms of educational prospects. That is why the Council of Europe promotes “better, wider and more equitable use of ICT at all levels of lifelong learning, and intend[s] to develop policies to support the use of digital material for educational and other social purposes”.<sup>82</sup>

Moreover, the information society will both require and facilitate the education of the people of the world. While it increases the need for literacy for participation in the job market, it also, with ICT as a key enabler, provides the means to ensure quality education to a larger proportion of the population than ever before in the history of the world.

The Office of the UN High Commissioner for Human Rights believes that “ICTs have significant potential for the realization of the right to education, especially with regard to distance learning, within and beyond national borders, and for people in remote and rural areas, and for the empowerment of disadvantaged groups, girls and women. In realizing this right, ICTs may also facilitate networking among individuals and organisations involved in human rights education; make it easier to share information on successful programmes and practices; and provide access to the many human rights education resources available on the Internet”.<sup>83</sup>

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## **Protocol No. 1 to ECHR**

### **Article 3 – Right to free elections**

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

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82. Political Message from the Committee of Ministers to the World Summit on the Information Society, op. cit.

83. Background note on the information society and human rights, op. cit.

The democratic process is another area where ICTs have become an inseparable part of the system. They can strengthen representative democracy by making it easier to hold fair elections and public consultations, accessible to all, help to raise the quality of public deliberation, and enable citizens and civil society to take an active part in policy making at national as well as local and regional levels. ICTs can make all public services more efficient, responsive, transparent and accountable.

In short, ICTs make such a difference to the functioning of democracy that terms like “e-governance”, “e-democracy”, “digital democracy” or “digital citizenship” are being introduced to signal what is being described as a qualitatively new situation.<sup>84</sup>

The various experiments with “e-voting” and “government online”<sup>85</sup> show that exercise of this human right is changing because of the application of ICTs and will no doubt change beyond recognition, at least in developed countries, in the intermediate future. At the same time, there is no lack of warning that ICTs cannot fully replace the traditional mechanisms of democracy and are not in and of themselves an answer to all the ills and shortcomings of contemporary democracy.

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#### **Article 11 – Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

#### **Protocol No. 4**

##### **Article 2 – Freedom of movement**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.

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Both these human rights are most often conceived in terms of interaction of individuals or groups, and of movement, in physical space. ICTs add the additional dimension of cyberspace, where both freedom of assembly and association, and freedom of movement, can be exercised in a new form. Cyberspace cannot replace what happens in the physical world, but enormously extends

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84. Oakley, *op. cit.*; see also, for example, Butcher J. et al. (2002) *Digital Democracy: Voting in the Information Age*, Center for Information Policy Research, Harvard University, Cambridge MA; Clift S. (2003) *E-democracy, e-governance and public net-work*. [www.publicus.net](http://www.publicus.net); Fuchs D. (2003) *Models of democracy: participatory, liberal and electronic democracy*. Paper presented at the ECPR Joint Session of Workshops; Workshop 2, Bringing Citizens Back In – Participatory Democracy and Political Participation, Edinburgh; Riley T. B. and Riley C. G. (2003) *E-governance to e-democracy: examining the evolution*. Commonwealth Centre for E-Governance, Ottawa.

85. See Oakley, *op. cit.*; Wolstenholme M., Report on the agenda-setting workshop on e-governance, Strasbourg, 10-11 June 2002. Integrated Project 1, IP1(2002)18, Council of Europe, Strasbourg, 2002.

and enriches ways of enjoying these rights. Therefore, as noted above, this confers a privilege on those who can use ICTs for this purpose, and discriminates against those who cannot.

Moreover, as noted in relation to the right to privacy and to derogation in times of emergency, monitoring, surveillance and possible electronic barriers to assembly, association and movement in cyberspace impose severe restrictions on the exercise of these rights in cyberspace by those who have access to it.

## 5. Conclusion

We can now attempt to provide preliminary answers to the questions posed in section 2 above.

Human rights are certainly affected by ICTs and the development of the information society in one of the four ways listed in Section 3 above. The full extent of this impact is yet to be revealed, as ICTs spread and develop and the information society emerges in full form. Still, it is already clear that with some exceptions most human rights are affected in one way or another.

Table 2 provides a tentative typology of the forms of ICT impact on human rights. In some cases (prohibition of slavery and forced labour and protection of property are provided here as examples), impact may be both qualitative and quantitative.

**Table 2. ICT Impact on Human Rights (ECHR)**

<b>Form of ICT Impact</b>	<b>Articles of the Convention</b>
Quantitative impact (multiplier effect)	Article 4 – Prohibition of slavery and forced labour Article 6 – Right to a fair trial Article 8 – Right to respect for private and family life Article 14 – Prohibition of discrimination Protocol No. 12 Article 1 – General prohibition of discrimination Protocol 1, Article 1 – Protection of property
Qualitative impact	Article 4 – Prohibition of slavery and forced labour Article 7 – No punishment without law Protocol 1, Article 1 – Protection of property
Redefinition of a human right, primarily by adding cyberspace as a new universe for its exercise	Article 11 – Freedom of assembly and association Protocol No. 1, Article 3 – Right to free elections Protocol No. 4, Article 2 – Freedom of movement
ICT-enhanced human rights	Article 10 – Freedom of expression Protocol 1, Article 2 – Right to education Protocol No. 4 Article 2 – Freedom of movement

This typology is very preliminary in nature and further analysis is required to arrive at a more precise understanding of the impact of ICTs on human rights.

At this stage, it would be an exaggeration to say that the impact has been profound enough to call for a general re-evaluation of human rights as defined and interpreted so far. A considerable body of piecemeal work has already been done to respond to various changes in the human rights system brought about by ICTs. Nevertheless, it is already clear that the current human rights protection system will need to be significantly developed and adjusted to be fully adequate and effective in the new circumstances.

## **Declaration CM(2005)56 of the Committee of Ministers on human rights and the rule of law in the information society<sup>86</sup>**

*The present recommendation was drafted by the Multidisciplinary Ad-hoc Committee of Experts on the Information Society (CAHSI), established in 2004 by the Committee of Ministers (Ministers' Deputies) as part of the integrated project "Making democratic institutions work" (IP 1). Karol Jakubowicz took part in the work of the committee as a representative of the then Steering Committee on the Mass Media and actively contributed to the drafting of the recommendation as a member of the drafting group, drawing on the earlier work of the Preparatory Group on Human Rights, the Rule of Law and the Information Society, of which he was also a member.*

### ***Declaration of the Committee of Ministers on human rights and the rule of law in the information society***

#### ***CM(2005)56 final***

The member states of the Council of Europe,

Recalling their commitment to building societies based on the values of human rights, democracy, rule of law, social cohesion, respect for cultural diversity and trust between individuals and between peoples, and their determination to continue honouring this commitment as their countries enter the Information Age;

Respecting the obligations and commitments as undertaken within existing Council of Europe standards and other documents;

Recognising that information and communication technologies (ICTs) are a driving force in building the Information Society and have brought about a convergence of different communication mediums;

Considering the positive contribution the deployment of ICTs makes to economic growth and prosperity as well as labour productivity;

Aware of the profound impact, both positive and negative, that ICTs have on many aspects of human rights;

Aware, in particular, that ICTs have the potential to bring about changes to the social, technological and legal environment in which current human rights instruments were originally developed;

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86. CM(2005)56 final 13 May 2005.

Aware that ICTs are increasingly becoming an integral part of the democratic process;

Recognising that ICTs can offer a wider range of possibilities in exercising human rights;

Recognising therefore that limited or no access to ICTs can deprive individuals of the ability to exercise fully their human rights;

Reaffirming that all rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) remain fully valid in the Information Age and should continue to be protected regardless of new technological developments;

Recognising the need to take into account in national legislation new ICT-assisted forms of human rights violations and the fact that ICTs can greatly intensify the impact of such violations;

Conclude that, to better respond to the new challenges of protecting human rights in a rapidly evolving Information Society, member states need to review and, where necessary, adjust the application of human rights instruments;

Undertake to adopt policies for the further development of the Information Society which are compliant with the ECHR and the case-law of the European Court of Human Rights, and which aim to preserve, and whenever possible enhance, democracy, to protect human rights, in particular freedom of expression and information, and to promote respect for the rule of law;

Declare that when circumstances lead to the adoption of measures to curtail the exercise of human rights in the Information Society, in the context of law enforcement or the fight against terrorism, such measures shall comply fully with international human rights standards. These measures must be lawful and defined as precisely as possible, be necessary and proportionate to the aim pursued, and be subject to supervision by an independent authority or judicial review. Further, when such measures fall under the scope of Article 15 of the ECHR, they need to be reassessed on a regular basis with the purpose of lifting them when the circumstances under which they were adopted no longer exist;

Declare that the exercise of the rights and freedoms enshrined in the ECHR shall be secured for all without discrimination, regardless of the technical means employed;

Declare that they seek to abide by the principles and guidelines regarding respect for human rights and the rule of law in the Information Society, found in section I below;

Invite civil society, the private sector and other interested stakeholders to take into account in their work towards an inclusive Information Society for all, the considerations in section II below;

Invite the Chair of the Committee of Ministers to submit this Declaration, as a Council of Europe contribution, to the Tunis Phase of the World Summit on the Information Society (WSIS) for consideration.

## ***I. Human rights in the information society***

### *1. The right to freedom of expression, information and communication*

ICTs provide unprecedented opportunities for all to enjoy freedom of expression. However, ICTs also pose many serious challenges to that freedom, such as state and private censorship.

Freedom of expression, information and communication should be respected in a digital as well as in a non-digital environment, and should not be subject to restrictions other than those provided for in Article 10 of the ECHR, simply because communication is carried in digital form.

In guaranteeing freedom of expression, member states should ensure that national legislation to combat illegal content, for example racism, racial discrimination and child pornography, applies equally to offences committed via ICTs.

Member states should maintain and enhance legal and practical measures to prevent state and private censorship. At the same time, member states should ensure compliance with the Additional Protocol to the Convention on Cybercrime and other relevant conventions which criminalise acts of a racist and xenophobic nature committed through computer systems. In that context, member states should promote frameworks for self- and co-regulation by private sector actors (such as the ICT industry, Internet service providers, software manufacturers, content providers and the International Chamber of Commerce). Such frameworks would ensure the protection of freedom of expression and communication.

Member states should promote, through appropriate means, interoperable technical standards in the digital environment, including those for digital broadcasting, that allow citizens the widest possible access to content.

### *2. The right to respect for private life and correspondence*

The large-scale use of personal data, which includes electronic processing, collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, disclosure by transmission or otherwise, has improved the efficiency of governments and the private sector. Moreover, ICTs, such as Privacy Enhancing Technology (PETs), can be used to protect privacy. Nevertheless, such advances in technology pose serious threats to the right to private life and private correspondence.

Any use of ICTs should respect the right to private life and private correspondence. The latter should not be subject to restrictions other than those provided



for in Article 8 of the ECHR, simply because it is carried in digital form. Both the content and traffic data of electronic communications fall under the scope of Article 8 of the ECHR and should not be submitted to restrictions other than those provided for in that provision. Any automatic processing of personal data falls under the scope of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and should respect the provisions of that instrument.

Member states should promote frameworks for self- and co-regulation by private sector actors with a view to protecting the right to respect for private life and private correspondence. A key element of the promotion of such self- or co-regulation should be that any processing of personal data by governments or the private sector should be compatible with the right to respect for private life, and that no exception should exceed those provided for in Article 8, paragraph 2, of the ECHR, or in Article 9, paragraph 2, of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

### *3. The right to education and the importance of encouraging access to the new information technologies and their use by all without discrimination*

New forms of access to information will stimulate wider dissemination of information regarding social, economic and cultural aspects of life, and can bring about greater inclusion and overcome forms of discrimination. E-learning has a great potential for promoting democratic citizenship through education and enhancing the level of people's knowledge throughout the world. At the same time, there is a serious risk of exclusion for the "computer illiterate" and for those without adequate access to information technologies for social, economic or cultural reasons.

Computer literacy is a fundamental prerequisite for access to information, the exercise of cultural rights and the right to education through ICTs. Any regulatory measure on the media and new communication services should respect and, wherever possible, promote the fundamental values of pluralism, cultural and linguistic diversity, and non-discriminatory access to different means of communication.

Member states should facilitate access to ICT devices and promote education to allow all persons, in particular children, to acquire the skills needed to work with a broad range of ICTs and assess critically the quality of information, in particular that which would be harmful to them.

### *4. The prohibition of slavery and forced labour, and the prohibition of trafficking in human beings*

The use of ICTs has expanded the possibilities for trafficking in human beings and has created a new virtual form of this practice.

In a digital environment, such as the Internet, when trafficking in human beings contravenes Article 4 of the ECHR, it should be treated in the same manner as in a non-digital environment.

Member states should maintain and enhance legal and practical measures to prevent and combat ICT-assisted forms of trafficking in human beings.

#### *5. The right to a fair trial and to no punishment without law*

ICTs facilitate access to legal material and knowledge. Moreover, public transmission of court proceedings and transparency of information regarding trials facilitates better public scrutiny of court proceedings. Trials can be conducted more efficiently by using ICT-facilities. However, given the speed of ICT-driven communication and the resulting wide-ranging impact, ICTs can greatly intensify pre-trial publicity and influence witnesses and public opinion before and during a trial. Moreover, ICTs allow crimes not covered by legal frameworks, which may hinder combating infringements of human rights. The global reach of ICTs, in particular the Internet, can create problems of jurisdiction and also raise issues on the ability to apply legal frameworks to instances of human rights violation.

In the determination of their civil rights and obligations or any criminal charge against them, everyone is entitled, in conformity with Article 6 of the ECHR, to identical protection in a digital environment, such as the Internet, to that which they would receive in a non-digital environment. The right of no punishment without law applies equally to a digital and a non-digital environment.

Member states should promote codes of conduct for representatives of the media and information service providers, which stress that media reporting on trials should be in conformity with the prescriptions of Article 6 of the ECHR. They should also consider whether there is a need to develop further international legal frameworks on jurisdiction to ensure that the right to no punishment without law is respected in a digital environment.

#### *6. The protection of property*

In the ICT environment, the protection of property refers mainly to intellectual property, such as patents, trademarks and copyrights. ICTs provide unprecedented access to material covered by intellectual property rights and opportunities for its exploitation. However, ICTs can facilitate the abuse of intellectual property rights and hinder the prosecution of offenders, due to the speed of technology changes, the low cost of dissemination of content, the volume of infringement, the difficulty in tracking offences across international borders and the decentralised nature of file sharing. Innovation and creativity would be discouraged and investment diminished without effective means of enforcing intellectual property rights.

Intellectual property rights must be protected in a digital environment, in accordance with the provisions of international treaties in the area of intellectual property. At the same time, access to information in the public domain must be protected, and attempts to curtail access and usage rights prevented.

Member states should provide the legal framework necessary for the above-mentioned goals. They should also seek, where possible, to put the political, social services, economic and research information they produce into the public domain, thereby increasing access to information of vital importance to everyone. In so doing, they should take note of the Council of Europe's Convention on Cybercrime, in particular Article 10, on offences related to infringements of copyright and related rights.

### *7. The right to free elections*

ICTs have the potential, if appropriately used, to strengthen representative democracy by making it easier to hold elections and public consultations which are accessible to all, raise the quality of public deliberation, and enable citizens and civil society to take an active part in policy making at national, regional and local levels. ICTs can make all public services more efficient, responsive, transparent and accountable. At the same time, improper use of ICTs may subvert the principles of universal, equal, free and secret suffrage, as well as create security and reliability problems with regard to some e-voting systems.

E-voting should respect the principles of democratic elections and referendums and be at least as reliable and secure as democratic elections and referendums which do not involve the use of electronic means.

Member states should examine the use of ICTs in fostering democratic processes with a view to strengthening the participation, initiative, knowledge and engagement of citizens, improving the transparency of democratic decision making and the accountability and responsiveness of public authorities, and encouraging public debate and scrutiny of the decision-making process. Where member states use e-voting, they shall take steps to ensure transparency, verifiability and accountability, reliability and security of the e-voting systems, and in general ensure their compatibility with Committee of Ministers' Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting.

### *8. Freedom of assembly*

ICTs bring an additional dimension to the exercise of freedom of assembly and association, thus extending and enriching ways of enjoying these rights in a digital environment. This has crucial implications for the strengthening of civil society, for participation in the associative life at work (trade unions and professional bodies) and in the political sphere, and for the democratic process in general. At the same time, ICTs provide extensive means of monitoring and surveillance of assembly

and association in a digital environment, as well as the ability to erect electronic barriers, severely restricting the exercise of these rights.

All groups in society should have the freedom to participate in ICT-assisted associative life as this contributes to the development of a vibrant civil society. This freedom should be respected in a digital environment, such as the Internet, as well as in a non-digital one and should not be subject to restrictions other than those provided for in Article 11 of the ECHR, simply because assembly takes place in digital form.

Member states should adapt their legal frameworks to guarantee freedom of ICT-assisted assembly and take the steps necessary to ensure that monitoring and surveillance of assembly and association in a digital environment does not take place, and that any exceptions to this must comply with those provided for in Article 11, paragraph 2, of the ECHR.

## ***II. A multi-stakeholder governance approach for building the Information Society: the roles and responsibilities of stakeholders***

Building an inclusive Information Society, based on respect for human rights and the rule of law, requires new forms of solidarity, partnership and co-operation among governments, civil society, the private sector and international organisations. Through open discussions and exchanges of information worldwide, a multi-stakeholder governance approach will help shape agendas and devise new regulatory and non-regulatory models which will account for challenges and problems arising from the rapid development of the Information Society.

### *1. Council of Europe member states*

Council of Europe member states should promote the opportunities afforded by ICTs for fuller enjoyment of human rights and counteract the threats they pose in this respect, while fully complying with the ECHR. The primary objective of all measures taken should be to extend the benefits of ICTs to everyone, thus encouraging inclusion in the Information Society. This can be done by ensuring effective and equitable access to ICTs, and developing the skills and knowledge necessary to exploit this access, including media education.

The exercise of human rights should be subject to no restrictions other than those provided for in the ECHR or the case law of the European Court of Human Rights, simply because it is conducted in a digital environment. At the same time, determined efforts should be undertaken to protect individuals against new and intensified forms of human rights violations through the use of the ICTs.

Taking full account of the differences between services delivered by different means and people's expectations of these services, member states, with a view to protecting human rights, should promote self- and co-regulation by private

sector actors to reduce the availability of illegal and of harmful content and to enable users to protect themselves from both.

## *2. Civil society*

Civil society actors have been and always will be instrumental in shaping the society in which they live, and the Information Society is no exception. To successfully build an Information Society which complies with the standards defined by the ECHR requires the full participation of civil society in both determining strategies and implementing them. Civil society can contribute to developing a common vision for maximising the benefits of ICTs for all and provide its own input into future common regulatory measures that will best promote human rights.

At the Council of Europe, one major channel of civil society input is the Conference of International Non-governmental Organisations (INGOs).

In addition, civil society, in partnership with governments and the business sector, is invited to preserve and enhance its role of drawing attention to and combating the abuse and misuse of ICTs, which are detrimental to both individuals and democratic society in general.

At a transnational level, civil society is urged to co-operate in the sharing of objectives, best practice and experience with respect to expanding the opportunities held by the Information Society.

## *3. Private sector*

Private sector actors are urged to play a role in upholding and promoting human rights, such as freedom of expression and the respect of human dignity. This role can be fulfilled most effectively in partnership with governments and civil society.

In co-operation with governments and civil society, private sector actors are urged to take measures to prevent and counteract threats, risks and limitations to human rights posed by the misuse of ICTs or their use for illegal purposes, and to promote e-inclusion. In addition, they are invited to establish and further broaden the scope of codes of conduct and other forms of self-regulation for the promotion of human rights through ICTs.

Private sector actors are also invited to initiate and develop self- and co-regulatory measures on the right to private life and private correspondence, as well as on the issue of upholding freedom of expression and communication.

Self- and co-regulatory measures with regard to private life and private correspondence should emphasise in particular that any processing of personal data should comply with the right to private life. Against this background,

private sector actors should pay particular attention to, *inter alia*, the following current issues:

- the collection, processing and monitoring of traffic data;
- the monitoring of private correspondence via e-mail or other forms of electronic communication;
- the right to privacy in the work place;
- camera observation;
- biometric identification;
- malware, including spam;
- the collection and use of genetic data and genetic testing.

With regard to self- and co-regulatory measures which aim to uphold freedom of expression and communication, private sector actors are encouraged to address in a decisive manner the following issues:

- hate speech, racism and xenophobia and incitation to violence in a digital environment such as the Internet;
- private censorship (hidden censorship) by Internet service providers, for example blocking or removing content, on their own initiative or upon the request of a third party;
- the difference between illegal content and harmful content.

Finally, private sector actors are urged to participate in the combat against virtual trafficking of child pornography images and virtual trafficking of human beings.

#### 4. The Council of Europe

The Council of Europe will raise awareness of and promote accession to the Convention on Cybercrime and its Additional Protocol, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, on a worldwide basis. The Convention Committee will monitor the implementation of these conventions and their additional protocols and will, if need be, propose any amendments.

In accordance with the Action Plan adopted by the 7th European Ministerial Conference on Mass Media Policy (Kiev, 10-11 March 2005), the Steering Committee on the Media and New Communications Services (CDMC) will:

- take any necessary initiatives, including the preparation of guidelines, *inter alia*, on the roles and responsibilities of intermediaries and other Internet actors in ensuring freedom of expression and communication;
- promote the adoption by member states of measures to ensure, at the pan-European level, a coherent level of protection for minors against harmful

content in traditional and new electronic media, while securing freedom of expression and the free flow of information;

- establish a regular pan-European forum to exchange information and best practice between member states and other stakeholders on measures to promote inclusion in the Information Society;
- monitor the impact of the development of new communication and information services on the protection of copyright and neighbouring rights, so as to take any initiative which might prove necessary to secure this protection.

The objectives of the project “Good governance in the Information Society” will be further defined, taking into account the Council of Europe’s work in the fields of e-voting and e-governance, and in particular its achievements represented by Committee of Ministers’ Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting, and Recommendation Rec(2004)15 on electronic governance (“e-governance”).

The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) will look into the application of data protection principles to worldwide telecommunication networks.

### ***Appendix to the declaration***

#### *Council of Europe reference texts*

Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)

European Convention on Transfrontier Television (ETS No. 132)

Protocol Amending the European Convention on Transfrontier Television (ETS No. 171)

Convention on Information and Legal Co-operation concerning “Information Society Services” (ETS No. 180)

Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)

European Convention for the protection of the Audiovisual Heritage (ETS No. 183)

Protocol to European Convention for the protection of the Audiovisual Heritage, on the protection of Television Productions (ETS No. 184)

Convention on Cybercrime (ETS No. 185)

Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)

Recommendation No. R(90)19 on the protection of personal data used for payment and other related operations

Recommendation No. R(91)10 on the communication to third parties of personal data held by public bodies

Recommendation No. R(95)4 on the protection of personal data in the area of telecommunications, with particular reference to telephone service

Resolution ResAP (2001) 3 "Towards full citizenship for persons with disabilities through inclusive new technologies"

Recommendation Rec(2001)7 of the Committee of Ministers to member states on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment

Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents

Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting

Recommendation Rec(2004)15 of the Committee of Ministers to member states on electronic governance ("e-governance")

Declaration of the Committee of Ministers on a European policy for New Information Technologies, adopted on 7 May 1999

Declaration of the Committee of Ministers on Cultural Diversity, adopted on 7 December 2000

Declaration of the Committee of Ministers on freedom of communication on the Internet, adopted on 28 May 2003

Political Message from the Committee of Ministers to the World Summit on the Information Society (Geneva, 10-12 December 2003) of 19 June 2003





## A new notion of media? Media and media-like content and activities on new communication services

*Commissioned by the Steering Committee on the Media and New Communication Services, Council of Europe and distributed as a discussion paper to participants in the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services. Reykjavik, 28-29 May 2009*

### **Executive summary**

1. Social and cultural change, as well as technological change (including particularly digitisation and convergence) are fundamentally changing the media. New communication services and new media are in an intermediate phase of their development, when their features and uses, as well as the opportunities and potential dangers associated with them, are not yet fully explored.
2. The Committee of Ministers has in recent years been revising and updating its standard-setting documents which originally applied to “traditional” mass media alone. This will inevitably be a long-term effort, potentially requiring successive revisions of the standards or ways of applying them, as the new media reach maturity.
3. Three new notions of media may be distinguished:
  - a) All media are new-media-to-be: traditional media are being changed into digital, convergent media that can incorporate all forms of media existing so far and potentially may assimilate them into a variety of media forms existing alongside one another on broadband networks; they combine all levels and patterns of social communication and all modes of content delivery; and are capable of overcoming constraints of time and space.
  - b) Forms of media created by new actors:
    - i) political, social, economic, sports and other entities to become content providers and disseminators, bypassing traditional media and reaching out directly to the general public;
    - ii) media or media-like content is disseminated either by non-professional content creators (e.g. bloggers);
    - iii) or by new intermediaries (Internet service providers, content aggregators, search engines, etc.).
  - c) Citizen journalism or user-generated content can be a new form of media, if it has all the features of a media organisation, including in particular willingness to abide by normative, ethical, professional and legal standards relevant in the case of media operation.

- d) Media or media-like activities performed by non-media actors: new intermediaries (mainly ISPs) provide access to content and access by content providers to the public. In many cases, they perform an editorial gatekeeping function, imposing rules, standards and constraints on what may be said and who may have access to particular content. Recognition of this fact may aid efforts to promote rule of law in the new communication services and exercise of human rights, as well as to eliminate violations of human rights in this domain.
4. There is growing recognition of the need to develop policy and regulatory frameworks for the new media, both to protect their freedom and to prevent the distribution of illegal and harmful content and prevent other forms of harm that can be inflicted by the new communication services.
  5. There is a growing array of forms of self- and co-regulation of new communication services, including the Global Network Initiative.
  6. There is also a growing body of statutory legislation, or plans to introduce such legislation, at the national and international level concerning forms of regulation and supervision of Internet and other new media content, including the Council of Europe Cybercrime Convention and Additional Protocol; extension of the scope of broadcasting legislation to online audiovisual media services; "war on terror," security; intellectual property, copyright, piracy, illegal file-sharing; consumer protection; protection of minors and human dignity.
  7. One exception are search engines – information services without a place in media law, which create special challenges and pose considerable risks in such areas as access to harmful and/or illegal content; discrimination of content; misleading consumers; influence on opinion-makers; exploitation of protected works and of personal data; fragmentation of the public sphere, distortion of competition, including transfer of market power to other markets (for example, advertising). Despite industry-developed solutions, like the Global Network Initiative, careful extension of regulatory frameworks to them should be considered in areas where self-regulation cannot suffice.
  8. Further efforts are needed to develop appropriate standards of effective self- and co-regulation, Full co-regulatory co-operation and partnership should be pursued, based on a truly multi-stakeholder – and indeed a more democratic – approach than has so far been the case in many national and international contexts.
  9. Five main lines of action suggest themselves as far as the future work of the Council of Europe in this area is concerned:
    - a) in-depth analysis of how new forms of media affect democracy, democratic processes and institutions, and the engagement of citizens in democracy and governance, in order to develop or modify policy serving the preservation and enhancement of democracy in the information age;

- b) continued full analysis of how human rights standards apply to new media and other media-like content providers on the new communication services and of the need, if any, to adapt or develop these standards, or take other measures, to protect freedom of expression and information and ensure balance with other legitimate rights and interests. More attention should be paid to new forms of online journalism;
- c) full analysis of how new intermediaries and other stakeholders who may perform media-like activities as part of their operation (ISPs, search engines, access mechanisms), affect freedom of expression and information. This should facilitate consideration of the need, if any, to adapt or develop human standards, or take other measures, to protect freedom of expression and information and ensure balance with other legitimate rights and interests in this regard;
- d) consideration of which policy goals and objectives can be achieved through self- and co-regulation, and which go beyond the capacity of market players to regulate or co-regulate themselves and therefore require traditional regulation;
- e) continued analysis of media self-regulation and co-regulation systems and the development of standard-setting documents, enabling these systems to meet the needs of the information society.

### **Introduction**

We are witnessing accelerated evolution of the media, due in part to convergence,<sup>87</sup> and the appearance of media as well as “media-like” content coming from a variety of sources on ever new platforms. The whole process and its ramifications require analysis, also in order to establish whether a new look is required at the conceptual, policy and standard-setting approach adopted so far and what changes, if any, are needed for it to keep abreast of, and adequate to, the new situation.

In the Council of Europe context, this is needed in order fully to understand how Article 10 of ECHR applies to new communication services and how Council of Europe standards should, if necessary, be adjusted to keep abreast of new circumstances created by changes in societal communication prompted by social and technological change.

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87. OFCOM (2008b) defines convergence as “The ability of consumers to obtain multiple services on a single platform or device – or obtain any given service on multiple platforms or devices.” Platforms are the means of delivering services to consumers and now include digital terrestrial TV, cable, satellite, fixed wireless and fixed and mobile phone lines. Services are the products and content that are provided over these platforms. They include TV, radio, mobile TV, Internet, messaging, podcasting, vodcasting, VOIP and many others. On convergence see also European Commission, 1997.

There are different scenarios of how electronic media will develop. According to Robin Foster (2007), four possible scenarios for 2016 may be envisaged for the United Kingdom:

### ***Scenario 1: Transformation***

In this world, a very fast pace of new technology adoption, supported by new fibre-based broadband access networks, drives a major and radical change in the broadcasting and electronic media sector. There is a dramatic decline in the use of scheduled broadcast TV. Instead, many consumers make extensive use of content delivered on-demand over the open Internet, from home and abroad. There is a significant increase in user-generated content. Distribution platforms are no longer part of vertically integrated media organisations – rather they act as common carriers, linking millions of individual consumers to many thousands of content suppliers. At the consumer interface, the emphasis is on use of search tools, rather than on content aggregation.

### ***Scenario 2: Consolidation***

This scenario suggests a market in which technology change advances apace, but in which extensive consolidation has taken place, resulting in only a small number of (largely vertically integrated) main players. Consumers prefer to remain with trusted content packagers and aggregators, who can help them through the complex world. In turn, those aggregators are able to secure a powerful position in the market through control of content rights and of essential gateway facilities.

### ***Scenario 3: Extreme fragmentation***

In this scenario, some consumers experience the transformation of scenario 1, but many are left behind, resulting in a significant digital divide and highly fragmented consumption. The result is an impoverished broadcast sector, a highly fragmented online sector, and a major digital and cultural deficit among those who are unable to participate fully in the new broadband world.

### ***Scenario 4: Stagnation***

In this scenario we get much slower than expected growth in demand for new broadband and digital services, and large-scale investment in new technologies is not forthcoming. It suggests a world in which the UK lags significantly behind its main international competitors, and also one in which there is less investment and innovation in new services and content creation.<sup>88</sup>

For its own purposes, OFCOM (2008a) uses the following scenarios to consider the future of PSM in the context of electronic media evolution.

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88. Somewhat similar scenarios (“Business as usual”, “Interactivity”, “Personalisation”) were developed some years ago for the European Commission by Arthur Andersen (2002).

**Figure 1. OFCOM scenarios**

Speed of new platform and technology uptake	HIGH	<p>Consolidation</p> <ul style="list-style-type: none"> <li>- Adoption of new technology is relatively high.</li> <li>- Use of linear TV platforms static.</li> <li>- Some viewing migrates to other platforms and internet content.</li> <li>- Consumers look to trusted content aggregators to navigate market.</li> <li>- Current players respond by acquisition / launch of new linear and on-demand services, retaining viewing across multiple platforms. Existing players consolidate share of the market in response to fragmentation.</li> <li>- Vertical and horizontal integration in industry leads to higher returns for a small number of large content providers and earn returns.</li> <li>- Less incentive for new players to invest in content.</li> </ul>	<p>Radical fragmentation</p> <ul style="list-style-type: none"> <li>- Take-up and usage rates for new technologies are very high.</li> <li>- High fragmentation of viewing by platform and operators.</li> <li>- Consumers divide into niches with divergent media use – blending linear, on-demand, interactive and user generated. Audiences for linear broadcasting are mainly old, downmarket.</li> <li>- Advertisers seek affluent targets on other platforms.</li> <li>- Few operators therefore have scale or resources to fund programming.</li> </ul>
	LOW	<p>Gradual transformation</p> <ul style="list-style-type: none"> <li>- Steady increase of new technology adoption and usage; incremental rather than substitution.</li> <li>- Continued growth of DTT, and slow growth of Pay TV or IPTV platforms.</li> <li>- Linear TV viewing continues to lead consumption.</li> <li>- Share of viewing to the PSMs declines to DSO, then slows.</li> <li>- Non-PSMs do not develop greater scale to invest.</li> <li>- PSMs leverage scale and investment more effectively.</li> </ul>	<p>Stagnation</p> <ul style="list-style-type: none"> <li>- Adoption of new technology is relatively high; seen as utilities rather than new services.</li> <li>- Consumption of linear audio-visual material across all platforms wanes. Freeview via DTT becomes prevalent at the expense of Pay TV.</li> <li>- Free To Air broadcasters retain high share of declining viewing.</li> <li>- Wide availability of free material on broadcast platforms and online, and piracy of digital content, leads to a sharp fall in investment.</li> <li>- Premium on-demand content remains marginal. New media entrants are unable to invest in new content.</li> </ul>
	LOW	Speed of audience fragmentation	HIGH

The key drivers of differences between the different scenarios presented above appear to be the speed of take up of new platforms and services, the rate of audience fragmentation across these and the ability of industry participants to raise revenues from audiences as they change. However, that is not enough to understand the whole process. Media evolution should be examined in terms of technology, economy, culture and law/politics.

From a technological point of view, dissatisfaction with existing technology and limits on its usefulness and application lead to the search for new technological solutions and ultimately the emergence of new technology as a new system entity. However, the technologically-deterministic view that it is technological change alone which drives change in the media is far from accurate.<sup>89</sup>

From an economic point of view, either old business models developed for particular technologies and media become unsatisfactory and new business models are sought, or the emergence of a new technology requires the development of a business model for it that will make it sustainable and profitable. Diffusion of the new business model leads to an increase in competition and a decline of the margin of profit.

In the cultural realm, social change leads to dissatisfaction with older media and emergence of new needs, stimulating a search for new opportunities offered by technology, followed by identification and discovery of new uses to which technology can be put.

The political and legal reaction to new media goes through a cycle: at first, there is no reaction; then there is an attempt to assimilate the new medium under a legal framework developed for older media; this is followed by debates on, and development of, a new legal framework, suited to the new medium; and finally by the enactment of the new framework.

Lack of space precludes analysis of all the factors influencing media development and evolution. One thing is certain, however: change will be all-encompassing and ultimately fundamental in terms of modes of social communication.

In Declaration on Human Rights and the Rule of Law in the Information Society (CM(2005)56 final) of 2005, the Committee of Ministers recognised that "ICTs have the potential to bring about changes to the *social, technological and legal*<sup>90</sup> environment in which current human rights instruments were originally developed." Accordingly, the Committee of Ministers has in recent years been

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89. This is eloquently stated by Karaganis (2007: 9): "New technologies take hold only in the context of accompanying cultural innovation as their latent possibilities are explored. This interdependence means that technologies are not merely received but, through processes of adoption, socially defined and, eventually, socially embedded in new collective and institutional practices. Social construction, in turn, feeds back into processes of technical innovation, shaping research priorities and design. In the end there is no simple causality: no chickens, no eggs."

90. Unless otherwise stated, emphasis in italics is added in quotations by the author.

revising and updating its standard-setting documents which originally applied to “traditional” mass media alone.

What makes this endeavour challenging is that new communication services and new media are in what could be described as their “chrysalis” stage, that is, in an intermediate phase of their development, when their features and uses, as well as the opportunities and potential dangers associated with them, are not yet fully explored. Therefore, this will inevitably be a long-term effort, potentially requiring successive revisions of the standards or ways of applying them, as the new media reach maturity.

The present discussion paper seeks to lay the groundwork for this effort. An attempt will be made to:

- I. examine, however briefly, change unfolding in the media and establish on this basis whether it is indeed possible to speak of a new notion or notions of media;
- II. provide an overview of the policy and regulatory response as it has developed in Europe and elsewhere so far; and
- III. consider, in this context, what should be done to ensure full effectiveness of Council of Europe standards, as applied to new media and new communication services.

### ***I. Emergence of new notions of media***

Social communication takes place at different levels (supra-national/global communication; society-wide, for example, mass communication; institutional/organisational, for example, political system or business firm; intergroup or association, for example, local community; intragroup, for example, family; interpersonal, for example, dyad, couple) and can be face-to-face communication (interpersonal, intragroup, potentially also intergroup), or mediated.

Mediation can be analogue or, with convergence, increasingly electronic (for example, taking the form of computer-mediated communication – CMC – that is, any communicative transaction which occurs through the use of two or more networked computers). Mediated communication is conducted with the use of technologies allowing remote synchronous communication (for example, telephone, traditional radio, television, videoconference) or asynchronous communication (for example, letters, print media, telegraph, email, fax, voice-mail; Whittaker, n.d.). Mediation is common in interpersonal or inter-, or intragroup communication (email, video, audio or text chat, bulletin boards, electronic mailing lists, etc.) , but is of course indispensable when large groups of receivers are involved.

As suggested by their very name, the media of mass communication are an instrument of mediated communication.



### ***Traditional mass media: selected basic concepts and definitions***

As traditionally understood, the mass media include the print media, film, broadcasting, recorded music, etc. Here, we are dealing primarily with “the press” (including print media and broadcasting) or “news media”, regardless of the platform on which they are disseminated, as they are crucial to freedom of expression, exercise of human rights and the operation of democracy, and so attract particular attention in terms of policy, regulation and standard-setting.

The news media, and indeed all mass media, are the organised technologies and organisations/institutions that make mass communication possible. They can be seen as “media organisations” (McQuail, 2005), operating in a field of social forces (social and political pressures, economic pressures, etc.), and performing a sequence of activities to obtain, select and process content, then assemble it into a media product and disseminate it, or have it disseminated, to the audience.

For the purposes of this paper, we could say that the following elements go into such a news media organisation:

1. purpose: to exercise, and enable exercise of, freedom of expression and information, serve the public interest, provide a forum for public debate, influence public opinion, inform, educate, entertain, operate as a business (where appropriate), gain social influence and prestige, maximise the audience (where appropriate), potentially also serve sectional interests (political, religious, cultural, etc.);
2. editorial policy and process: producing and obtaining content and then selecting, editing, structuring and packaging it to serve the purposes of the given media organisation, and assuming editorial responsibility for it;
3. journalists and other content creators; management and technical sectors of the organisation;
4. periodic dissemination;
5. public nature of communication via different delivery and distribution platforms;
6. conformity with normative, ethical, professional and legal standards relevant in the case of media operation.

A key element of the news media from our point of view is the concept of journalism and the journalist. McQuail (2008) defines “journalism” as “the publication of accounts of contemporary events, conditions or persons of possible significance or interest to the public, based on information believed to be reliable.” He explains that what counts as journalism need not necessarily be done as work for financial reward, as this would exclude a range of journalistic activities undertaken for non-profit purposes or otherwise in non-institutionalised forms.

Consideration of journalism as a public occupation has led to the following conclusions which are important in terms of our consideration below of “media-like” content disseminated by non-traditional providers of such content:

- journalism as a paid occupation cannot claim a monopoly over the central activity of observing, reporting and publishing about public events. This is open to all citizens in a free society. It is widely accepted that the occupation of journalism should be open to everyone, without artificial legal or other barriers;
- the degree of freedom that a journalist may sometimes require to adequately perform the public element of the role is probably not compatible with accepting the institutional restraints that go with professionalism;
- the journalistic ethic of responsibility to society is inevitably quite weak, beyond the question of avoiding harm, since the public good to be served is open to quite diverse interpretations and journalists have the right and even obligation to decide this matter for themselves. Most journalists work in situations that recognise and follow codes of norms and ethics (see, for example, Breit, 2008), although procedures for enforcement are not usually very strict and cannot easily be so without endangering autonomy;
- professional detachment is quite firmly embedded in the attitude and work practices of many journalists in observing and reporting as objectively as possible,<sup>91</sup> but it is also arguable that certain kinds of journalism need at times to be engaged and involved if they are to serve audience and society. Not all journalists can promise to be neutral and balanced on all issues and events. Active involvement may be called for, especially one that is driven by a personal view of the vocation;
- the interests of the client conceived as an audience may not coincide with the interests of society as a whole (McQuail, 2008).

It is significant that, according to the International Federation of Journalists, there is a growing number of “atypical work relationships” in journalism, that is, types of employment that are not permanent and/or full-time (including short-term rolling contracts; subcontracted work; casual work; temporary work; freelance work) and that these “atypical workers” account for some 34% of the combined memberships of journalistic organisations affiliated to the IFJ. Freelancers account for the largest proportion (71%) of “atypical workers” (Walters, Warren, Dobbie, 2006).

In view of this, we may say that while “hard,” formal criteria (technology for content dissemination, periodic dissemination, full-time journalists, etc.) are

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91. However, as pointed out by many authors (Mancini, 2000; Hallin, Papathanassopoulos, 2002; Hallin, Mancini, 2004), in many countries there is strong “political parallelism” in the media (that is, they reflect, also in their content, political divisions in society and may represent one or another side of those divisions), and journalists are politically engaged, rather than detached and objective.

important, it is “soft” criteria that really determine whether we have to do with a media organisation and media or media-like content. These criteria are identified in items 1, 2 and 6 of the above list of elements of a media organisation: (i) purpose, (ii) editorial policy and responsibility, finally (iii) awareness of, and at least attempted conformity with, normative, ethical, professional and legal standards.<sup>92</sup>

Though insistence on these standards is often a defence tactic employed by professional journalists, one should perhaps agree with the view that “What distinguishes a journalist from the average citizen who records news on his or her cell phone are education, skill, and standards. *Information without journalistic standards is called gossip*” (quoted after Cooper, 2008).

According to McQuail (2005):

free media have responsibilities in the form of obligations which can be **assigned, contracted, or self-chosen** for which they are held accountable to individuals, organisations or society (legally, morally or socially) either in the sense of liability (for harm caused) or answerability (for quality of performance)

The public responsibilities of professional media can, in general terms, be described as follows: support for basic social order; respect for public mores; providing a picture of social reality; meeting informational needs; providing a forum for public expression; acting as a “watchdog” on the powerful; promoting social cohesion; providing for cultural/entertainment needs; behaving ethically; respect for individual and human rights.

As noted above, the editorial responsibility and accountability of professional media can be said to take the form of either “answerability” (moral/social basis; voluntary; verbal forms; co-operative; non-material penalty; reference to quality) or “liability” (legal basis; imposed adjudication; adversarial; material penalty; reference to harm).

Several different frames of accountability can be distinguished, as shown in Table 3.

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92. According to the American Electronic Frontier Foundation (EFF), the question whether bloggers are journalists should be answered in the following way: “Sometimes ... You can use blogging software for journalism ... [but also] for other purposes. What makes a journalist a journalist is whether s/he is gathering news for dissemination to the public, not the method or medium she uses to publish ... If you are engaged in journalism, your chosen medium of expression should not make a difference. The freedom of the press applies to every sort of publication that affords a vehicle of information and opinion, whether online or offline” (Bloggers’ FAQ - the Reporter’s Privilege, no date). This descriptive definition includes the element of purpose and editorial policy, but leaves out the elements of responsibility and awareness of, and at least attempted conformity with, normative, ethical, professional and legal standards. In our view, therefore, it is incomplete as such, though, as we will see below, EFF attaches considerable importance also to some legal and professional standards as applied to bloggers.

**Table 3. Frames of media accountability**

	<b>Frame of accountability</b>			
	<b>Legal/ regulatory</b>	<b>Financial/ market</b>	<b>Public</b>	<b>Professional</b>
Main issues	Media structure Harm caused to individuals Other interests Property Freedom	Product quality Service	Public good and/or harm Conduct and performance quality	Quality of conduct and performance
Main values	Order Justice	Freedom Choice/ diversity Profitability Volume/scale	Social responsibility Diversity Quality Order Mores Solidarity	Skill or craft Professional autonomy Duty
Logic	Administrative, legal	Commercial Calculative Populist	Normative	Contractual Ethical Technical
Procedure	Formal, adjudicatory	Market forces	Public debate Self-regulation Inquiries	Voluntary Internal hearings Self-managed adjudications Ombudsmen
Instruments	Texts Codes Schedules	Sales Financial accounts Ratings	Policies Public opinion Publicity Pressure Public ownership	Codes of professional ethics and conduct
Currency of account	Material penalty	Money Fame/ popularity	Esteem or lack of it	Praise or blame Apology, correction

Source: McQuail, 2005.

### ***Transformation of mass media***

Evolution or transformation of the media, or the need to develop new media, is driven by situations when:

1. existing media no longer deliver a satisfactory service, for technological, social or cultural reasons;
2. technological innovation has resulted in such change in old forms of media that old notions no longer apply, or need to be revised or reformulated;
3. new forms of media have emerged, calling for new notions and new concepts;
4. the legal and regulatory framework applying to the media has lagged behind change and new developments, requiring its adjustment and modernisation.

According to Stöber (2004), the evolution of media proceeds in three stages:

- the original invention of a new medium (mainly of a technical nature);
- followed by innovation (involving changes needed to introduce the new medium into social use and develop an economic model);
- and then diffusion, when the new medium becomes a new cultural technology for users, audiences and consumers.

Innovation, says Stöber, may involve two kinds of improvements: adaptation – the improvement of a feature for the sake of its original purpose, or exaptation – a second-stage improvement, serving to perform new functions which may not have been envisaged at the time of invention.

It is usually during the phase of innovation and particularly exaptation that a truly new medium is born, as shown in Table 4.

**Table 4. Media emergence and evolution**

	Invention's first function: improvement on an old medium	Innovation, the second function: emergence of a new medium
Printing	Improvement on writing	Development of serial (and quasi-serial) press
Electrical telegraphy	Improvement on optical telegraphy for political and military purposes	News agencies, stock market information
Telephony	Improvement on telegraphy	One-to-one medium for business and private purposes

Film	Vaudeville and variety amusement	Programme medium with newsreels and films
Wireless telegraphy/ radio	Improvement on wire-based telegraphy	Broadcasting with entertainment and information programmes
Television	Improvement on telephony	Broadcasting combined with film
Computing/ Multimedia	Improvement on arithmetic	Multipurpose devices

Source: Stöber, 2004.

One more case which Stöber does not discuss is the following:

Mobile telephony	Improvement on fixed telephony as a means of verbal communication	A major medium of text communication (Short Message Service – SMS) <sup>93</sup> and, increasingly, of audiovisual communication – Multimedia Message Service (MMS) and Mobile TV
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In this context, we could also mention the French *Minitel*, which was originally conceived as a “one-to-many” information medium, but was turned by consumers into a “many-to-many” communication space through the emergence and growth of its popular messaging systems (Boczkowski, 1999).

From a technological point of view, convergence has changed traditional mass media and has driven the emergence of new forms and modes of communication. The main features of fully developed convergent digital communication, which most likely will be the prevalent (though not the only) mode of communication in the information society, include: multimedia communication; non-linear, on-demand delivery of content; interactivity; asynchronous communication; individualisation/personalisation (customisation); portability of receivers and mobile reception; disintermediation (elimination of intermediaries, for example, media organisations, as anyone can offer information and other content to be directly accessed by users and receivers); and “neo-intermediation” (emergence of new intermediaries, especially on the Internet, capable of offering new services or aggregating and packaging content in new ways).

<sup>93</sup>. messages per month.

Convergent digital communication blurs old divisions between types of communication. In terms of medium and content, the following could be distinguished:

- private/direct: face-to-face, birthday party, pub;
- public/direct (communal): election meetings, business talks, classroom discussions;
- mediated/private: letter, phone, email, cellphone;
- mediated/public: group email, discussion forum, television.

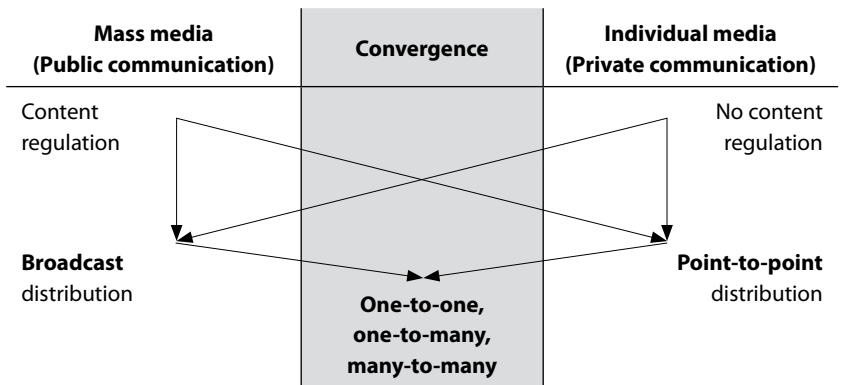
In turn, the criteria of medium and access help distinguish the following types of communication:

- non-public/direct: face-to-face;
- non-public/mediated: letter, phone call fax, personal email, video-conference;
- public/direct: general assembly, street demonstration;
- public/mediated: television, radio, press.

As noted by Heller (2006), each of these types of communication has traditionally come with its own set of cultural norms and expectations as to appropriate content, language, etc., but, in the case of public communication, also different regulatory standards. These old distinctions are being undermined by media evolution.

Figure 1 illustrates the effects of convergence on traditional divisions in social communication and the regulatory systems that apply to different forms of communication.

**Figure 1. Effects of convergence**



Adapted from: Østergaard, 1998: 96.

In the 1980s, the term "new media" was used to denote cable and satellite television, the VCR, as well as teletext and videotext. Today, it is sometimes applied to

"blogs, social networking sites, cell phone messaging, and other relatively new technology applications" (Khalatil, 2008). These applications do serve as media of communication, but it is doubtful they can all be classified as news media (as defined above). In general, the term "new media" applies precisely to digital and convergent media:

**new media:** all those means of communication, representation and knowledge (i.e. media), in which we find the digitalization of the signal and its content, that possess dimensions of multimodality and interactivity. This definition [is] comprehensive [and] inclusive of everything from the mobile phone to digital television and also embracing game consoles and the Internet ... The new media may be termed thus because they are mediators of communication, because they introduce the novelty of incorporating new technological dimensions, because they combine interpersonal communication and mass media dimensions on one and the same platform, because they induce organisational change and new forms of time management and because they seek the synthesis of the textual and visual rhetoric, thus promoting new audiences and social reconstruction tools. (Cardoso, 2006, pp. 123-4; see also Rice, 1999)

What this means in practice is that all media will one day turn into new media, so the distinction between "old" and "new" media is only temporary. We may use the example of television to examine the transformation of an "old" medium into a "new" one.

The following stages of television's evolution may be distinguished:

- "Paleo-television" – the initial age of public or state monopoly;
- "Neo-television" – the second stage after the dismantling of monopoly, when the public and commercial sector compete, and "broadcasting" co-existed with "narrowcasting", that is, thematic channels;
- "Post-television," resulting from digital technology consolidation and continuous innovation, and characterised by multiplication and personalisation of programme offers, as non-linear delivery and individualised TV gain in prominence, while users are able to use time- and place-shifting technologies to receive content of their choice, also via alternative distribution platforms – mobile telephony, PDA or the Internet (Roel, 2008).

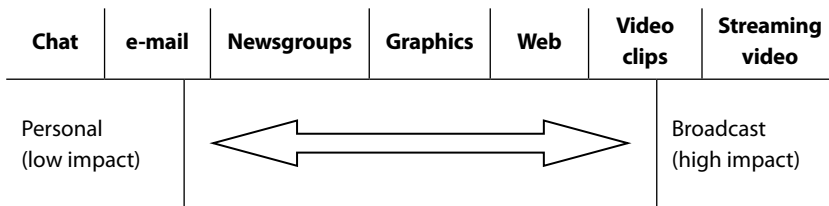
A similar trajectory has been followed by the print media which have embraced the Internet, for example, and established online newspapers in one of three main versions: either an exact electronic copy of the newspaper as appearing in print, or a reduced version of the original, or indeed "virtual newspapers" – a much extended version of the original, offering more content (thanks to potentially unlimited "space" on the Internet); more up-to-date content (often foreshadowing news and articles to appear in print the next day); links to related content and information sources; specialised newsletters; ability to engage in email correspondence with the editorial staff or other users, express oneself in a public forum, or take part in some sort of electronic community (Migaczewska, 2006).



The archetypal “new medium” is the Internet – at the same time a mass medium and a medium of interpersonal communication. As a technological base, the Internet serves both those dimensions and for that reason the market and the state have adopted it as the new central element in the media system.

As illustrated in Figure 2, at one end of the spectrum of modes of communication available via the Internet there are various forms of interpersonal (private) communication which are not subject to any content regulation. At the other end, there is the potential for anyone with enough money and bandwidth (not to mention communication competence) to run the equivalent of a television station via the Internet, via streaming video, that is, to engage in public communication. In the middle between the two extremes, there is the current web, and future web-like services, which increasingly offer more broadcast-like services.

**Figure 2. Range of material and modes of communication available on the Internet**

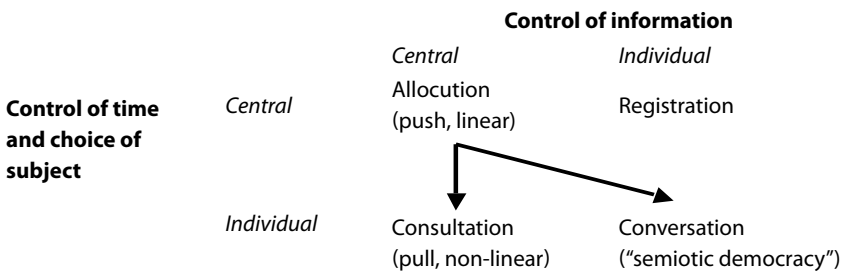


Source: Mitchell, Armstrong, 2001.

One consequence of the emergence of “new media” in this sense is that all the levels of communication process and all the communication patterns involved, can now be conducted with the use of the new technologies – from interpersonal to mass communication, all on one and the same platform.

The emergence and societal assimilation of the new media in this meaning is promoting a fundamental change in patterns of mediated communication, as shown in Figure 3.

**Figure 3. Changing modes and patterns of social communication due to new technologies**



→ Redistribution of information traffic due to new technologies.

Adapted from McQuail, 2005: 146.

Allocution (one-way, top-down, one-to-many communication) is losing its dominance in mass communication, with “consultation” and interactive “conversation” gaining in importance. Registration is the collection of information available to, or about, individual participants, according to a centrally determined choice of subject and time in a central storage area. This is a long-established element in many organisations for record-keeping, control and – potentially – surveillance. According to van Dijk (2006), contemporary new media can be classified as such if they incorporate and make possible all four modes of social communication.

The emergence of “consultation” and “conversation” as important modes of mediated communication is aided by a new stage in the development of the Internet, known as Web 2.0, based on an implicit “architecture of participation,” a built-in ethic of co-operation, in which the service acts primarily as an intelligent broker, connecting the edges to each other and harnessing the power of the users themselves (O’Reilly, 2005). All this, says Stark (2006), amounts to a revolution based on a simple concept: semiotic democracy, or the ability of users to produce and disseminate new creations and to take part in public cultural discourse. Users are by and large developing and posting their own original creations. Anyone can now – with access to the right technology and appropriate communication and information literacy – become a creator, a publisher, an author via this new form of cultural discourse, a platform to publish to the world at large that grants near instant publication and access. The publisher-centric business models of the 20th century will not last, says Stark. We will see massive disintermediation in the next decade or so. More artists, creators, citizen journalists (see Kim and Hamilton, 2006, on “OhmyNews”) and others will self-publish, and they will find ways to do so in a sustainable way, perhaps by selling MP3s on their websites, opportunities for production work, or touring to a greater number of fans.

Whether or not these predictions will all come true, we are indeed seeing the emergence of “a digital commons,” also known under other names, for example, “information commons” (Kranich, 2004).

The emergence of “conversation” on a societal scale in mediated electronic communication marks a new stage of social communication. The nature of this new stage is summed up by Kűng’s (2002) comments on “old” versus “new” assumptions about the nature and strategic significance of content. According to old assumptions, content is the product of scarce creative skills and trained discriminating minds. Now, anything can be content and content does not have to be produced by experts. In fact, many users are happiest producing their own content. Kűng’s (2002) comparison of old and new media content takes the form of Table 5.

**Table 5. “Old” and “new” media content**

<b>Characteristic</b>	<b>“Old” media content</b>	<b>“New” media content</b>
<b>Core customer proposition</b>	Information, education, entertainment	Synthesis of information, communication and service
<b>Basic communication paradigm</b>	One-to-many, mass	Two-way, personalised, interactive, on-demand
<b>What is quality</b>	“Quality” content fulfils exalted goals and has intellectual and artistic merits	Quality content keeps users on the site and is constantly refreshed and updated
<b>Who produces content?</b>	Experts dictate Content-generation relies on artistic expertise and discriminating minds	Customer in the driving seat: decides what, when, and in which form; the end of “journalist knows best”; successful content often generated by users
<b>Relationship with commercial elements</b>	Content and commerce strictly separated and clearly labelled	Content and commerce inextricably linked

All this has produced greater engagement by large numbers of individuals in social networking, in forms of public communication via the Internet (blogs, etc.), and generally in the public debate. This process of collaborative content creation in environments, from open source through blogs and Wikipedia to Second Life, amounting to continuous creation and extension of knowledge and art by collaborative communities, has been called “produsage.” This is why “mass media” are sometimes described as being transformed into “media of the masses”<sup>94</sup>

The scale of this phenomenon is difficult to gauge precisely (see Table 1 in Appendix 1). However, as shown by American research, the proportion of active creators of user-generated content is clearly higher among the teen population (12-17). In 2006, 64% of teenage Internet users (that is, 59% of all teens) participated in one or more content-creating activities, compared to 57% in 2004. Thus, the proportion of content-creating users is rising over time, as shown in Table 6.

94. AgoraVox, a website that describes itself as “The first online newspaper in Europe written by citizens,” explains why it is “the medium of the masses”: “Whereas traditional media bring down the information from the top to the bottom (“one to many” principle), AgoraVox makes it move along in a transversal way (“many to many” principle). This is thanks to a very motley team of citizen authors, constituted with very various profiles.”

**Table 6. Share of content creators among American Internet users**

Type of user-generated content	Adult users 2006	Teen users	
		2004	2006
% of Internet users			
Share something online that you created yourself, such as your own artwork, photos, stories, or videos	19	33	39
Post comments to an online news group or website	18	n.d.	n.d.
Create or work on your own web page	12	22	27
Create or on web pages or blogs for others, including friends, groups you belong to, or for work/friends, school assignments	11	32	33
Take material you find online – like songs, text, or images – and remix it into your own artistic creation	9	19	26
Create or work on your own online journal or weblog	8	19	28

Sources: For adults: Pew Internet & American Life Project April 2006 Survey. N=2,882 for Internet users. Margin of error is  $\pm 2\%$ . For teen users: Pew Internet & American Life Project Survey of Parents and Teens, October-November 2006. Margin of error for teens is  $\pm 4\%$ .

While it is no doubt difficult to generalise these figures and in many countries these proportions are certainly much lower, one can most probably expect that in developed societies a large section of the population will in the future be engaged in content creation and distribution via the new technologies, either regularly or occasionally, probably with varying intensity over the course of their lives.

If it is true, for example, that “blogs are pervasive and part of our daily lives” (Technorati, 2008), then it is clear that the new communicators and the content they distribute will continue to be a significant feature of social life and social communication.

Thus, the traditional features of mass communication have changed substantially, as shown in Tables 7 and 8.

**Table 7. The mass communication process**

<b>Old</b>	<b>New</b>
Large scale distribution and reception	Distribution at once global and personalised
One-directional flow	Two-way flow: the audience can respond or provide content to be disseminated by the medium
Asymmetrical relation	User can respond, offer feedback, engage in dialogue
Impersonal and anonymous	Affected by individualisation and personalisation
Calculative or market relationship	UCG and new communicators change that
Standardised content	Highly diversified content

Adapted from McQuail, 2005.

**Table 8. The mass audience**

<b>Old</b>	<b>New</b>
Large numbers	Full range – from global to individual reception
Widely dispersed	Addressability and localisation permit reaching clearly identifiable audiences
Non-interactive and anonymous	Interactive and potentially personalised
Heterogeneous	Potentially homogenous
Not organised or self-acting	Capable of organisation, reaction, response
An object of management or manipulation	More media literate, resistance to propaganda or manipulation

Adapted from McQuail, 2005.

In view of this, we should look again at the features of a news media organisation identified at the outset, to see whether they retain their relevance, or need to be revised.

Purpose remains largely the same, whether in traditional or alternative new media. An example of the latter is provided by Indymedia, an “internet media offshoot of social movements,” such as the anti-globalisation movement, and relying on

“volunteer journalists.” In 2006, this “internet-based alternative to corporate mass media in the United States” (Garcelon, 2006) included 42 websites in 54 countries and territories. As one example, Istanbul Indymedia (“a non-commercial, democratic collective of Istanbul independent media makers and media outlets”) seeks to “encourage a world where globalization is not about homogeneity and exploitation, but rather, about diversity and co-operation; provide edited audio, video, and print stories of the above on the internet for independent media outlets and the general public; offer community classes for training in internet and media skills; encourage, facilitate, and support the creation of independent news gathering and organisations” (Kejanlioglu (2008: 151).

Editorial policy and especially the editorial process take different forms in mainstream and alternative media, and especially in “media-like” activities of new intermediaries, disseminating user-generated content, for example. In the latter two cases, there is much less selection and editing of content. Also editorial responsibility takes different, often very limited, forms. All this will be discussed in more detail below.

Journalists and other content creators are, in the case of alternative media, mostly “volunteer”, “citizen” or “amateur” content providers. This need not detract from their ability to perform a journalistic role and for their activities to approximate the operation of news media if, as already suggested, they are aware of, and prepared to comply with, normative, ethical, professional and legal standards relevant in the case of media operation, and with “the same standards of veracity, the same expertise and experience that are part and parcel of professional journalism” (Fioretti, 2008). The degree of this compliance may, however, be different in different cases.

Periodic dissemination naturally retains its relevance as a criterion of whether content provision can be classified as “media,” but in practical terms may mean something very different. Whereas a daily newspaper may at best bring out one or more “extras” a day,<sup>95</sup> an Internet publication can update or revise news items or stories countless times a day, as new information comes in. Archived web pages, such as citation index databases, online archives and postings in discussion groups, usually remain static over time. At the other end of the spectrum, Google News is updated every 15 minutes (Carlson, 2007), news article headlines are sometimes updated hourly. In between there is a wide scale of updating frequency (Hellsten, Leydesdorff, Wouters, 2006). This complicates the application of this criterion, but naturally static websites can hardly qualify as media.

The public nature of communication clearly retains its relevance, with some of the new platforms (for example, the Internet) potentially offering global reach. However, while traditional media usually operated as “push” communication (allocution), many new services operate as “pull” communication (consultation).

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95. A rare example of the high number of such “extras” is provided by the *New York Herald*, which put out six editions the morning after Lincoln was shot.

Communication is still public, in the sense that everyone with the right equipment and communication competence can access it, but the receiver's control over the act of content consumption is greatly enhanced and personalisation functionalities may potentially diversify the exact contents reaching particular receivers/users.

Conformity with normative, ethical, professional and legal standards relevant in the case of media operation is seen here as an important criterion whether "alternative" or "civic" forms of communication can be classified as "media." This will be discussed below.

The image and role most often associated with the traditional concept of the journalist, and even more the editor, is that of the "gatekeeper." The gatekeeper role is maintained and enforced by a set of professional routines and conventions that are said to constitute a sort of quality-control mechanism in institutional journalism. To some degree that also extends to the role of the publisher/broadcaster. The journalist may be assigned a story, but often decides what to report on, or what to write about. The editor selects news and other journalistic and editorial content for publication. The publisher or broadcaster determines the general editorial policy, influencing the work of the journalist and editor, as well as news values and other criteria for selecting editorial content. The publisher or broadcaster, by choosing a target audience and potentially restricting access to content by way of price, distribution or conditional access technologies in broadcasting, influences not only what content is disseminated, but partly also who has access to it.

Today, in times of disintermediation, the gatekeeper role is much reduced. A special case of gatekeeping is represented by Google News which in the case of the English language version describes itself as:

a computer-generated news site that aggregates headlines from more than 4,500 English-language news sources worldwide, groups similar stories together and displays them according to each reader's personalised interests ... [our goal is to offer] our readers more personalised options and a wider variety of perspectives from which to choose. On Google News we offer links to several articles on every story, so you can first decide what subject interests you and then select which publishers' accounts of each story you'd like to read. Click on the headline that interests you and you'll go directly to the site which published that story. Our articles are selected and ranked by computers that evaluate, among other things, how often and on what sites a story appears online. We also rank based on certain characteristics of news content such as freshness, location, relevance and diversity. As a result, stories are sorted without regard to political viewpoint or ideology and you can choose from a wide variety of perspectives on any given story. (see also Carlson, 2007)

Where elements of a gatekeeping role persist in new communication services, this might indicate that we have to do with media or media-like activities.

**Defining “media” today**

As noted above, the new media and new communication services are in their interim “chrysalis” stage of development: they have not matured enough to have developed their own mature public definitions, or for their users and the public in general to know where to place them in the system and how to approach them, or indeed what effects their use will bring.<sup>96</sup>

Nevertheless, on a conceptual level, this evolution of the media has prompted the development of new technology-neutral definitions of the media of (mass) communication.

One example is Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns. It states in the preamble that “the constant development of information and communication technology and the evolving media landscape ... necessitates the revision of Recommendation No. R(99)15 of the Committee of Ministers on measures concerning media coverage of election campaigns.” The difference between the concept of “media” in the two recommendations on the same subject, adopted eight years apart, can be seen in Table 9.

**Table 9. The concept of “media” in two Committee of Ministers recommendations**

R (99) 15	CM/Rec(2007)15
Print and broadcast media	<p>“The term ‘media’ refers to those responsible for the periodic creation of information and content and its dissemination over which there is editorial responsibility, irrespective of the means and technology used for delivery, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. This could, inter alia, include print media (newspapers, periodicals) and media disseminated over electronic communication networks, such as broadcast media (radio, television and other linear audiovisual media services), online news-services (such as online editions of newspapers and newsletters) and non-linear audiovisual media services (such as on-demand television).”</p>

96. One unexpected consequence of the arrival of new communication services is described as “egocasting,” a situation when technologies potentially offering an infinite variety of content are actually used to reduce the range and variety of content received: “With the advent of TiVo and iPod, however, we have moved beyond narrowcasting into ‘egocasting’—a world where we exercise an unparalleled degree of control over what we watch and what we hear. We can consciously avoid ideas, sounds, and images that we don’t agree with or don’t enjoy ... The more control we can exercise over what we see and hear, the less prepared we are to be surprised. ... TiVo, iPod, and other technologies of personalization are conditioning us to be the kind of consumers who are, as Joseph Wood Krutch warned long ago, ‘incapable of anything except habit and prejudice,’ with our needs always preemptively satisfied” (Rosen, 2005).



Another well-known recent example of this search for a new, technology-neutral definition of the “media,” is the EU’s Audiovisual Media Services Directive (AVMSD). The definition of “audiovisual media service” is explained at length in recitals 16 to 25 of the preamble and is set out in Article 1 (a). It is composed of six cumulative criteria:

- it must be a service thus requiring an economic activity (hence excluding private websites, services consisting of the provision or distribution of user-generated audiovisual content for the purposes of sharing and exchange within communities of interest);
- mass media character (that is, intended for reception by, and which could have a clear impact on, a significant proportion of the general public);
- the function of the services is to inform, entertain and educate the general public. It presupposes an “impact of these services on the way people form their opinions,” as emphasised by recital 43;
- the principal purpose should be the provision of programmes (as opposed to cases where audiovisual content is merely incidental), as emphasised by recital 18;
- a service with audiovisual character (does not cover audio transmission or radio services or electronic versions of newspapers or magazines);
- a service provided by electronic communications networks (for example, excluding cinema, DVD).

The directive is helpful in our search for a new notion of media, especially in that it unpacks the concepts of linear and non-linear audiovisual media services and defines their particular elements. Nevertheless, it is clearly designed primarily for specific regulatory purposes, to provide legal certainty as to the scope of application of this particular directive. Therefore, a number of traditional media (radio, electronic versions of newspapers or magazines, cinema, DVD) are excluded from this definition. The same is true of new borderline cases which under some circumstances potentially could be classified as media, for example, private websites; blogs; services consisting of the provision or distribution of user-generated audiovisual content for the purposes of sharing and exchange within communities of interest. This limits its usefulness for our purposes, as it leaves out of consideration forms and modes of communication which require close analysis precisely in order to establish whether they should, or should not, be classified as media – in general, or in some aspects of their operation. Another reason is the requirement that only services based on “economic activity” and competing for the same audience as television broadcasts can be covered by this definition (recital 17), while “activities which are primarily non-economic and which are not in competition with television broadcasting” should not be covered by the directive and its definition of audiovisual media services (recital 16).

Moreover, the directive defines “editorial responsibility” in Article 1 (c) in the following way:

‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.<sup>97</sup>

As is clear from the foregoing, this concept leaves out of consideration a large area of what is generally recognised as editorial accountability and answerability/liability for the contents of communication, but also a broader understanding of editorial responsibility as editorial policy.

This is another reason why we need to go beyond the AVMSD definition of audiovisual media services in search of new notions of media.

The evolution of media has blurred distinctions between previously clearly demarcated fields:

- mass and public communication vs. interpersonal and private communication;
- media outlets and individual communicators;
- professional and amateur journalists and communicators.

Therefore, as we search for new notions of media, we should seek to understand:

- whether notions of media result from changes in traditional media;
- and whether new forms of media, or media-like activity have appeared.

On this basis, several new notions of media may tentatively be identified.

*New notion of media (1): all media are new-media-to-be*

So far, media development has been cumulative rather than substitutive: newly emerging media did not replace older media, though they may have modified their functions and content. Digitalisation and convergence can potentially change this. The Internet, for example, is both a new medium, and a technology with which all the other media and modes of communication seem to want to interact through the establishment of digital or analogue links. With the digitisation of all media, they may all be transformed into convergent media distributed on broadband networks. Older media will not be substituted for and disappear, but may re-emerge in changed form, as another source of content available on broadband Internet and other broadband networks.

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97. For detailed consideration of the concept of “editorial responsibility,” as defined in AVMSD, and its application under the directive, see Schulz, Heilman, 2008.

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On this basis we may conclude that one element of the new notion of media is that traditional media are being changed into digital, convergent media that:

- can incorporate all forms of media existing so far and potentially may assimilate them into a variety of media forms existing alongside one another on broadband networks;
  - combine all levels and patterns of social communication and all modes of content delivery;
  - are capable of overcoming constraints of time and space.
- 

*New notion of media (2): forms of media created by new actors*

So far, we have been on relatively familiar territory. However, as we have seen, the contemporary communication landscape has seen the emergence of new types of communicators, capable, thanks to the Internet, of engaging in public communication on a global scale. The moot question is whether this produces new forms of news media, or of media-like news activity. We should therefore seek to establish whether, and to what extent, these new types of communicators and the content they distribute satisfy the “hard” and “soft” criteria identified above, enabling them to be recognised as “media.”

One may identify three possible cases:

- disintermediation (see above) allows political, social, economic, sports and other entities to become content providers and disseminators, bypassing traditional media and reaching out directly to the general public;
- media or media-like content is disseminated either by non-professional content creators (for example, bloggers);
- or by new intermediaries (Internet service providers, content aggregators, search engines, etc.).

The first case involves international organisations (like the European Union, the European Parliament, NATO, etc.), government agencies and all kinds of other institutional actors (for example, sports clubs) that establish television channels or content services on the Internet.

This may be significant in terms of the democratic process in that the media have so far been the primary actors in holding political power to account by virtue of the public nature of their work, testing and challenging and inquiring into government decisions, actions and arguments. They play this part by virtue of the privileges of the “fourth estate”, meaning access to politicians and public figures and the wide public acceptance that this challenging role is their duty and their very identity. This function is unique to traditional and mass media, by virtue of their large audience, reach and public recognition of their role. Without that force, backed by public consent in the public interest, it may be

all too easy for political forces to distort the debate, exclude critical voices and conceal important facts from the public. Even without that, this may accelerate transition towards the “post-objectivity” period in media evolution (see endnote 13), producing disorientation among the public as impartial information and analysis are replaced by advocacy and persuasion/propaganda.

Special attention should be paid to new content providers whose output goes under the name of “user-generated content” (UGC), or “user-created content” (UCC). Examples of both new content providers and intermediaries are provided in Table 10.

**Table 10. Forms of user-generated content and platforms for its distribution**

Type of platform	Description	Examples
Blogs	Web pages containing user-created entries updated at regular intervals and/or user-submitted content that was investigated outside of traditional media	Popular blogs such as BoingBoing and Engadget; blogs on sites such as LiveJournal; MSN Spaces; CyWorld; Skyblog
Wikis and other text-based collaboration formats	A wiki is a website that allows users to add, remove, or otherwise edit and change content collectively. Other sites allow users to log in and co-operate on the editing of particular documents	Wikipedia; sites providing wikis such as PBWiki, JotSpot, SocialText; writing collaboration sites such as Writely
Sites allowing feedback on written works	Sites which allow writers and readers with a place to post and read stories, review stories and to communicate with other authors and readers through forums and chat rooms	FanFiction.net
Group-based aggregation	Collecting links of online content and rating, tagging, and otherwise aggregating them collaboratively	Sites where users contribute links and rate them such as Digg; Sites where users post tagged bookmarks such as del.icio.us
Podcasting	A podcast is a multimedia file distributed over the Internet using syndication feeds, for playback on mobile devices and personal computers	iTunes, FeedBruner, iPodderX, WinAmp, @Podder

Social network sites	Sites allowing the creation of personal profiles	MySpace, Facebook, Friendster, Bebo, Orkut, Cyworld
Virtual worlds	Online virtual environment	Second Life, Active Worlds, Entropia Universe, and Dotsoul Cyberpark
Content or filesharing sites	Legitimate sites that help share content between users and artists	Digital Media Project

Source: Wunsch-Vincent, Vickery, 2007.

It has been noted that podcasting, blogs and related technologies are also increasingly used in the professional context (Wunsch-Vincent, Vickery, 2007), and indeed, many professional news organisations host UGC on their websites.<sup>98</sup> Indeed precisely these two forms of UGC may – under many conditions – come to approximate news media. Social networking sites can also be used as disseminators of information and mobilising tools, but they may lack the element of periodic dissemination of structured content. In many other cases, we may have to do with “personal publishing,” or intra- and inter-group communication, but not with media, or “media-like” activities.

Deuze (2003) distinguished four distinct “online journalism”:

1. mainstream news sites: operated by professional media organisations and generally offering a selection of editorial content and a minimal, generally filtered or moderated form of participatory communication. As the author describes it, this type of content is distinctive in that it can be characterised as originated (produced originally for the web) or aggregated (shovelled from a linked parent medium, “framed” or “deep-linked” from an external source – not in the least done by so-called artificial market actors such as searchbots and spiders, that is, software that automatically enables Internet searches. Examples of the “originator” type of mainstream news sites are the much-visited sites of CNN, BBC and MSNBC. Most online newspapers can be located in this category, as well as several “Net-native” news sources;

98. In 2005, 10 mainstream UK news websites used seven major UGC formats: “polls”, “have your says”, “chat rooms”, “Q&As”, “blogs with comments enabled”, “pre-moderated message boards” and “post-moderated message boards”, together with a number of additional formats. “Q&As” – interviews with journalists or invited guests, the questions for which are submitted by readers – were the most popular format (used by 70% of publications), followed by “polls” (50%), “have your says” – in which journalists post topical questions to which readers send written replies (40%), “post-moderated message boards” (30%), and “pre-moderated message boards” (20%). “Blogs with comments enabled”, “chat rooms” and the nine “other” formats were each used by a single publication (Thurman, 2005).

2. index and category sites: this type of online journalism is often attributed to certain search engines (such as Yahoo), marketing research firms (such as Moreover) or agencies (Newsindex), and sometimes even enterprising individuals (Paperboy). Here, online journalists offer (deep) links to existing news sites elsewhere on the Internet. Those hyperlinks are sometimes categorised and even annotated by editorial teams, thus generally featuring more or less contextualised (or contextually presented), aggregated content. These index and category sites generally do not offer much “original” editorial content (that is, content produced exclusively or specifically for web publication), but do at times offer areas for chat or exchanging news, tips and links by the general public. Most search engines offer an option to “add a site,” which will then be subjected to editorial scrutiny. Sites offering some editorial content and furthermore providing annotated links to content elsewhere on the web (similar to so-called “portal” sites), such as the Australian Arts and Letters Daily, Bosnian Mario Profaca’s Cyberspace Station or the US-based Drudge Report by Matt Drudge, fall into this category;
3. meta- and comment sites: sites about news media and media issues in general; sometimes intended as media watchdogs (US examples: Mediachannel, Freedomforum, Poynter’s Medianews, E&P’s E-Media Tidbits), sometimes intended as an extended index and category site (European Journalism Centre’s Medianews, Europemedia). They and other sites serve as a meta- and comment type of online journalism in terms of media criticism or “alternative” media voices; examples of which are Mediekritik.nu in Sweden, Extra! in the Netherlands, dotJournalism in the UK and OnlineJournalismus in Germany. Editorial content is often produced by a variety of journalists and basically discusses content found elsewhere on the Internet. An important factor for coining and including this category is the widespread emergence of so-called “alternative” news sites. Alternative news sites tend to define themselves in terms of what they consider the mainstream (corporate, commercial) news organisations not to be. Such sites – notably the Guerrilla News Network and the Independent Media Centers in various places across the globe – offer not only their own news online, but tend to critically comment upon the news offered by existing media networks, guiding users to places outside of the mainstream news offerings on the web. Many of these sites exist as online journalisms in that they collect, annotate and comment upon sources of news all over the web, focusing explicitly on issues and angles that they feel the “mainstream” journalists have not covered (well or sufficiently). As most of these sites also tend to allow individuals to upload and contribute their own stories in an open publishing environment, they can be seen to act as more or less “participatory” metasites;
4. share and discussion sites: these are platforms for the exchange of ideas, stories and so forth, often centred around a specific theme such as worldwide anti-globalisation activism (the aforementioned Independent Media

Centers, generally known as Indymedia) or computer news (Slashdot, featuring a tagline reading: "News for Nerds, Stuff that Matters"). Several sites have opted to commercially exploit this public demand for connectivity, by organising more or less edited platforms for discussion of content elsewhere on the Internet. This type of online journalism has also been described as "group weblogs," offering personal accounts of individuals about their experiences on the Internet.

Deuze adds that what is sometimes labelled as "new" online journalism is the phenomenon of the weblog or blog, an often highly personal online periodical diary by an individual, not necessarily a journalist, telling stories about experiences online and offering readers links with comments to content found while surfing the web. These types of individual journalism (user-generated content sites) can, in his view, be located somewhere between index and comment sites, as they tend to offer limited participatory communication (being usually just one person speaking his or her mind about certain issues and offering links), but present plenty of content — and comment on content.

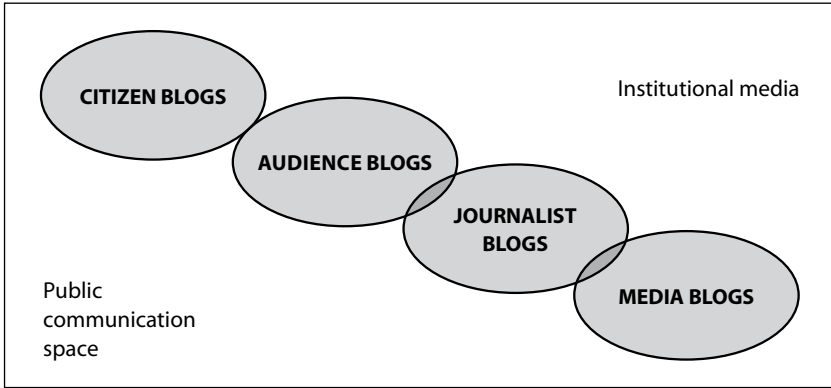
The question from our point of view is which of these types of "online journalism" — when not created and maintained by professional news organisations or journalists — can be classified as news media. We will consider this on the example of citizen journalism, also known as public/civic/communitarian, people's, open source or participatory journalism (see Deuze, 2008).

In addition to e-zines, the best known form of this type of journalism is weblogs (blogs). As noted by Domingo and Heinonen (2008), not all weblogs pretend to be journalistic or related to current events in the sense shared by institutional media. In fact, most blogs are mainly personal and revolve around the feelings and experiences of the author. Many serve the purpose of political organisation and civil involvement (see, for example, Kerbel, Bloom, 2005). Only 34% of US bloggers surveyed by PEW Internet considered their blogs a form of journalism. However, "any blogger can 'commit journalism' when describing or analysing an event he/she has witnessed." In the authors' view:

this heterogeneous group of weblogs, some made by the public, some by journalism practitioners, and some by media houses, have something in common that justifies the label "journalistic weblog": Although they may not strictly follow traditional journalistic routines and conventions, these weblogs have a clear intention to collect, analyse, interpret or comment on current events to wide audiences and in this way perform the very same social function usually associated with institutionalized media.

Domingo and Heinonen (2008) propose the following typology of journalistic blogs:

**Figure 4. Typology of journalistic weblogs**



These types of blogs are described in the following way:

1. **citizen blogs:** journalistic weblogs written by the public outside the media. Such bloggers may adopt different roles: media commentators, specialised writers, amateur reporters. Media commentary is one of the most popular activities in the journalistic blogosphere. Such blogs, often called watch-blogs, monitor the work of professional media online and offline to highlight under-covered stories, expose errors or bias in reporting, and to criticise poor arguments in editorials and columns. In some citizen weblogs, authors actually take the role of a reporter, even when the publisher him-/herself would not purposely pretend to be substituting for a journalist. In many cases, a personal weblog turns into first-hand reporting of an event that the blogger has accidentally witnessed;
2. **audience blogs:** journalistic weblogs written by the public within the media. Media companies sometimes incorporate public weblogs into their websites as one of a range of actions to promote a more reciprocal relationship with their audiences. Depending on the case, they may be closely linked to the newsroom work, but most are just spaces for personal blogs that have nothing to do with current events and public debate;
3. **journalist blogs:** journalistic weblogs written by journalists outside media institutions. This offers uncontrolled self-publishing space in which journalists can expand on issues and points of view that do not get into the media journalists work for. Weblogs allow complete editorial freedom and enable the journalist to adopt a much more interpretative or even opinionated position in comparison to the standards of mainstream media;
4. **media blogs:** journalistic weblogs written by journalists within media institutions. Some media companies set up weblogs for their journalists inside



their media news websites. In this case, editorial control and stylistic requirements may not be as strict as in the news, but editors usually oversee the weblog entries as they are posted. There are three different approaches to weblog use within the media:

- i. special events coverage. These blogs are born and die with the newsworthiness of the event. Electoral campaigns, major sports events and big-impact breaking news stories are usual issues for these weblogs, but online media are starting to be active even in starting weblogs for unanticipated events such as terrorist attacks;
- ii. opinion columns. This way, media can offer more permanent featured writers online than they can offline;
- iii. news commentary. In these blogs, correspondents or specialised journalists elaborate on the stories they produce for the main outlet, and publish notes and reflections that would not have room in the paper or the broadcast. In some cases, blog writers are hired specifically for the website.

From our point of view, types 1 and 2 represent a new form of media activity. These bloggers question the “ownership” of journalism, traditionally tied to certain organisational forms, whereby journalism is what the media publish: “Exclusive rights to both gatekeeping and dedicated working practices are being taken away from professionalists and unashamedly adopted by weblog publishers” (Domingo, Heinonen, 2008: 12-13).

There is no question that blogs can be highly popular and influential. In terms of Internet traffic figures the highest score was achieved in the United States by *huffingtonpost.com*, a stand-alone political blogs and news site, with 4.5 million visitors in September, 2008. It was followed by *politico.com* with 2.4 million visitors and *drudgereport.com* with 2.1 million. Thus, according to some:

“Blogging has certainly arrived,” said Technorati’s chief executive Richard Jalichandra, via *VentureBeat*. “Blogs are media. That is the difference now. They are as relevant as the *New York Times* or the *Wall Street Journal*. The blogger with 5,000 readers may be just as credible a source of information for those 5,000 people as anyone else”. (quoted after Leggatt, 2008)

Also Kalathil (2008: 11) regards blogging as news media: “Blogs have become much more than just personal observations. News-oriented bloggers can create their own news brand, hiring their own staff, breaking investigative stories, and pushing their own point of view”.<sup>99</sup> In any case, bloggers can also

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99. Kalathil (2008: 11) confirms what has been called a process of the media moving into a “post-objectivity period”: “As technology helps blur the line between straight news reporting and advocacy, there has been a shift toward more ‘opinion’-centric news media, away from more traditional norms of impartiality and objectivity.” The tendency for highly polarised views to be disseminated on the Internet (see, for example, Atton, 2006) has prompted the Dutch public service broadcaster VARA to seek to redress balance by launching a debate website intended to encourage “progressive” views.

influence wider media networks, provide them with material, and potentially set the agenda for them (Morozov, 2008).

This is confirmed by Robert Cox, co-founder and president of the American Media Bloggers Association (MBA): "From a handful of bloggers in 2000, to tens of millions today, bloggers have been granted full press credentials, broken major news stories, and dethroned high-profile politicians and media figures." In the US and elsewhere, bloggers' right to protect their sources and not to disclose unpublished information (a privilege of professional journalists) is recognised in some cases by courts and/or legislation. For example, in November 2008, the Dutch government published a draft law on the protection of sources of journalists, bloggers and "other opinion-makers." The California reporter's shield protects all persons "connected with ... a newspaper, magazines, or other periodical publication," without limitation. In September 2008, a court in Montana also ruled that a newspaper does not have to reveal the identity of those who posted comments on its website, meaning that anonymous web comments are protected like journalists' sources. The judge ruled that the anonymous commenters were protected by the Montana shield law, the Media Confidentiality Act, which protects news organisations, as well as "any person connected with or employed by [a news organisation] for the purpose of gathering, writing, editing, or disseminating news".

Assuming that what we regard as formal criteria distinguishing news media are met, what about the "soft" criteria: purpose, editorial policy and responsibility and awareness of, and at least attempted conformity with, normative, ethical, professional and legal standards?

One example in the area of citizen journalism is AgoraVox which admits to performing editorial functions in the full sense of the word. AgoraVox speaks of its "never-seen-before editorial policy and editorial committee", describing their role thus:

Generally speaking, the objective of the AgoraVox editorial policy is to publish verifiable news related to objective events or facts, as far as possible unpublished ones. We are indeed convinced that each internet user is capable of identifying first unpublished information, accessible with difficulty or purposely hidden ... We are fully conscious that an initiative such as AgoraVox's raises the risks of disinformation, destabilization, manipulation or rumors propagation. For this reason, we believe it is essential to put in place a new type of editorial committee that can act as a "filter". The submitted information is thus moderated to avoid any political or ideological drift. ... Each moderator has to vote individually on the articles based on their relevancy to the news and their originality.

But beyond verifications made by authors and watchmen, AgoraVox glorifies a collective intelligence process to enhance the reliability of the online information. This process is based on readers comments. As soon as a story is published, any reader can freely comment on it, criticize it, complete it, enrich it or denounce it. The author and the committee can interact with the readers to

complete and improve the story ... Sometimes the editorial committee decides to delete a story after comments by readers (especially in case of obvious plagiarism). (AgoraVox, no date)

AgoraVox publishes around 75% of all submitted articles. It specifies the following reasons why it may refuse publication: "copyrighted content; delivers a personal opinion while lacking documentation; not recent / does not cover news; not exclusive; describes misleading or non checkable facts; too short; too long; unclear, imprecise; content may be libellous; features pornographic content; features commercial content; encourages hatred, racism, sexism, homophobia; already submitted item." This is clearly a gatekeeping role.

There is also growing evidence that in some cases, at least, the blogging community is developing forms of training, self-regulation, editorial responsibility and accountability serving precisely this purpose. The American Media Bloggers Association (MBA), for example, believes that blogger access to education, training, legal advisory services and liability insurance is critical to the sustainability of a strong and vibrant citizen media. Hence MBA's efforts to provide legal protection for bloggers.<sup>100</sup>

Similar action has been launched by the American Electronic Frontier Foundation to help bloggers deal with legal liability issues.<sup>101</sup>

Also the ethical obligations of bloggers seem to be accepted by at least a part of the online journalism community itself, as shown by the following introduction to a model Bloggers' Code of Ethics, developed by cyberjournalist.net (2003):

Some bloggers recently have been debating what, if any, ethics the Weblog community should follow. Since not all bloggers are journalists and the Weblog form is more casual, they argue they shouldn't be expected to follow the same ethics codes journalists are. But responsible bloggers should recognize that they are publishing words publicly, and therefore have certain ethical

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100. The MBA has launched a scheme to give bloggers the same access to legal support as traditional media organisations. It includes BlogInsure, a form of liability insurance for bloggers, which will cover parties against defamation claims, allegations of copyright infringement and invasion of privacy "arising out of blogging activities", MBA said in an announcement. The insurance package is available through Media/Professional Insurance and will cover cost and damages incurred from such claims.

101. The American Electronic Frontier Foundation (EFF) has accordingly published a number of documents helping raise the professional and legal competence and protection of bloggers: *The Overview of Legal Liability Issues FAQ*; *The Bloggers' FAQ on Intellectual Property*; *The Bloggers' FAQ on Online Defamation Law*; *The Bloggers' FAQ on Section 230 Protections* (concerning a law that gives the blogger, as a web host, protection against legal claims arising from hosting information written by third parties); *The Bloggers' FAQ on Privacy*; *The Bloggers' FAQ on the Reporter's Privilege*; *The Bloggers' FAQ on Media Access*; *The Bloggers' FAQ on the Freedom of Information Act*. Other EFF documents dealing with legal issues for bloggers concern, among other things, the legal issues bloggers may face blogging about political campaigns; legal issues with workplace blogging, including union organising, protections for political blogging away from the workplace, and whistle-blowing; finally legal issues arising from publishing risqué adult-oriented content, including obscenity law, community standards on the Internet, etc.

obligations to their readers, the people they write about, and society in general ... Integrity is the cornerstone of credibility. Bloggers who adopt this code of principles and these standards of practice not only practice ethical publishing, but convey to their readers that they can be trusted.

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On this basis, we may perhaps conclude that the second element of the new notion of media is citizen journalism or user-generated content, provided it has all the features of a media organisation listed at the outset of this paper, including in particular awareness of, and willingness to abide by normative, ethical, professional and legal standards relevant in the case of media operation.

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*New notion of media (3): media or media-like activities performed by non-media actors*

When user-generated content is not disseminated by professional media, it is distributed by various new intermediaries (providing an example of “neo-intermediation”), that is, Internet service providers, dedicated sites and content aggregators. They may disseminate or facilitate access to media or media-like content. They can become a vehicle for communication by users and non-professional content creators, as in the case of “citizen journalists,” with professional editors and journalists performing the role of gatekeepers and guardians of professional and ethical standards.

The question here is not whether these intermediaries can themselves be classified as media (as defined above), but whether some of the functions they perform can be described as being media-like or editorial in nature. If the intermediaries did indeed perform editorial and regulatory functions vis-à-vis both suppliers and users of content, this would make them mediators and bring their operation closer to that of the media, implying a degree of editorial responsibility and accountability for the content being distributed.

On the face of it, many intermediaries perform no media or editorial functions. Therefore, Article 12 of the EU Electronic Commerce Directive refers to a “mere conduit”, stating that:

Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.

In turn, recital 19 of the Audiovisual Media Services Directive excludes from the definition of media service provider “natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third

parties." Of course, as we have already seen, "editorial responsibility" is used here very narrowly to refer only to selection and organisation of content.

However, in many cases the intermediaries do go beyond the role of a "mere conduit" and do perform a gatekeeping role. A simple example is provided by Reuters which imposes the following "house rules" when it encourages users of its website to post comments: "We moderate all comments and will publish everything that advances the post directly or with relevant tangential; We try not to publish comments that we think are offensive or appear to pass you off as another person, and we will be conservative if comments may be considered libellous information." Such moderation requires editorial judgment based on a number of criteria and may lead to rejection of a comment, depriving its author of a chance to reach an audience, and the audience of access to the contents of the comment. Even on this small scale, this is therefore highly relevant in terms of freedom of expression.

We saw above that AgoraVox applies a fairly elaborate system of editorial policy and editorial process. Other UGC sites are less active and intrusive editorially. Many make it clear that they do not police content or that they do not assume editorial responsibility for the content created. Nevertheless, some still perform certain editorial functions, as shown in Table 11.

**Table 11. Content and conduct provisions in terms of service of UCC sites**

Content regulation and editorial responsibility	Most sites specify that users are solely responsible for the content that they publish or display on the website, or transmit to other members. The sites specify that they have no obligation to modify or remove any inappropriate member content, and no responsibility for the conduct of the member submitting any such content.
	The sites reserve the right to review and delete or remove any member content which does not correspond to defined standards.
	Some sites use age and content ratings or have areas for content which is rated mature.
Community standards	Most sites have community standards on intolerance (derogatory or demeaning language as to race, ethnicity, gender, religion, or sexual orientation), harassment, assault, the disclosure of information of third parties and other users (for example, posting conversations), indecency, etc.
Actions to enforce standards	Sites specify penalties when users infringe community standards. They range from warnings, to suspensions, to banishment from the service. The creation of alternative accounts to circumvent these rules is being tracked.

Source: Wunsch-Vincent, Vickery, 2007.

Procedures used by these sites include:

- pre-production moderation – content submitted by users is not posted until reviewed by an expert or a person controlling for exactness and quality;
- post-production moderation – content submitted by users is accessible by everybody immediately but moderation may opt to review, make changes or delete the content after it being posted;
- peer-based moderation – content submitted by users is available immediately, but can be edited, reviewed or even deleted by certain or all users of the same UCC platform. New governance schemes have also emerged with allow for rating and recommendation (that is, social filtration and accreditation).

Also age limits and warnings can be found in terms of service of UGC sites. Most sites require users either to be 13-14 years old or 18 years old. Some put the bar at 16 years. Some have special sub-sites or parts of virtual worlds which are reserved for teenagers.

One special example of self-regulation and gate-keeping is contracts — Terms of Service (TOS) and Acceptable Use Policies (AUPs) – between Internet Service Providers (ISPs) and users. They introduce a vast array of rules pertaining to content and expression on the Internet.<sup>102</sup> This invests ISPs with a “regulatory” function and give ISP rules a “media law-like effect.” A comparison of US-based vs. non-US-based ISPs shows that non-US-based ISPs provide less detail in the areas of intellectual property rights and privacy, but tend to restrict more areas of content and behaviour that are legal in the USA and to forbid anonymity. An important feature is what Braman and Roberts (2003) call disregard for constitutional standards:

Agreements drafted by ISPs show disregard for constitutional standards regarding restrictions on speech such as the narrow tailoring of problem-driven constraints, establishment of criteria to be met before restrictions can be deemed acceptable, and avoidance of vagueness and overbreadth. The result is creation of a speech environment significantly more restrictive than that developed through two centuries of judicial consideration of the type of communications environment intended by the US Constitution.

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102. Based on an analysis of such contracts used by ISPs around the world in 2002, Braman and Roberts (2003) identify a number of areas covered by these contracts (policies, service limits, identity, liability, privacy, intellectual property, behaviour, security). As far as content is concerned, contracts specify illegal contents (no unlawful content, no defamation/libel/slander, no incitement to violence, no obscenity) and other content restrictions (On non-personal objectionable content: no inappropriate content; use filters; no indecency/pornography; no material violating internet norms; no objectionable content; no posting off-topic (newsgroups); no profanity; On personal abuse: no harmful content; no abuse of others; no contesting crimes against humanity; no hate speech; no flaming (newsgroups); no threat to person/property).

Braman and Roberts (2003) conclude that:

ISPs do not want to be content providers but do want to control all content. This contradiction has not yet received analysis in the courts because liability issues have been treated distinctly from intellectual property issues, but inclusion of the latter in analyses of the former should be expected in coming years. For the moment, however, ISPs have control without liability.<sup>103</sup>

Both self-regulation (Tambini, Leonardi, Marsden, 2008) and co-regulation (Hans Bredow Institut, EMR, 2006) help further with “codifying cyberspace” and establishing rules for expression via the new communication services.

As shown on the example of ISPs, but also on the example of other intermediaries, this is not without dangers to freedom of expression. Rorive (2004) has drawn attention to the problem of “hidden censorship” by Internet search engines, and pointed to the possibility of “private censorship”:

This system of conditional exemption of liability constitutes a considerable economic incentive for private censorship. In practice, it is in the interest of a hosting provider who has been notified of the presence of illegal content to remove this content from its server, whether the content is ultimately illegal or not.

Also Tambini, Leonardi, Marsden (2008: 282) point out that systems of self-regulation and self-regulatory bodies may impose limits upon freedom of expression and that this may amount to the “privatisation of censorship,” potentially involving “a clash between freedom-of-expression rights such as they are laid out in Article 10 of the ECHR, and the limitations on speech imposed by self-regulatory bodies.”

All this suggests that some of the intermediaries certainly may and do perform editorial functions, as one aspect of their activities, potentially with serious consequences for the content of communication and the exercise of freedom of expression, not least because of the lack of legal certainty caused by their manner of their operation.

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On this basis, we may perhaps conclude that the third element of the new notion of media is the activity of the new intermediaries providing access to content, and by the same token access by content providers to the public. In many cases, they perform an editorial gatekeeping function, imposing rules, standards and constraints on what may be said and who may have access to particular content – usually to protect minors and human dignity and to prevent dissemination of illegal or harmful content (O’Connell, 2005). This does not turn the intermediaries into media organisations, but does allow them to perform

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103. Frydman and Rorive (2002) explain that in some cases transatlantic ISPs have been put under pressure to take down racist material because of the enforcement by European courts of domestic law online. This, they say, may potentially lead to massive (and, let us add, uncontrolled) private censorship.

certain media functions. Recognition of this fact may aid efforts to promote rule of law in the new communication services and exercise of human rights, as well as to eliminate violations of human rights in this domain.

## ***II. Emergence of a new regulatory framework for the new media***

In general terms, different types of control and supervision are exercised over the media: of content for political reasons; or for cultural and/or moral reasons and of infrastructures for technical or for economic reasons. Features of the media, and media content, that may be used to justify imposing controls include: more political influence or politically subversive potential;<sup>104</sup> more moral, cultural and emotional impact; more feasibility of applying control; more economic incentive to regulate.

As noted above, the political and legal reaction to new media goes through a cycle: (1) at first, there is no reaction; (2) then there is an attempt to assimilate the new medium under a legal framework developed for older media; (3) this is followed by debates on, and development of, a new legal framework, suited to the new medium; (4) and finally by the enactment of the new framework. As we will see below, we are past stages 1 and 2 in developing the legal reaction to the new media and in the middle of stages 3 and 4.

### ***Elements of the debate***

An example of debates regarding a legal framework for a new medium is provided by the European Parliament's concerns regarding the legal status of blogs. A European Parliament resolution on concentration and pluralism in the media in the European Union (2007/2253(INI)), adopted on September 25, 2008, states in the preamble:

Whereas weblogs are an increasingly common medium for self-expression by media professionals as well as private persons, the status of their authors and publishers, including their legal status, is neither determined nor made clear to the readers of the weblogs, causing uncertainties regarding impartiality, reliability, source protection, applicability of ethical codes and the assignment of liability in the event of lawsuits.<sup>105</sup>

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104. For example, the last sentence of paragraph 1 of Article 10 ECHR "This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises" may perhaps be an indication that "cinema enterprises" were seen at the time when the convention was being adopted as central to politics, and therefore requiring control by state. If so, then "cinema enterprises" have certainly since then been redefined from this point of view as they are not licensed today in democratic societies.

105. It is interesting to note in this context that a recent Guardian poll showed that 46% of Web users in the United Kingdom think a code of conduct should be created to regulate user-generated content on the Internet. The code of conduct, many believe, would prevent users from committing libel, despite being unenforceable through the law. That is an expression of concern with the fact that such content is unregulated and may elude any forms of accountability.



The resolution calls for “an open discussion on all issues relating to the status of weblogs.”<sup>106</sup> The MEPs believe that the growth of commercial media outlets for user-generated content, such as photos and videos, used without paying a fee, raises problems of ethics, right of reply and privacy, and puts journalists and other media professionals under pressure. German Liberal Jorgo Chatzimarkakis, who acted as adviser for the European Parliament’s Economic and Monetary Committee, as it discussed the report and the resolution, said: “Imagine pressure groups, professional interests or any other groups using blogs to pass on their message. Blogs are powerful tools, they can represent an advance form of lobbyism, which in turn can be seen as a threat.” At issue, in particular, are “any blogger[s] representing or expressing more than their personal view.”

As regards online content, we are also seeing that the debate – so far very often proceeding from the view that Internet content should not be regulated in any way – is taking a different turn, not least because it is becoming increasingly obvious that the Internet is successively being taken over and controlled by the traditional forces seeking to control the media, that is, social, political and business interests. Commercial entities, including media companies, have come to play an increasing role in supporting, searching, aggregating, filtering, hosting, and diffusing UGC. This process is known as “monetisation of user-created content” (Wunsch-Vincent, Vickery, 2007: 23). The Internet is becoming increasingly commercialised, as shown by ubiquitous online advertising and other visual reminders of the profits being made in cyberspace. Big business is taking over sites hosting UGC that used to be regarded as an area of free expression, long essentially non-commercial ventures of enthusiasts or start-ups with little or no revenues (see Table 2 in Appendix 1).<sup>107</sup> This process is perhaps best symbolised by the fortunes of Napster, once a free online music file sharing service, helping users bypass the established market for such songs, in violation of copyright. It was shut down by court order, reopened as a copyright-respecting commercial pay service and purchased in September 2008 by Best Buy, the largest specialty retailer of consumer electronics in the United States and Canada.

A very pertinent point as concerns Internet content has been made by Tambini, Leonardi and Marsden (2008: 294):

[T]he idea of a pristine Internet, free from regulation, is a myth, and not a particularly helpful one. Internet communication, like all communication, is a social

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106. Estonian centre-left MEP Marianne Mikko – the report’s author – had originally wanted to call for full clarification of the legal status of weblog authors, disclosure of bloggers’ interests and the voluntary labelling of blogs. This was supported by MEPs across the political spectrum at the committee level, but was ultimately rejected – in favour of much softer language – in the plenary.

107. According to some views, this is a process of “corporate colonization of online attention and the marginalization of critical communication”: large corporate portals and commercial media sites are dominating online attention for news, information and interaction, privileging consumer content and practices while marginalising many voices and critical forms of participation. This situation threatens to limit the Internet’s contribution to the expansion of democratic culture (Dahlberg, 2005).

practice that comes with responsibilities, ethics, norms, disputes and harms ... As the Internet embeds itself further into everyday life, so too will concerns about content and its consequences, and we contend that in Europe, and even in the United States, the illusion that the Internet can constitute a “free” sphere separate from social life will fade...<sup>108</sup> [D]iscussions of regulation need to take on the positive question of what form of policy intervention may be acceptable – even required – if the medium of the Internet is to be more fully free. In our approach to the Internet we need to have a sense that norms, rules and codes are necessary in all human communication.

The point that regulation may make the Internet “more fully free” is well taken, as regulation often serves protection of freedom of expression, rather than imposes restrictions on that freedom. So is that regarding the appropriate and acceptable forms of policy intervention.

The initial approach of many governments and parliaments to the regulation of the Internet and other new media, and its evolution, has been well summed up by Lord Currie, Chairman of OFCOM:

It is an entertaining parlour game to guess how many mentions of the internet there are in the [2003] Communications Act. Answer: zero. But Parliament thought seriously about the issue in the debates leading up to the Act. Its view – I believe the correct one – was that the internet was still so new and its implications so uncertain that a period of legislative forbearance was called for. Ask most legislators today and, where they think about it, they will say that period is coming to an end ... Public policy development on potentially harmful internet content has got off to a good start. The danger of importing old broadcasting style regulation to the internet has been avoided...<sup>109</sup> Ofcom with other bodies and the industry need to develop, and spread awareness of the practical actions, and the tools and technologies – from the use of filtering and kite-marks, to parent’s enforcement of simple rules about internet use – that allow people to navigate the online world and for parents to ensure their children’s safety. (Currie, 2008)

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108. Exactly the same point has been made by the European Internet Coregulation Network (2005), broadly representing the industry itself, in a policy statement on Internet governance submitted to Commissioner Reding: “Internet is a social space which needs regulation in all its aspects according to common social values. Internet cannot evolve in the future if the social dimension of this space is not recognized. Most of the human activities are now transferred on the internet and it implies new responsibilities for all the actors, public and private.” Also Frydman and Rorive (2002) agree that “the heroic idea that cyberspace should remain free from any regulation cannot be seriously sustained.”

109. Nevertheless, British Secretary of State for Culture, Media and Sport, Andy Burnham, said in September 2008: “The time has come for perhaps a different approach to the internet,” he said. “I want to even up that see-saw, even up the regulation [imbalance] between the old and the new.” He said that perhaps the wider industry, and government, had accepted the idea that the internet was “beyond legal reach” and was a “space where governments can’t go.” Burnham said that he would like to “tighten up” online content and services. When a new Minister for Communications, Technology and Broadcasting was appointed in the UK in October 2008, he listed the following among his priorities: “Internet: looking at a range of issues affecting internet users, such as user security and safety and a workable approach to promoting content standards.”

### ***Self-regulation of new media content***

Of course, different industry groups active in electronic media beyond broadcasting already engage in various forms of self-regulation, as shown in Table 12.

**Table 12. Scope and forms of self-regulation according to industry groups**

<b>Industry group</b>	<b>Scope and form of the institutionalisation of self-regulation</b>	<b>Practical examples</b>
Cinema/film/ DVD/video	Few classification organisations which are not governed by the state	Belgian Video Federation (Belgium) Video Standards Council (UK)
Games	Some classification organisations which are not governed by the state	ISFE-PEGI (international)
Online services/ Internet Service Providers, ISPs	Many ISP codes of conduct Many hotlines/NTD systems	ISPAI (Ireland) Meldpunt Kinderporno op Internet (Netherlands)
Online services/ Internet Content Providers, ICPs	Sectoral codes of conduct Rating/filter systems	Health on the Net Code (international) ICRA (international)
Mobile communications	Few classification organisations which are not governed by the state	ICSTIS-IMCB (UK)*
Internet search services	One code of conduct	Selbstkontrolle Suchmaschinen (Self-regulation of search engines) (Germany)

Adapted from Latzer, 2007.

As concerns specifically the Internet, the operation in Europe of organisations such as EuroISPA, INHOPE, INCORE and ICRA testifies to the development of self-regulatory schemes in this area. Table 13 illustrates self-regulatory activities at various stages of the value chain, with the upper row displaying technical measures embedded in the software code and the lower row showing codes of conduct adopted by market players.

**Table 13. Self-regulation and codes in the Internet value chain**

	<b>Content provider</b>	<b>→ISP</b>	<b>→ISP-user</b>	<b>→Search</b>	<b>→Access</b>	<b>→User</b>
<b>Code</b>	Self-labelling of content (RSACi, PICS, ICRA) Trustmarks	ISP filtering (e.g. BT CleanFeed/ Telnor)	Reputational systems	Search-level filtering	Log in/ access restrictions/ reputation management	Browser-level filtering, age verification
<b>Code of conduct</b>	Content standards codes; Privacy codes; Government website guidelines; E-commerce codes	ISP code of conduct (ISPA, Eurolspa code of conduct) privacy codes Hotlines NTD codes	Terms of service	Search engine code of conduct German FSM	Computer misuse codes	Awareness/ literacy

Source: Tambini, Leonardi, Marsden, 2008.

In this context, we should also note a new form of self-regulation, the Global Network Initiative ([www.globalnetworkinitiative.org](http://www.globalnetworkinitiative.org)) launched in October 2008, founded on the internationally recognised laws and standards for human rights on freedom of expression and privacy set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Its founders include, in addition to human rights organisations, academics and the United Nations Special Representative to the Secretary-General on Business and Human Rights (as an observer), a number of leading players in the field, such as Google Inc., the International Business Leaders Forum; Microsoft Corporation and Yahoo! Inc.

The initiative provides guidance to the ICT industry and its stakeholders on how to protect and advance the human rights of freedom of expression and privacy when faced with pressures from governments to take actions that infringe upon these rights. It also seeks to promote the rule of law and the adoption of laws, policies and practices that protect and respect freedom of expression and privacy through collaboration among companies, NGOs, investors and academics. To this end, it adopted Principles on Freedom of Expression and Privacy and has developed Implementation Guidelines, providing also a

framework for collaboration among companies, NGOs, investors and academics. The guidelines are to be regularly reviewed and revised to take into account actual experience, evolving circumstances and stakeholder feedback.

Self-regulation and co-regulation of new media content is encouraged, for example, by the 2006 Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, calling on member states to take the necessary measures to, among other things, ensure the protection of minors and human dignity in all audiovisual and online information services and make the Internet a much more secure medium. In October 2008, the European Parliament approved the European Commission's proposal for a multi-annual community programme on protecting children using the Internet and other communication technologies (extending "Safer Internet" for 2009 to 2013), aiming to improve safety for children surfing the Internet (specifically targeting cyber-bullying and child pornography), promote public awareness and create national centres for reporting illegal online content.

#### ***Statutory regulation or co-regulation of Internet and other new media content***

There is a growing body of binding legislation, or plans to introduce such legislation, at the national and international level concerning forms of regulation and supervision of Internet and other new media content. Obviously, civil and criminal codes are applied to Internet and new media content (see Frydman and Rorive, 2002), but some other examples are:

1. Council of Europe Cybercrime Convention and Additional Protocol;
2. extension of the scope of broadcasting legislation to online audiovisual media services;
3. "war on terror," security;
4. intellectual property, copyright, piracy, illegal file-sharing;
5. consumer protection;
6. protection of minors and human dignity.

A special case in this regard is a bill (Global Online Freedom Act of 2007) submitted to the US House of Representatives, obliging the United States "to promote as a fundamental component of United States foreign policy the right of everyone to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers" and "to use all appropriate instruments of United States influence, including diplomacy, trade policy, and export controls, to support, promote, and strengthen principles, practices,

and values that promote the free flow of information, including through the Internet and other electronic media.”

Under this law, the freedom of electronic information in each foreign country would become a criterion to be taken into consideration in economic co-operation and security assistance, an Office of Global Internet Freedom would be established, and Internet-restricting countries would be designated by the US president each year and would be subject to a number of restrictions.

This has met with a mixed reaction both in the United States itself, and in Europe, where Commissioner Viviane Reding (2009a) has called for self- and co-regulatory measures (like the Global Network Initiative) as a better way of dealing with the challenge than a “hard law” solution.

At the national level, a special example of action on some of these fronts is plans by the Japanese government to develop legislation in three major areas of online communication: web content, mobile phone access and file sharing (Shioyama, 2007).

The planned regulation targets all web content, including online variants of traditional media such as newspaper articles and television broadcasting, while additionally going as far as to cover user-generated content such as blogs and web pages under the vaguely-defined category of “open communication.”

As far as web content is concerned, a point of departure in these plans is the blurring line between “information transmission” and “broadcasting,” a distinction that becomes less and less meaningful as content transfer shifts from the realm of traditional media to that of ubiquitous digital communication (so-called “all over IP”). All online content, with the exception only of private messages used only between specific persons (that is, email, etc.), is to be targeted under the proposed policy, including bulletin board systems, personal blogs and web pages.

Online content judged to be “harmful” according to standards set down by an independent body will be subject to law-enforced removal and/or correction.

As for mobile phone access, the Japanese government has already demanded that mobile carriers NTT Docomo, KDDI, Softbank and Willcom implement filtering on all mobile phones issued to users under the age of 18. The proposed regulation would heavily strengthen earlier policy by making filtering on mobile phones the default setting for minors; only in the case of an explicit request by the user’s parent or guardian could such filtering be turned off by the carrier. According to the new policy proposal, sites would be categorised on two lists, a “blacklist” of sites that would be blocked from mobile access by minors and a “white list” of sites that would not. The categorisation of sites into each list will reportedly be carried out together with carriers through investigations involving each company targeted. The definition of “harmful” content is likely to be very broad indeed. Current optional filtering services offered on NTT Docomo phones

include categories as sweeping as “lifestyles” (gay, lesbian, etc.), “religion,” and “political activity/party”, as well as a category termed “communication” covering web forums, chat rooms, bulletin boards and social networking services.

Finally, as concerns file sharing, the existing law currently bans uploading of copyrighted material onto public websites, while permitting copies for personal use only. New law would ban “illegal” file sharing.

We could also mention the Australian example, where first the broadcasting regulator (Australian Broadcasting Authority) and then the integrated regulator (Australian Communications and Media Authority – ACMA) have been mandated by broadcasting legislation to administer the national regulatory scheme for online content in order to address community concerns about offensive and illegal material on the Internet and mobile phones. ACMA investigates complaints about online content and Internet gambling services; encourages the development and registration of codes of practice (Internet Industries Codes of Practice developed under its supervision cover areas such as Internet content, spam, gambling, privacy and cybercrime); and undertakes a range of supporting activities including research and international liaison. If the content is hosted in, or provided from, Australia and is prohibited, or is likely to be prohibited, ACMA will direct the content service provider to remove or prevent access to the content on their service. If the content is not hosted in, or provided from, Australia and is prohibited, or is likely to be prohibited, ACMA will notify the content to the suppliers of approved filters in accordance with the Internet Industry Association’s Code of Practice. If the content is also sufficiently serious (for example, illegal material such as child pornography), ACMA may refer the material to the appropriate law enforcement agency.

Extension of the scope of broadcasting legislation to online audiovisual media services is taking place following the adoption of the EU’s Audiovisual Media Services Directive and its transposition into domestic law in member states. In consequence, broadcasting regulation will be applied *inter alia* to IP services via broadband connections on ADSL or Internet; mobile phone Internet Protocol streaming; digital broadcasting to mobile phones, IPTV, pay-per-view (linear service); video-on-demand (non-linear service).

Linear television services available via mobile television are licensed by broadcasting regulators in many countries (Broadcast Mobile Convergence Forum, 2008).

As for protection of minors and human dignity, the Protect Our Children Act, adopted in the United States in 2008, creates a strong nationwide network of highly trained law enforcement experts to track down offenders and requires the Department of Justice to develop and implement a National Strategy for Child Exploitation Prevention and Interdiction. The Act authorises \$320.5 million over the next five years for: (i) the National Strategy for Child Exploitation Prevention and Interdiction; (ii) an ICAC grant programme, ensuring that local agencies have the additional resources necessary to create robust cyber units with highly

trained investigators; (iii) increased forensic capacity for child exploitation cases at the Regional Computer Forensic Labs (RCFL); and (iv) enhanced reporting requirements, increasing the legal responsibilities of Internet Service Providers to report any evidence of child exploitation discovered on their network to the National Center for Missing and Exploited Children.

### ***Developing and democratising co-regulation***

According to Palzer (2002), “co-regulation” is normally used as a generic term for co-operative forms of regulation that are designed to achieve public authority objectives. It contains elements of self-regulation as well as of traditional public authority regulation. The co-regulation model is based on a self-regulation framework (in its broadest sense), which is anchored in public authority regulations in one of two ways:

1. the public authority either lays down a legal basis for the self-regulation framework so that it can begin to function;
2. the public authority integrates an existing self-regulation system into a public authority framework.

In line with this, Mandelkern Group on Better Regulation (2001: 17) lists two forms of co-regulation:

- setting of objectives by the regulatory authority and the delegation of the details of implementation. An initial approach involves establishing, by regulation, global objectives, the main implementation mechanisms and methods for monitoring the application of a public policy. At the same time, the intervention of private players is requested in order to define the detailed rules. This method means that regulations can be avoided which are too general or which are too unwieldy to be applied precisely in fields which require adaptability and flexibility;
- regulatory validation of rules stemming from self-regulation. A bottom-to-top approach may also prove effective. If necessary, co-regulation may lead to a non-compulsory application method established by private partners being changed into a mandatory rule by the public authority. Similarly the public authority may penalise companies’ failure to honour their commitments without giving any regulatory force to those commitments.

These two basic types of co-regulation may take many forms, including:

- subcontracting: where the state limits its involvement to setting formal conditions for rule-making, but leaving it up to parties to shape the content;
- concerted action: where the state not only sets the formal, but also the substantive conditions for rule-making by one or more parties;
- incorporation: where existing but non-official norms become part of the legislative order by insertion into statutes (PCMLP, 2004: 11).



Thus, there are different combinations of public authority and private sector elements, as well as of the degree of trust between them. There is scope for developing and democratising this relationship, primarily by promoting a third form of co-regulation, in addition to the ones listed at the outset of this section:

### 3. Joint development of the normative and regulatory framework.

Regulation involves rule-making, implementation and enforcement. The key to understanding co-regulation and measuring the extent of co-operation and trust between state and non-state partners lies in the degree of involvement of both partners in all elements of the process. We could therefore distinguish three basic forms of co-regulation:

- top-down (or state-led) co-regulation: whereby rule-making is done by state authorities and non-state partners are invited to be involved in the process of implementation and enforcement;
- bottom-up (or non-state-led) full co-regulation: whereby rule-making developed by non-state partners (potentially within a general formal framework defined by the state) is then validated and adopted by the state;
- mixed full co-regulation: assigning the two sides leading and supplementary roles in rule-making, for example, with the state providing the general legislative framework while non-state actors are invited to fill in more detailed rules.

Naturally, all the above cases may apply also in co-regulatory co-operation between an international organisation and non-state actors.

In reality, we usually have to do with top-down co-regulation. Thus, according to the Hans Bredow Institut/EMR (2006: 35) study, co-regulation means “combining non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation.”

A detailed list of conditions which must be met if co-operation between state and non-state entities is to be regarded as a true case of co-regulation has been formulated in the Hans Bredow Institut/EMR (2006: 35) study. According to this, the non-state component must fulfil the following conditions:

- it must involve specific organisations, rules or processes;
- these must be created for the purpose of influencing decisions by persons or, in the case of organisations, decisions by or within such entities;
- this activity must be performed – at least partly – by or within the organisations or parts of society whose members are addressees of the (non-state) regulation;
- the entire system must be established to achieve public policy goals targeted at social processes;

- there must be a legal connection between the non-state regulatory system and the state regulation (however, the use of non-state regulation need not necessarily be mentioned in acts of parliament);
- the state must leave discretionary power to a non-state regulatory system;
- the state must use regulatory resources to influence the outcome of the regulatory process (to guarantee the fulfilment of the regulatory goals).

The fact that “a non-state regulatory system links up with state regulation” is explained to mean that “there must be a legal connection between the non-state regulatory system and the state regulation” and that “the state must use regulatory resources to influence the outcome of the regulatory process (to guarantee the fulfilment of the regulatory goals).” What this means in this system is that non-state partners are trusted to perform only some elements of the process of regulation, largely implementation and enforcement, with the national or international regulatory system always retaining backstop powers to intervene, if this is deemed necessary. As a result, co-regulatory schemes apply in a narrow range of cases, mostly to do with protection of minors and advertising regulation (Jakubowicz, 2007).

An alternative view of co-regulation has been presented by Jean-Pierre Teyssier (2007), Chairman of the European Advertising Standards Alliance), who rejected the definition of co-regulation in the EU Interinstitutional Agreement of 2003, as a “mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties” and supported the definition of the draft AMS directive: “a form of regulation based on co-operation between public authorities and self-regulating bodies.” That definition did not, however, make its way to the final text of the directive. Teyssier also called for the autonomy and responsibility of self-regulatory systems and bodies and finally for openness to civil society, stakeholders and consumer organisations.

A truly multi-stakeholder – and indeed a more democratic – approach would seem to require more than an asymmetrical approach and one-sided rule-making. In some cases, it will not be possible to ensure a “legal link” between the official and industry-based regulatory system, nor will the national or international regulatory or standard-setting system always be able to have backstop powers, allowing it to take over, should self-regulation or co-regulation fail. Full co-regulatory co-operation and partnership should be pursued. Further Council of Europe efforts to develop appropriate standards of effective self- and co-regulation are needed (see Appendix 3).

An imperfect example of this approach could be provided by the European Framework for Safer Mobile Use by Younger Teenagers and Children, described as “brokered by the European Commission”, with mobile operators committing themselves to access control mechanisms, to raise awareness and education to the classification of commercial content and to fighting illegal content on mobile community products or on the Internet. Another example is the Social

Networking Task Force, convened by the European Commission in 2008, which in February 2009 issued Safer Social Networking Principles for the EU. The commission acted as a facilitator, held a public consultation and will monitor further progress in this field.

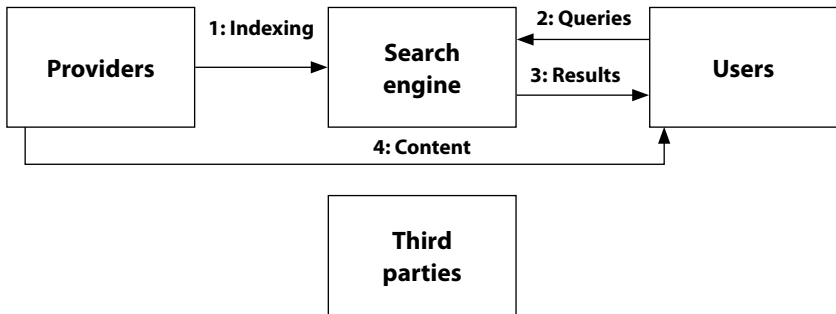
Both documents are an act of self-regulation, inspired and promoted by an international organisation. They could thus be recognised as an act of co-operation between an official body and the industry. What appears to be lacking is integration of this self-regulation system into a public authority framework, that is, formal adoption of these norms and standards by the European Union itself, as only this would make it a case of true full co-regulation.

***Information services with “no place in (media) law”***

Given the importance of the new intermediaries in the dissemination of, and access to, content and information, the role of search engines also merits consideration.

Search engine operations can be understood in terms of the information flows among four principal actors: search engines themselves, their users, information providers and third parties (such as copyright holders and censorious governments) with interests in particular content flows. There are, in turn, four significant information flows: the indexing by which a search engine learns what content providers are making available, user queries to the search engine for information about particular topics, the results returned by the search engine to users and finally the content that providers send to users who have found them through searching (Grimmelmann, 2006).

**Figure 5. The operation of a search engine**



As Machill, Beiler and Zenker (2008) put it, search engines assume a selection and mediation function at the interface between public and individual communication. Their ability to reduce the complexity of the web and extend the horizon of the purely human search in many cases enables certain information to be accessed at all. They therefore perform a function similar to that of the classical gatekeepers.

The authors explain that search engines are not machines in the traditional sense. They can be described as software which produces an index of defined data that is accessible using retrieval methods and utilises a particular presentation mode to display the search results. The contents are stored in compressed form in an index from which the search engines produce a ranked list of search results in response to a user's search query. The relevance criteria represent corporate secrets kept by the search engine companies.

Van Eijk (2006) believes that the search engine is mainly an information service. He lists three forms of manipulation of search results: the search engines themselves (their algorithms; deliberate omission of some information; or manual adjustment of information by employees, based on more detailed criteria); information providers, seeking to achieve higher ranking for their web pages; and finally hackers.

Trying to make search engines provide only "objective" search results is not realistic, says van Eijk, given that the operating model of search engines is determined precisely by manipulation. Excesses of this market failure should nevertheless be examined more closely and be considered for regulation.

According to Schultz (2008), risks posed by Internet search engines include: access to harmful and/or illegal content; discrimination of content; misleading consumers; influence on opinion-makers. There is also the danger of exploitation of protected works and of personal data. Other risks mentioned by Schultz are more systemic: fragmentation of the public sphere, distortion of competition, including transfer of market power to other markets (for example, advertising).

Accordingly, Grimmelmann (2006) notes that in addition to enormous benefits that the use of search engines can bring, they can "also cause enormous harms to particular parties". By controlling the matching process between users and content providers, they create winners and losers within these communities. Both users and providers entrust search engines with valuable information and may be upset at the terms on which search engines reveal that information. Third parties who would prefer that certain content not flow from providers to users also are injured when search engines enable such flows.

The harm may be in terms of the privacy of users or the interests of copyright-holders to content accessed via the search engine. From our point of view, the key issue is access to, and quality of, information retrieved with the use of the search engine, which should provide what is sometimes called "unbiased results" of search engine use.

All this has considerable implications for the media and the right of access to information.

Search engines are universally used by journalists as a preliminary research instrument, though classical journalistic research methods have not declined in importance to the extent feared by critics. The Internet appears to supplement rather

than displace other research sources. Nevertheless, a number of risks are attached to such use of search engines by journalists, as Machill, Beiler and Zenker (2008) point out, especially that of reality being distorted: because of the quality of information available on the Internet, or because of the highly selective nature of the ranking and updating algorithms the search engines employ. Then, there is the risk of dependence on a single search engine: the “Google-isation of research”. Given also that basically only already published information is adopted, an entirely new dimension of journalistic self-referentiality may result.

However, as previously mentioned, search engines not only impact on journalism indirectly as a research instrument, but also assume journalistic functions themselves, as shown by Google News and the MSN Newsbot. These are automated news portals which automatically assign reports found on the Internet to topics and arrange them on a page which bears a strong similarity to an online journalistic offering. With these offerings, search engines venture into an area previously the preserve of traditional journalism.

The selection of sources is one of the most critical aspects of the news search, since it determines the offerings from which news is conveyed. In the case of Google News, for example, this is entirely up to the providers and is a non-transparent process.<sup>110</sup> When selecting sources, the search engine operators must also decide whether non-traditional offers, such as weblogs, are to be included. The inclusion of press releases is problematic because the dividing line between editorial contents and PR is blurred. Google News has encountered criticism for precisely this reason. The concentration of the news on only a few sources is also a problem associated with news search engines. For example, a 2005 study involving the Altavista news and Paperball showed that 75% of the news originated from only 10 different offerings. The same applied to 38% of the items featuring in Google News. A further unanswered question is the degree of similarity between the selection and ranking processes performed by news search engines in comparison with editorial journalistic offerings.

Even more serious risks are involved in situations when a search engine might consciously bias its results by favouring one provider or viewpoint over another. In China, major search engines remove from their indices content disfavoured by the government, such as information on the banned Falun Gong movement.

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110. Nevertheless, as noted by Dahlberg (2005: 165-6), “the selection and ranking of news stories for any particular event biases the big media. The 4,500 sources, though numerous, are dominated by the so-called authoritative Western, commercial media. Most independent online media channels and Web logs are not included. Furthermore, although the details of the algorithm are corporate secrets, a number of the main (relevancy) criteria for the selection and ranking of stories are well known. Three of the criteria are the credibility of the source, how recently stories are published on the Web, and how widely linked and reproduced stories are. These criteria again privilege the big, corporate media, which enjoy their codification as so-called quality and thus trusted news, have the resources to continually update their reports, and are extensively referred to online, given (and subsequently reinforcing) their trusted news status. So whereas a few non-Western media sources and a few noncommercial news sites are included, it is the dominant commercial media reports that are constantly ranked highest.”

The concern is commercial as well as political: some have claimed that search engines systematically favour their own advertisers or providers corporately affiliated with them.

Technical design features of search engines can also introduce unconscious structural biases in their coverage and ranking of content. Studies of relative traffic and links to websites have also caused some to discern a “Googlearchy”, in which the most popular content receives more attention from users and therefore becomes even more popular, effectively preventing new providers from entering because they can never hope to catch up with established content in this vicious circle.

Those who are concerned about systematic biases have also proposed various forms of forced ranking or inclusions. One proposal would require search engines to randomly intermix new content that has not yet had the time to establish itself with older and already popular content. Others would require search engines to show users more diverse content to break down their biases towards the familiar and towards their own viewpoint. There is a strong counter-argument, however, that regulators would be grossly incompetent (and even more biased) at the task of dictating search results in general, a claim that would place a significant upper limit on the ambition of any anti-bias proposal.

Nevertheless, there is a clear need for a media policy debate on the subject of search engines. On the one hand, this is because of the high degree of concentration in the search engine market. The three US search-engine operators, Google, Yahoo and MSN, enjoy a global oligopoly. This is associated with considerable market power and the potential risk of abuse. The concentration in the search engine market is in fact even more serious since numerous takeovers have occurred in recent years and the search engines are additionally linked with each other via supply contracts.

This market power results in considerable social responsibility on the part of the search-engine operators which – according to Machill, Beiler and Zenker (2008) – cannot be left to the free play of market forces. To date, however, the concentration of the search engines has not been regulated either in their home market or in Europe, in spite of the fact that, in the case of other electronic media, an overall concentration to the aforementioned extent and a market dominance such as that enjoyed by Google would not be permissible in the US or in Europe. There are no rules for the search engine market that would correspond to limits on media concentrations in force in various countries. Thought must therefore be given to extending the system of control of market power and the ability to influence opinion to cover the area relating to search engines. Machill, Beiler and Zenker (2008) point out that measures might include installing advisory councils comprising socially relevant groups that are, for example, entrusted with the task of ensuring that discrimination against content providers in terms of their access to the search engine does not occur. Flanking measures would also include a duty on the part of search engines to publicly justify their corporate and journalistic activity in regular reports.

Secondly, the need for a media policy debate on search engines results from content-related problems. In addition to that, legislation and the activity of the regulatory authorities are concerned with aspects relating to the protection of minors, the liability of search engines in the case of copyright violations, and consumer protection.

Some approaches concerning content-related aspects do already exist. However, given that, as part of the Internet, search engines operate globally, their legal obligations are difficult to enforce in countries where they do not maintain any infrastructure. Hence the importance of self- and co-regulation. A co-regulatory model has developed in Germany, as shown in Tables 12 and 13.<sup>111</sup> Media regulation of search engines must also concern itself with copyright-related aspects.

Nevertheless, regulatory structures for search engines have so far only developed in connection with individual aspects and only at national level.

According to Grimmelmann (2006), in order to achieve both the provision, and the use, of “neutral” search engines, some form of governmental intervention – to be derived from a duty of care as yet to be fleshed out within the framework of the information society – will be unavoidable. This could lead to the support of initiatives that aim to provide independent search engines. In view of the fact that these forms of government intervention would be within the domain of information law and concern freedom of expression, caution is advised in outlining possible government policies.

The problem, however, is – as van Eijk (2006) points out – that it is difficult to place search engines squarely in the Article 10 framework, given their dual telecom and information-related nature: “the search engine ... concerns issues that are considered to fall within telecommunications law and partly – if not very much so – issues to do with content”, so it operates in a “a legal vacuum ... [and] does not have a place in [media] law” (van Eijk, 2006: 7). This is confirmed by Valcke (2008) on the basis of her examination of the EU regulatory framework, including the Audiovisual Media Services Directive. As noted by van Hoboken (2008), the matter should perhaps be approached primarily in terms of Article 19 of the Universal Declaration of Human Rights and of the International

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111. After the entry into force of the State Treaty on the Protection of Minors from Harmful Media Contents in 2003, a law which also provided for systems of voluntary self-control in the case of the Internet, the most important search engine operators with German offerings (for example, Google, Yahoo, MSN and Lycos) agreed to self-control within the umbrella association for the “voluntary self-control of multimedia service providers” (FSM). In December 2004, they agreed on a code of conduct which regulates Internet pages that are harmful to minors or clearly illegal in Germany, such as, for example, those that incite hatred and violence against segments of the population, deny the reality of Auschwitz or contain child pornography. Measures include the exclusion of the relevant pages or the employment of family filters. The FSM complaint centre must be contacted in the case of complaint. Sanctions are available, depending on the seriousness of the violation. In addition, the search engine operators have committed themselves to labelling commercial search results in an appropriate manner and to exercising restraint in the recording and utilisation of user data.

Covenant on Civil and Political Rights, which contain an explicit reference to the “right to seek information and ideas” (whereas the European Convention on Human Rights does not refer to such a right directly).

### ***III. Council of Europe standards and the new media: possible lines of action***

Article 10 of ECHR guarantees freedom of expression and information, but also states in paragraph 2 that the exercise of these freedoms carries with it duties and responsibilities and may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. A number of reasons are given for subordinating the mass media to forms of control: pervasiveness, invasiveness, publicness and influence of mass communications (Verhulst, 2002); or special impact on the formation of opinion; spread (multiplication) effect; suggestive power; immediacy (Grunwald, 2003). These may not apply fully to new communication services, so the rationale for legitimate public policy intervention into these services, where appropriate and needed, must be developed.

The Council of Europe is a standard-setting organisation. As has already been stated, the Committee of Ministers has in recent years been revising and updating its standard-setting documents which originally applied to “traditional” mass media alone. In Declaration of the Committee of Ministers on Human Rights and the Rule of Law in the Information Society (CM(2005)56 final), the Council of Europe undertook to take a number of steps to continue this work. The results up until now are presented in Appendix 2.

Though the record so far is encouraging and valuable, more remains to be done. Naturally, the point of departure in considering standards regarding freedom of expression and information in new communication services must be the 2003 Declaration of the Committee of Ministers on Freedom of Communication on the Internet, which called for reaffirming the principle of the freedom of expression and the free circulation of information on the Internet, while at the same time pointing to the need to balance freedom of expression and information with other legitimate rights and interests, in accordance with Article 10, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

As the above analysis suggests, there are new sources of media content, and new forms of media or media-like activity on new communication services, that remain unexplored, or insufficiently explored, in terms of protection of human rights, including particularly freedom of expression and information.

Five main lines of action suggest themselves:

1. in-depth analysis of how new forms of media affect democracy, democratic processes and institutions, and the engagement of citizens in democracy and governance, in order to develop or modify policy serving the preservation and enhancement of democracy in the Information Age (see Buchsbaum, 2008; Frissen, 2008; Gross, 2008);



2. continued full analysis of how human rights standards apply to new media and other media-like content providers on the new communication services and of the need, if any, to adapt or develop these standards, or take other measures, to protect freedom of expression and information and ensure balance with other legitimate rights and interests. Human Rights Guidelines for Online Games Providers, developed by the Council of Europe in co-operation with the Interactive Software Federation of Europe are one example, but they are an example of co-regulation, projecting existing standards onto a new area, rather than new formal standard-setting, responding to specific new challenges, on the part of the Council of Europe itself. Human rights instruments may in some cases need to be “translated” into information society terminology, in order to specify the precise requirements that need to be met in order for some rights to be safeguarded in cyberspace,<sup>112</sup> though the danger of technology-specific standards which may with time become outdated should be avoided. In any case, more attention should be paid for example to new forms of online journalism;
3. full analysis of how new intermediaries and other stakeholders who may perform media-like activities as part of their operation (ISPs, search engines, access mechanisms), affect freedom of expression and information. This should facilitate consideration of the need, if any, to adapt or develop human standards, or take other measures, to protect freedom of expression and information and ensure balance with other legitimate rights and interests in this regard. Again, Human Rights Guidelines for Internet Service Providers, developed by the Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA)<sup>113</sup> are an important start, but this should be backed up by more formal standard-setting. We have shown that ISPs perform a crucial gatekeeping role, sometimes in possible violation of constitutional standards, and this requires an adequate standard-setting response, especially as the ISPs may be the only actors in communication in cyberspace under the jurisdiction of the particular country with effective control over the flow of content that could be held accountable or liable for violation of the law or human rights standards;

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112. One example of this approach is the APC Internet Rights Charter which seeks to render rights enshrined in the Universal Declaration of Human Rights in technological terms. For example, Article 27 (“Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”) is transformed in the Charter into the following “rights”: “The right to free and open source software; The right to open technological standards; The right to share content; The right to benefit from convergence and multi-media content.”

113. In this case, unlike in that of the European Framework for Safer Mobile Use by Younger Teenagers and Children and Safer Social Networking Principles for the EU, the guidelines, developed by an international organisation in co-operation with an industry association, were formally adopted by the organisation, but the role of the public authority framework appears to have been predominant, and that of the industry association subsidiary, thus again falling somewhat short of full and equal co-regulation.

4. consideration of which policy goals and objectives can be achieved through self- and co-regulation, and which go beyond the capacity of market players to regulate or co-regulate themselves and therefore require traditional regulation;<sup>114</sup>
5. continued analysis of media self-regulation and co-regulation systems and the development of standard-setting documents, enabling these systems to meet the needs of the information society.

## Appendix 1

### Additional tables

**Table 1. American technology users**

	<b>Group name</b>	<b>Median age</b>	<b>% of adult population</b>	<b>Description</b>
Elite tech users (31% of American adults)	Omnivores	28	8	Have most information gadgets and services which they use to participate in cyberspace and express themselves online; web 2.0 activities: blogs, own web pages
	Connectors	38	7	Use cellphones and online services to connect to people and manage digital content, work with community groups and pursue hobbies
	Lacklustre veterans	40	8	Frequent use of Internet, less avid about cellphones; not thrilled with ICT-enabled connectivity
	Productivity enhancers	40	8	Strongly positive views about how technology lets them keep up with others, do their jobs, learn new things

114. According to Schultz (2008), the German example of self-regulation by search engines shows that, in the field of protection of minors, co- and self-regulation could function. The same goes for the problems of discrimination of content and misleading consumers. Voluntary self-regulation of search engine providers in Germany also addresses some of the issues that concern the transparency of the selection process (not of the algorithm as such). Regarding the risk that search engines might play a role in exploiting protected (audiovisual) works or personal data, there also seems to be at least some leeway for co-regulation. However, when it comes to public policy goals, like controlling the influence of public opinion making, and the fragmentation of the public sphere, which might be aggravated by search engines, there is no incentive for search engine providers to co-operate. Moreover, the distortion of competition and the transfer of market powers is obviously not a field in which it could be expected that service providers would offer their co-operation voluntarily. In these fields, if any regulation is called for, it would be traditional state regulation that would seem to be necessary.

Middle-of-the-road tech users (20%)	Mobile centrics	32	10	Use cellphones and the Internet, but not often; like how ICTs connect them to others
	Connected but hassled	46	10	Invested into a lot of technology, but find connectivity intrusive and information a burden
Few tech assets (49%)	Inexperienced experimenters	50	8	Occasionally take advantage of interactivity, but with more experience might do more with ICTs
	Light but satisfied	50	15	Have some technology but it does not play a central role in their daily lives
	Indifferents	47	11	May have cellphones or online access, but use ICTs only intermittently
	Off the network	-	15	Older adults content with old media, neither cellphones nor Internet connectivity

Source: Pew Internet & American Life Project April 2006 Survey.

As can be seen, only 15% of the adult American population, who also happen to be relatively the youngest of all the groups, are “omnivores” and “connectors,” most likely to become one-to-many communicators and engage in many-to-many communication.

**Table 2. Acquisition of UGC platforms by media corporations**

Date	Acquirer	Acquired	Type	Price in USD millions
2005	News Corp	MySpace	Social networking	580
2005	Viacom/MTV	iFilm	Video	49
2006	Sony	Grouper	Video	65
2006	Viacom/MTV	Atom Films	Games, films, animations	200
2006	Yahoo	Jumpcut	Video editing	Undisclosed
2006	Viacom/MTV	Quizilla.com	Texts, quizzes, images	Undisclosed
2006	Google	YouTube	Video	1580
2006	Google	Jotspot	Wiki	Undisclosed

Source: Wunsch-Vincent, Vickery, 2007.

## **Appendix 2**

Council of Europe legally-binding and standard-setting documents concerning protection of human rights in the information society (\* denotes a document concerning freedom of expression standards).

1. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ETS No. 108)
2. Convention on Cybercrime
3. Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems
4. Human Rights Guidelines for Internet Service Providers\*
5. Human Rights Guidelines for Online Games Providers\*
6. Council of Europe Guidelines for the Co-operation Between Law Enforcement Authorities and ISPs Against Cybercrime (2008)
7. Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters\*
8. Declaration on Protecting the Dignity, Security and Privacy of Children on the Internet\*
9. Declaration on the Allocation and Management of the Digital Dividend and the Public Interest\*
10. Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet\*
11. Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns\*
12. Recommendation CM/Rec(2007)11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment\*
13. Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society\*
14. Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content\*
15. Council of Europe Resolution ResAP(2007)3 of the Committee of Ministers on achieving full participation through universal design
16. Recommendation Rec(2006)12 of the Committee of Ministers to member states on empowering children in the new information and communications environment\*

17. Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society (CM(2005)56 final)\*
18. Recommendation Rec(2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment\*
19. Council of Europe Rec(2004)11 of the Committee of Ministers on legal, operational and technical standards for e-voting
20. Recommendation Rec(2004)15 on electronic governance (“e-governance”).
21. Declaration on freedom of communication on the Internet\*
22. Recommendation No. R(2003)9 on measures to promote the democratic and social contribution of digital broadcasting\*
23. Recommendation No. R(2001)8 on self-regulation concerning cyber content\*
24. Recommendation No. R(2001)7 on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment
25. Council of Europe Resolution ResAP(2001)3 towards full citizenship of persons with disabilities through inclusive new technologies
26. Declaration on a European policy for new information technologies\*
27. Recommendation No. R(99)14 on universal community service concerning new communication and information services\*
28. Recommendation No. R(92)19 on video games with a racist content\*
29. Recommendation No. R(92)15 concerning teaching, research and training in the field of law and information technology\*
30. Recommendation No. R(89)7 concerning principles on the distribution of videograms having a violent, brutal or pornographic content\*

### **Appendix 3**

#### *Recommendations regarding self- and co-regulatory schemes*

In their book *Codifying Cyberspace. Communications self-regulation in the age of Internet convergence*, Tambini, Leonardi and Marsden (2008) formulate recommendations which are relevant in the context of the foregoing remarks on self- and co-regulation. Below follows a selection of those recommendations, as arranged by the author of this paper.

#### *General*

1. The European Commission, Council of Europe, and OSCE should develop and publish clear benchmarks for acceptable levels of transparency,

accountability and due process and appeal, particularly with regard to communications regulation that may impact upon freedom of expression.

2. Self-regulatory institutions should follow the guidelines for transparency and access to information that are followed by public and government bodies according to international best practice. At the very least, self-regulators should provide summaries of complaints by clause of code of conduct, numbers of adjudications and findings of adjudications on their website. Failure to conform to these baseline standards of transparency should be viewed as a failure of self-regulation.

#### *Multi-stakeholder participation in co-regulation*

1. If co-regulation is to operate successfully, it is essential that Internet Regulatory Authorities (IRAs) or ministries ensure that a continual programme of technical and regulatory education be provided to consumer groups for their effective participation and trust in co-regulatory fora.
2. Industry professionals should constitute a minority on boards of content self-regulatory bodies. Measures should be adopted to ensure that bodies that are 100% funded by their industry are not captured by it. These measures could include: forced tenure for board members, dismantling separate "funding boards" (who may attempt to hold regulatory boards to ransom), and replacing them with a compulsory levy on industry participants, as currently applies to premium telephony in, for instance, the United Kingdom. This transparent and guaranteed funding then permits industry participants to play a much greater expert role in advising the regulator, with less conflict of interest.

#### *Internet co-regulation*

1. Technical enthusiasts or global user communities without real self-interest cannot achieve the co-ordination that is necessary. Future studies of filters and hotlines should continue to focus not only on the technical capabilities of filtering technology or police co-operation, but on the skills of users, parents, children and others and awareness and ease-of-use of these technologies. Moreover, end-user software, for instance filters and search engines, raise significant problems for freedom of expression. For instance, popular search engines may have rules for search that prioritise content inappropriately for specific cultures: by language, content type or software format.
2. It is essential that studies of filters be instituted that examine the freedom of speech implications of commercial ranking of sites, pages, content types and languages. ISP or portal judgements of speech freedoms must be subjected to national law as well as international standards of freedom of speech (for example, standards set out in regional and international human rights agreements).
3. Co-regulatory practice needs to take account of rapidly developing technologies and content types in (a) broadband and (b) mobile Internet networks.

*Co-regulation: resource audit role of Independent Regulatory Authorities (IRAs)*

1. Industry must take an active part in co-regulatory initiatives. Whereas large multinational corporations (such as Microsoft, AOL and ISP subsidiaries of national telcos) and voluntary actors (typically from research or educational backgrounds) are active participants, proactive measures need to be taken to fully engage with user groups and smaller for-profit content and access providers.
2. IRAs should convene a co-regulatory forum on a quarterly basis located at their offices, with minutes and participants published on the IRA website. This will introduce much-needed transparency into the co-regulatory process, to ensure all commercial operators take content co-regulation seriously. Effective co-regulatory schemes will find this no extra burden, but indeed a stimulus for new members and educational function for the consumer.
3. Accrediting co-regulatory codes of conduct and behaviour can only be carried out under the auspices of IRAs, who have the regulatory resource, stakeholder participation and competition law exclusion to effectively institute a voluntary kite-marking scheme. IRAs may choose to subcontract the scheme's functioning to a third party.
4. IRA audit of self-regulatory activity, incorporating assessment of market structure and interests in self-regulation and an assessment of impact on fundamental rights, must take place within a dynamic and pragmatic framework which encourages rather than discourages self-regulatory activity where it is appropriate. We also recommend a "national resource audit of ISP and content sectors" – to answer essential questions of effective and sustainable ISP self-regulation:
  - Who is engaged in the notice and take-down regime?
  - What is the dedicated legal resource in each ISP?
  - Are the crucial code-writing and adjudication functions sufficiently independent from industry?
  - Who performs the freedom of expression function in each ISP?
  - Does the self-regulatory industry scheme, as well as individual ISPs, have sufficient resource "ring-fenced" away from industry participant control, to operate efficiently, transparently and fairly?

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## **Draft recommendation of the Committee of Ministers to member states on a new notion of media**

*The first draft of a possible recommendation commissioned from the author by the Committee of Experts on New Media (MC-NM). After revision by the MC-NM it may be submitted to the Steering Committee on the Media and New Communication Services and subsequently, potentially after further revision, to the Committee of Ministers for adoption.*

1. In the resolution “Towards a new notion of media” adopted at the first Council of Europe Conference of Ministers responsible for Media and New Communication Services (28 and 29 May 2009, Reykjavik, Iceland), the Ministers noted that convergence and digitalisation are reshaping the traditional mass media and are instrumental in the emergence of many new communication services, addressing the same audience and offering a range of similar types of content. The Ministers called for an examination of whether our understanding of media and mass communication services remains valid in the new information and communications environment and for the establishment of criteria for distinguishing media or media-like services from other forms of mass communication.
2. The term “mass media” has traditionally covered, in a narrower sense, the news media (press, radio, television). In this sense, it continues to be used to refer to professional news media organisations that create and/or package, in an editorial process, information and content capable of influencing public opinion for which they take full editorial responsibility, and periodically disseminate it for reception by the general public with the use of technologies specific to each medium. Their underlying objectives are to inform, educate and/or entertain; to animate the public debate and set its agenda; to promote specific views or values; to generate an income; or, most frequently, a combination of the above. These media enable the public to form opinions on matters of public concern and to follow and participate in the public debate. They also facilitate public scrutiny of politicians and civil servants. They are therefore essential for the exercise of human rights, in particular, freedom of expression, including access to information, and for the operation of democracy through popular participation in political, social, cultural and economic life. If misused, the media’s impact can be damaging.
3. More broadly, the term “mass media” also refers to films, books and recorded music. They often serve to convey works of artistic or cultural value and are primarily the object of cultural policy.



4. Social change has brought significant changes to the mass communication landscape. Many more people than in the past have the will and ability to engage in public communication. Artists, creators, citizen journalists and others can now self-publish, including via electronic communications networks. This enables new communicators who adopt the purposes and underlying aims of media increasingly to complement or sometimes substitute for traditional media, especially in the news media field. Such media-like activities may extend and enrich the public sphere and help the democratic process and participation by enhancing the public's freedom of expression and information and enabling many more voices to join the public debate. However, quality and respect for professional standards are not always guaranteed.
5. Another force of change challenging the established notion of media is technological development. Media formats and content are evolving due to the new ways in which information is gathered and content is created, selected, distributed and received. Traditional mass media are being transformed into digital, convergent media. They combine all levels and patterns of social communication and all modes of content delivery. They can incorporate all forms of media existing so far and potentially may over time assimilate them into a variety of media forms existing alongside one another on broadband networks. Traditional media also use new technologies to branch out into new forms of content creation and delivery. New media and media-like services are emerging on old and new platforms, often provided by new communicators from outside the established media. A new interactive relationship with the public has emerged: users can control the process of communication, interact with the medium and contribute content to it.
6. New communication services differ from traditional media in that they are often provided by unprofessional communicators, operating in non-institutional or new institutional settings. They may also be delivered on new platforms (usually via electronic communications networks) that have not been used for similar purposes by traditional media. Some such activities display features or perform selected key functions associated with the media, such as addressing the general public; devoting content to matters of public debate; seeking to influence public opinion; and being published periodically. This may set them apart from personal communication or self-expression via the new technologies and turn them into media or media-like communication services.
7. Policy and regulatory frameworks designed for application to traditional mass media are proving inadequate and lack full legal certainty if and when applied to new media or media-like communication services. Distinctions between different categories of actors, such as user, content creator or platform operator, and between telecommunications and media, or media-like services are blurring. There is no clarity with regard to new communication services regarding expectations of impartiality, reliability, source protection, applicability of ethical codes and the assignment of responsibility in the event of lawsuits.

8. A new notion of media is thus needed to interpret rapid change in the media landscape and to provide a basis for developing new policy and regulatory frameworks. It should be technology-neutral and acknowledge that many different actors can take up media functions in many different institutional and non-institutional settings and that content can be delivered in different forms on different platforms. At the centre of such a new notion should be media functions (understood as the media's purpose and underlying aim) and features of their content, rather than categories of media actors, their institutional forms or the delivery platforms used by them.
9. The following definition reflects this new notion of media and can be applied, for policy and regulatory purposes, both to traditional and new forms of media: "Mass media are media organisations (regardless of their size, professional and economic status) that conduct regular communication activity, in a potentially interactive relationship with the users, by producing and/or assembling, in an editorial process and with respect for legal and ethical norms, content serving to inform, educate and/or entertain (and – especially in the case of the news media – to influence public opinion), assume full editorial responsibility for it and arrange for its periodic dissemination to the general public via appropriate delivery and distribution platforms".
10. The Council of Europe has developed a large body of media freedom standards that seek to protect the traditional professional media from interference, in compliance with Article 10 of the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights. They also set out the media's duties and responsibilities which equally stem from Article 10. These standards take into account the economic and technological operation of media as well as their influence on the public and their impact on political, cultural and economic processes. They aim to ensure pluralism, diversity, editorial independence of the media and the protection of the rights of individuals, such as the right to privacy. Media financed by the public and tasked with acting in the public interest, such as public service media, should also have specific obligations and the pre-requisites needed to implement the public service remit.
11. Journalists' unions and associations and other self-regulatory systems have developed ethical codes of conduct that guide the way they work. Journalists are bound by professional, values, standards and responsibilities – the need to be truthful, to be independent and to be accountable to the public. Many unions and associations have developed training and guidance for their members, as well as systems of enforcing compliance with professional and ethical standards.
12. In addition to promoting and, where appropriate, supporting the development of new forms of public debate and social communication, the Council of Europe and its member states now should develop policy and regulatory frameworks, prominently including self- and co-regulation that can, as necessary and appropriate, be applied to new communication services of a media

or media-like nature. Given that they may meet the criteria laid down in paragraph 9 to different degrees, a way could be sought to develop a graduated approach and give some of them outright media status, while classifying others as media-like activities. This should help promote their development, offer them a level of protection in the performance of their functions, and enhance their quality, responsibility and accountability. Council of Europe standards remain relevant in the new media landscape and should be retained and applied in ways that take account of the social, cultural, market and technological realities of the media landscape. There should be a common understanding among all the stake holders of the way in which Council of Europe standards on media freedom apply to these media-like activities so as to ensure their independence and protect human rights.

13. Given the multitude of different media actors in the new media landscape, many of whom are not organised in a (traditional) media business or organisation, ways have to be found to:

- identify and recognise these actors as media actors (either collectively with regard to some new types of media or media-like activities, or on a case-by-case basis);
- ensure they are made aware of their freedoms, privileges and responsibilities and extend existing, or develop new policy and graduated regulatory, self- and co-regulatory frameworks for them, adjusted to what is required to promote them and offer them necessary protection, as well as to secure their observance of the law and professional and ethical standards. This should take the form of encouraging the development of effective, independent, transparent and accountable self- or co-regulatory mechanisms;
- encourage new media actors to undertake training in professional media standards.

14. The Committee of Ministers agrees on the new notion of media as set out above and recommends that member states:

- use this new notion of media as a basis for their media policy;
- use the guidance laid out in the appendix for the purpose of identifying new media or media-like actors and of assessing the extent and nature of freedoms, privileges or responsibilities which should be attributed to them;
- be attentive to the requirements of media pluralism and possible related positive obligations, as well as the role of public service media in this connection;
- make media actors, as identified in accordance with the new notion of media, aware of their freedoms, privileges and responsibilities and encourage and assist them, if necessary, in the setting up of self- or co-regulatory mechanisms, following the broad principles on self regulation in the new media environment.

## **Appendix**

### ***Toolkit for identifying new communication services and actors of media or media-like nature***

#### *1. Selected components of the notion of media. Some preliminary remarks*

Traditionally, different definitions of “the media” placed emphasis on some, or all, of their different dimensions:

- material, relating to the prerequisites needed for an act of communication to take place, that is, the physical or other infrastructure that mediates in the process of transmitting or distributing the message or content;
- organisational, referring to the “media organisation” that produces and/or assembles the content, involving also the editorial processes required for preparation of content to be distributed to a mass audience;
- functional, referring to the tasks and functions of the media, such as information, education and entertainment, or any combination of them, as well as influencing public opinion (especially in the case of the news media) and availability to all potential receivers or at least significant parts of the public.

For a long time, definitions referring primarily to the material dimension, that is, to the technology specific to a particular medium, were regarded as sufficient and satisfactory. Familiarity with the established media led to the other dimensions being taken for granted or regarded as self-evident.

The reason why the traditional approach to defining “the media” is no longer pertinent is that social and technological change are to some extent de-institutionalising and have largely “dematerialised” media content.

As far as social factors are concerned, many more people than in the past have the desire, communication competence and technical means to engage in the creation and distribution of content to a broad audience. They can do so simply as individuals acting as media organisations, without any institutional background. Untypical organisational forms have also been created to develop and offer citizen journalism, for example. Moreover, many users seek an interactive relationship with media organisations.

As for technological change, the main features of fully developed convergent digital communication include: multimedia communication; non-linear, on-demand delivery of content; interactivity; asynchronous communication; individualisation/personalisation (customisation); portability of receivers and mobile reception; disintermediation (elimination of intermediaries, for example, media organisations, as anyone can offer information and other content to be directly accessed by users and receivers); and “neo-intermediation” (emergence of new intermediaries, especially on the Internet, capable of

offering new services or aggregating and packaging content in new ways). In addition, a variety of tele-services and other information society services have emerged that do not qualify as so-called media services.

Digitalisation has “dematerialised” media content in the sense that it can now be separated from its physical form (roll of film, book, tape, etc.), as well as from the technology traditionally used to deliver it to the public (the same content can now be delivered via different platforms; many different services can be provided on a single platform or device; and any given service can be received on different platforms or devices). This content can now be provided in many new ways and formats.

Thanks to this, also traditional professional media organisations are able to develop new forms for content packaging and delivery.

We may say, in general, that while “hard” technological criteria have lost much of their importance in defining “the media”, some institutional criteria (editorial process and responsibility, respect for legal, ethical and professional standards) retain their significance, and “soft” functional criteria are decisive in this respect.

These are some of the reasons why a new notion of media is necessary. Given the fact that new media and media-like communication services are accessible either separately from, or through the intermediary of, professional media outlets, and that more and more such services are created by professional media and journalists themselves, the definition and its application should, as far as possible, create a level playing field for all such cases.

To separate media and media-like activities from personal communication and from telecommunication and non-media information services, resort must be made to evidence showing that the criteria laid out in the new definition of media provided in paragraph 9 of the above recommendation are satisfied to a degree that qualifies a particular form of communication as a mass medium or a media-like activity.

Consideration of the idea of graduated regulatory systems is proposed here to make possible adjustment of the level and form of any regulation to what is really necessary and justified in a particular case.

## *2. A new notion of media*

Below, particular elements of the new notion of media are discussed (usually in the order in which they appear in the definition) to assist with the identification and assessment of evidence showing whether a particular form of communication qualifies as a medium. The decisive criterion is not superficial “similarity” to traditional media, but functions, features and processes that replicate or approximate – possibly in new or different forms – those of media organisations.

### *2.1. Mass and general public*

Mass communication has traditionally been defined as a case of mediated public communication addressed to a large audience and open to all. In quantitative terms, the concepts of “mass” and “large” audience have covered a variety of situations, from potentially global audiences in the case of satellite television or the Internet, to a territorial or other community served by a local or community medium. Technologies making possible non-linear, on-demand delivery of content, conditional access, unbundling of electronically delivered content, personalisation of content, unicasting, etc., create new difficulties in interpreting the term. So does the capacity of the Internet to support the full range of public (one-to-many, many-to-many) communication, as well as group (few-to-few) and private communication (one-to-one).

The determining criterion for recognising a communication service as a mass medium must therefore be (in addition to other requirements: see Table 2 below) that its contents are intended for reception by, and are accessible to, the general public without discrimination (regardless of the actual number of recipients) and are not provided at the individual request of a recipient of the service.

### *2.2. Medium*

In addition to satisfying a sufficient number of criteria laid down in the concept of the new notion of media as defined in paragraph 9 of the above recommendation (see Table 2 below), self-recognition or self-identification of a content provider as providing a media or media-like service can serve as a useful auxiliary source of evidence, though it must be subject to verification.

The following circumstances can attest to the intention to act as a media, or media-like service:

- i. (self-) labelling of a service offered as “media”;
- ii. adoption of a mission statement or a document on editorial policy that avows media or journalistic goals, or terms and conditions of use that define legal, professional and ethical standards whose observance is required from users;
- iii. membership in a professional or other organisation that has and enforces a code of ethics or good practice, engages in other forms of self-regulation, offers its members training in legal and journalistic standards, provides assistance in areas of legal liability, offers insurance which will cover parties against defamation claims, allegations of copyright infringement and invasion of privacy, etc.
- iv. setting up of a business or platform with the aim of arranging content for its dissemination to a large public;
- v. creating a brand, business plan, and/or hiring staff with the aim of running a business that facilitates the dissemination of content to the general public;

- vi. promoting content, for example by positioning content to make it easier for a large audience to access it or even to encourage them to access it at all.

Another useful source of evidence is provided by legal solutions in other jurisdictions. If in other countries specific new communication services are treated as media, or accorded some of the same forms or protection and responsibilities as traditional media, this could be grounds for considering a similar approach in the country in question.

### 2.3. Media organisation

A “media organisation” is defined as a basic unit of media operation, comprising management, media personnel and technical dimensions and operating in a field of social forces (social and political pressures, economic pressures, etc.). The media organisation performs a sequence of activities to obtain, select and edit content, then assemble it into a media product and disseminate it, or have it disseminated, to the public.

There is an extensive range and variety of media organisations, differing in size from large corporations with large, specialised personnel, concentrating on the different functions and operations, to small groups of people involved in a community radio station. In new communication services, the various roles of personnel and dimensions of the media organisation can be telescoped into the activities of single individuals (for example, bloggers).

Recognition of a particular communication service as a medium requires, *inter alia*, an assessment of whether it displays a sufficient number of the features of a media organisation, that is, whether its operation includes the activities characteristic of such an organisation, including particularly the editorial process (see below) of preparing content for dissemination.

New communication services often rely on untypical institutional arrangements for the editorial process, for example, with users involved in the moderation process (see below). Agoravox, the French-based online citizen journalism site, explains that “we believe it is essential to put in place a new type of editorial committee that can act as a ‘filter’. The submitted information is thus moderated to avoid any political or ideological drift. Given the specificity of Agoravox, the editorial committee is not formed in the same way as a traditional newspaper committee. It is made up not only of independent authors who wish to participate, but also of experts in strategic information monitoring services from the information specialist Cybion. Each moderator has to vote individually on the articles based on their relevance to the news and their originality”. As soon as a story is published, any reader can freely comment on it, criticise it, complete it, enrich it or denounce it. The author and the editorial committee can interact with the readers to complete and improve the story. Sometimes the editorial committee will decide to delete a story after comments by readers (especially in case of obvious plagiarism). On Fame TV, a UK-based TV channel based on UCG,

the public can vote via SMS for the clips they want to view. They can vote any video off screen in a matter of seconds and choose the next one to air.

These procedures differ from traditional ones, but replicate their purpose and effect to an extent that justifies recognising them as new forms of the editorial process.

#### 2.4. Interactive relationship with users

An interactive relationship with users is not a *sine qua non* for the recognition of a new communication service as a media or media-like activity. At a basic level, such a relationship can take the form of willingness on the part of the communicator publicly to respond to comments by users and engage in email-communication. Many more advanced forms of such relationships exist, including the use of user-generated content. The way in which a media organisation deals with news-related UGC, and especially any rules that govern evaluation, acceptance and use of such content, can provide useful evidence of a possible editorial process and application of professional or ethical standards.

News departments in broadcasting organisations may include in their programming audience-generated news content; audience comment; collaborative content; interactive journalism, etc. On television, viewers have long participated in *vox populi* formats, phone-ins, studio audience discussions, game shows, quizzes, talk shows and make-over programmes. The recent surge of reality television shows has boosted the participation of “ordinary people” in broadcast productions. A study of the websites of established British news organisations has identified nine formats used to encourage contributions from the public: “Polls”, “Messageboards”, “Have your say”, “Comments on stories”, “Q&As”, “Blogs”, “Reader blogs”, “Your media”, and “Your story”.

Digital media comprise many models of (semi-)participatory organisations

- organisations aimed at facilitating access, interaction and participation: alternative radio or Indymedia; community media or the Center for Digital Storytelling (which describes itself as “an international non-profit training, project development and research organisation dedicated to assisting people in using digital media to tell meaningful stories from their lives”);
- organisations aimed at facilitating access and interaction: Community Wifi; platforms for blogging, vlogging (Ourmedia and YouTube) and social networking (Facebook and MySpace), as well as cases of citizen journalism, for example, where non-professionals provide raw materials to newsrooms.

Professional media organisations that are open to the use of user-generated content (UGC) usually apply the same editorial judgment and scrutiny to user-generated content as any other material with particular attention paid to issues of privacy, consent, copyright, child protection, defamation and taste and



decency and assign specific staff dedicated to the moderation of UGC. This should happen on the basis of publicly available guidelines and criteria.

The question arises as to how this content is managed in new communication services which do not have a code of professional ethics. Indications of whether a new communication service qualifies as a media or media-like activity are especially likely to be found in any policies and arrangements applied by news- and journalism-oriented services as part of an editorial process (see below).

### *2.5. Production and/or assembly of content*

“In-house” production of content is not a necessary prerequisite for a communicator to be recognised as a medium or media-like activity. Nevertheless, its presence (indicated *inter alia* by possession of equipment needed for the purpose) could be treated as important evidence – along with the fulfillment of other criteria – of this nature of the activity.

Assembly or packaging of content can help decide whether the given communication activity can be classified as a media or media-like activity if any regularity over time can be established regarding the way content is structured and organised. This can concern, as the case may be, channels, schedules, catalogues, the title of the publication, its layout, titles of sections, graphics, etc.

### *2.6. Editorial process*

Media-organisational functions include: securing an in-house and/or external supply of content, gate-keeping and selection of content for consideration (that is, the application of a broad range of criteria – which may be formalised and made public – such as observance of the law, news values, truthfulness, accuracy, timeliness, etc.); processing of content (including editorial processing); decisions about presentation, structuring and packaging; preparation for distribution; and assuming full editorial responsibility for it.

The editorial process involves a set of professional routines and conventions that constitute a sort of quality control mechanism. In professional media, the reporter/journalist, editor and publisher/broadcaster are all involved in decision-making regarding the choice of subject, evaluation of content, acceptance or rejection, and the standards to be applied.

Determination of whether the editorial process takes place may need to be made with regard to two main types of new communication services: those that rely on self-produced content, and those that convey to their users (solely or mostly) content provided by external content providers, for example, UGC. In the first instance, and especially in the case of one-person media organisations (for example, bloggers, podcasters, etc.), this may need to rely on information provided by the interested party. In the second case, evidence may be derived from standards and procedures applied by the communicator in the process

of moderating such content (and usually spelt out in founding documents or terms and conditions of use, etc.).

Moderation refers to the process of reviewing, removing, modifying or refusing to publish unsuitable UGC. Many Internet sites carrying UGC reserve the right to review and delete or remove any member contribution which does not correspond to defined standards. The terms and conditions of Fame TV, the UK-based user-generated TV channel, defines “moderation” as “the process by which we decide whether submitted material conforms with all our requirements for that submitted material (including to comply with all laws, statutes, regulations, byelaws and codes of practice)”.

On Ohmynews, the South-Korea-based online newspaper, every article is vetted, copy edited and double-checked before it is published. Sites apply age and content ratings or have areas for content which is rated mature. They also apply community standards on intolerance (derogatory or discriminatory language with regard to race, ethnicity, gender, religion or sexual orientation), harassment, assault, the disclosure of information relating to third parties and other users (for example, posting conversations), indecency, etc. Some sites may impose penalties if users infringe community standards. Penalties range from warnings, to suspensions, to contributors being barred from the site. Governance schemes have also emerged which allow for rating and recommendation (that is, social filtration and accreditation).

Several forms of moderation are applied:

- pre-moderation is the moderating of material before it is published. One example is Agoravox, the citizen journalism site in France, that publishes around 75% of all submitted articles. It may refuse publication for the following reasons: “copyrighted content; delivers a personal opinion while lacking documentation; not recent/does not cover news; not exclusive; describes misleading or non checkable facts; too short; too long; unclear, imprecise; content may be libellous; features pornographic content; features commercial content; encourages hatred, racism, sexism, homophobia; already submitted item”. Also the terms and conditions issued by Fame TV contains the concept of “rejected content”, that is, “content which we have decided has not passed moderation and which we have therefore decided (at least for now) will not be used by us on the Fame TV Channel or Fame TV website”;
- post-moderation is the moderation of material after it has been published when it is the moderator’s role to decide as to whether it should continue to remain in the public domain. This can take the form of “reactive moderation” that takes place when and if users make the moderator aware of content they regard as unsuitable. This is also known as “peer-based moderation”: content submitted by users can be edited, reviewed or even deleted by certain or all users of the same UGC platform. For example, Dailymotion, a video sharing service based in Paris, France, has established a means of allowing anyone

to notify it of dissemination via its site of content such as child pornography; dangerous or illegal acts; unlawful, obscene, defamatory or libelous material; or any sexually explicit content. Upon receipt by Dailymotion of notice of such violations, the content in question will be reviewed and may be removed. Additionally appropriate authorities may be notified;

- a borderline case in this respect is Internet Service Providers (ISPs) whose terms of service (TOS) and acceptable use policies (AUPs) may contain a considerable number of rules pertaining to content and expression on the Internet. This is described as investing ISPs with a “regulatory” function and giving ISP rules a “media law-like effect”. Any decision as to whether ISPs should be recognised as media, or media-like activities, will need to take into consideration all the other criteria laid down in paragraph 9 of the above recommendation.

### 2.7. Legal and ethical norms

The media and journalists are covered by general law (penal and civil code) and by press, media, broadcasting, freedom of information, access to information and other related laws. These regulate the activities of traditional media and journalists and offer them protection required for media freedom to be respected. Policy and legal systems now face the question of how, if at all, this legal framework applies to new communication services.

The same is true, to some extent, of Council of Europe standards. Those on media freedoms cover, *inter alia*, access to events and scenes of action; safety for media professionals; confidentiality of sources; political speech, reporting on political affairs and reporting on judicial proceedings and editorial independence. Standards covering the media’s responsibilities refer to accuracy; providing a right to reply; avoiding discrimination, harm or threats to dignity; avoiding forms of expression that can have a detrimental effect on human rights: “hate speech”, defamation, discrimination, etc.

Recognition of a new communication service as a form of media or media-like activity implies, in a system of graduated regulation, full or partial extension of the legal framework (both as concerns freedoms and responsibilities) to the given activity.

Knowledge of, and willingness to, observe legal norms by providers of new communication services, and any forms of self-regulation serving this goal, are important indicators in gaining recognition for media-like activity.

Codes of ethics are adopted by media professionals to guide and regulate their own performance. They form part of media accountability systems that encourage media organisations and journalists to respect the ethical rules set by the profession. Such systems are extremely diverse, and range from codes of conduct; ombudsmen and media-oriented non-governmental organisations; processes and ethical audits.

Surveys of codes of journalistic ethics show that truthfulness, responsibility, freedom of expression and of the press, objectivity, equality, fairness and journalistic independence top the list of standards most frequently included in such codes.

The ethical obligations of bloggers seem to be accepted by at least a part of the online journalism community itself, as shown by the model Bloggers' Code of Ethics, developed by the American portal CyberJournalist.net by "modifying the Society of Professional Journalists' Code of Ethics for the Weblog world". Its sections are entitled "Be honest and fair", "Minimize harm", "Be accountable".

Knowledge of, and willingness to, comply with ethical norms by providers of new communication services and any form of self-regulation serving this goal, are important indicators in possibly recognising their activities as media or media-like.

### *2.8. Influence on public opinion*

As with the intention to reach a "mass audience" (regardless of actual size of the audience), the intention to influence public opinion (regardless of how strong the potential impact is) is enough to take this factor into account in classifying a particular new communication service. As already noted, this intention is revealed by dealing with matters under public debate and efforts to reach a large audience by making content available to all.

Nevertheless, any evidence showing the actual existence and extent of such influence can be helpful in making such a determination. This evidence can be derived from: the number of people that the content reaches; its credibility and trustworthiness, as shown by research; ability to diffuse news (especially if this information is picked up by traditional mass media); ability to set the agenda of public debate (that is, draw attention to events and issues and attribute importance to them); ability to frame, that is, interpret and suggest a way of understanding events and issues; ability to contribute to public scrutiny of public figures; ability to mount or contribute to public campaigns, etc.

### *2.9. Full editorial responsibility*

New communication services, depending on their nature and on the regulatory objective being sought, can be exempt from editorial responsibility. Article 12 of the EU Electronic Commerce Directive refers to a "mere conduit," stating that an information society service provider is not liable for the information transmitted, "on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission". The Audiovisual Media Services Directive (AVMSD) defined "editorial responsibility" as "effective control both over the selection of the programmes and over their organisation ... Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided".

“Selection” (based in the case of AVMSD – according to some interpretations – on avoidance of unlawful content and on “journalistic-editorial” criteria) and “organisation” of content are important elements of the editorial process, yet they certainly leave out key elements of the full notion of “editorial responsibility”.

In the case of services recognised as media or media-like activities, the full notion of “editorial responsibility” should be applied, covering responsibility for the selection of content, for the editorial process (see above), and including potential legal liability for the content provided.

### 2.10. Periodic dissemination

Periodic dissemination may in practical terms mean, as in the case of traditional media, very different frequency of publication – from daily to yearly. With electronic media, content can be updated or revised many times a day. On the other hand, archived webpages usually remain static over time, which excludes them from consideration as media services.

Periodic (and additionally, but not necessarily, regular) publication retains its relevance as a criterion of whether a particular case of content provision can be classified as media service.

### 2.11. Appropriate delivery and distribution platforms

“Appropriate” means two different things in the present context. One meaning refers to the fact that the platform is appropriate from the point of view of the content provider and selected with a view to the nature of the content. The other, and more relevant meaning in terms of the above recommendation, refers to the fact that the platform must make possible distribution of content to, and reception by, the general public, that is, it must make content available to all. Therefore it should not create any barriers to reception by the general public.

## 3. Applying the toolkit

In Table 1 an effort is made to apply the new notion of media to actual cases.

**Table 1. Reference cases for determination of media or media-like status: can a particular service display the particular feature or quality and can this be ascertained by a regulator?**

	<b>Blogger, Podcaster</b>	<b>Citizen journalism platform</b>	<b>Video-sharing platform (e.g. YouTube)</b>	<b>ISP</b>
1. Own <sup>1</sup> content that informs, educates and/or entertains	√	√	-	-
2. Mass	√	√	√	√

3. Media organisation	? <sup>2</sup>	√	Only some functions	-
4. Interactive relationship with users	√	√	√	-
5. Production of content	√	-	-	-
6. Assembly/packaging of content	√	√	Limited to organisation of portal	-
7. Editorial process	?	√	Reactive, if terms of use are violated	Reactive, if terms of use are violated
8. Legal and ethical norms	√	√	√	√
9. Intention to influence public opinion	√	√	-	-
10. Periodic dissemination	√	√	Only scheduled tv channels	-
11. Full editorial responsibility	√	√	-	-
12. General public/ Not at individual request	√	√	-	-
13. Appropriate delivery and distribution platforms	√	√	√	√

<sup>1</sup> "Own" in the sense that the given communicator produced the content and/or obtained it externally and assumes full editorial responsibility for it.

<sup>2</sup> The question mark indicates that while a particular feature may be present in the operation of the media organisation, it may be difficult to identify in a one-person operation.

As can be seen, a citizen-journalism platform may satisfy all the criteria of the new notion of media, and in such a case can be recognised as a fully-fledged mass media activity. Bloggers and podcasters can meet most of the criteria, but some crucial ones (those of media organisation and editorial process) are difficult to ascertain in a one-person operation. Neither a video-sharing platform like YouTube, nor ISPs can claim the status of a mass medium or a media-like activity, even if YouTube could, under some circumstances, qualify as an audio-visual media service under the AVMSD.

Tables 2 and 3 list minimum criteria for recognition of a new communication service as, respectively, a mass medium or a media-like activity.

**Table 2. Minimum criteria for recognition of a new communication service as a mass medium**

1. Own content that informs, educates and/or entertains
2. Mass
3. Assembly/packaging of content
4. Editorial process
5. Legal and ethical norms
6. Intention to influence public opinion
7. Periodic dissemination
8. Full editorial responsibility
9. General public
10. Appropriate delivery and distribution platforms

**Table 3. Minimum criteria for recognition of a new communication service as a media-like activity**

1. Own content that informs, educates and/or entertains
2. Mass
3. Assembly/packaging of content
4. Intention to influence public opinion
5. Periodic dissemination
6. General public
7. Appropriate delivery and distribution platforms

## **The regulation of new communication technologies and services and the extent to which it promotes pluralism**

### ***Introduction***

This document (written in 1999) reproduces the report prepared by Mr Karol Jakubowicz (Poland) on “the regulation of new communication technologies and services and the extent to which it promotes pluralism” for the MM-S-PL.

### ***Pluralism and the new communication technologies***

The following are excerpts from, or comments on, pieces of legislation, regulations, reports or other texts providing evidence (or otherwise) of pluralism considerations being taken into consideration in policy orientations and in regulating new communication technologies.

This overview covers only such information as was available at the time of its preparation. Proposals for supplementing it with other relevant information will be appreciated.

### ***International policy and legislation***

#### ***Web Internationalization & Multilingualism Symposium, Seville, 20-22 November 1996***

This symposium, which was organised jointly by Sadiel S.A., on behalf of the European Commission, and the World Wide Web Consortium (W3C), was designed to promote the advancement of internationalisation and multilingualism on the World Wide Web (WWW) provided by the Internet. The symposium was split into five half-day tracks.

The symposium was opened by José Carlos Alarcón, Councillor for Work and Industry in the Andalusian Region responsible for Information and Telecommunications Technologies, who stressed the importance of language-specific IT in the development of the remoter regions of the European Union.

The first session on Social, Political and Cultural Aspects covered the social, political and cultural constraints on the development and use of the Internet.

Patrice Husson discussed the multilingual requirements of electronic commerce. Individuals or small and medium-sized enterprises (SMEs) need to be able to access the information superhighway using their own language, through technology adapted to the cultural and administrative processes of the user's country.



Ana L. Valdes stressed that we need to remember that we are increasingly working in a multicultural world. A new class struggle is developing – a struggle for information. Countries and areas with poor communications are losing out on development possibilities. We need to look carefully at how to train minority groups to benefit from the Internet.

Iain Urquhart from Directorate General XIII (Telecommunications), gave an overview of the activities of the European Commission's Language Engineering Unit. Language engineering was concerned with language in all its forms, text, speech and even aspects of image handling. Although the web was mainly concerned, for now, with text and images, the importance of speech as a highly natural form of communication should not be underestimated, especially in addressing problems of social exclusion.

Yvan Lauzan, the EDI co-ordinator for the Government of Quebec, provided a Canadian view of the benefits to be gained from adopting a multilingual approach to the use of the electronic commerce on the Internet. The UN Trade Facilitation Process has already standardised some 200 forms for electronic commerce in a form that is highly multilingual, based on nine languages, including Arabic, Russian (Cyrillic) and Chinese. Fatma Fekih-Ahmed of the Institut Regional des Sciences Informatiques et de Telecommunications (IRSIT) in Tunisia pointed out that IRSIT is using the proposed multilingual HTML specification to make bilingual text available over the Internet.

Arabised tools exist but are not widely used as the character sets they are based on are often not interoperable.

### ***The Council of the European Union***

*Council Decision of 21 November 1996 on the adoption of a multiannual programme to promote the linguistic diversity of the Community in the information society (MLIS) (excerpts)*

- (1) Whereas the advent of the information society provides industry and in particular the language industry with new prospects for communication and trade on European and world markets which are marked by a rich linguistic and cultural diversity;
- (3) Whereas the private sector in this field consists mainly of small and medium-sized enterprises (SMEs), which face considerable difficulties in addressing different language markets and must thus be supported, especially when their role as a source of employment is considered;
- (5) Whereas the European Council, meeting in Corfu on 24 and 25 June 1994, stressed the importance of the cultural and linguistic aspects of the information society, and whereas the European Council in Cannes on 26 and 27 June 1995 restated the importance to the European Union of its linguistic diversity; whereas the G7 Conference of Ministers meeting in Brussels on

25 and 26 February 1995, drew attention to the importance of linguistic and cultural diversity in the global information society;

- (6) Whereas the emergence of the information society could afford the citizens of Europe greater access to information and offer them an outstanding opportunity for access to the cultural and linguistic wealth and diversity of Europe;

...

Action Line 1: Support for the creation of a framework of services for language resources and encouragement for the associations involved in such a construction

Action Line 2: Encouragement for the use of language technologies, resources and standards and their incorporation into computer applications

Action Line 3: Promotion of the use of advanced language tools in the Community and Member States public sector

### ***National policy and regulation***

#### ***Australia***

- Broadcasting Services Amendment (Online Services) Bill 1999

The bill does not incorporate any provisions or clauses designed to promote political or cultural pluralism in online services.

- Innovate Australia. Information and Communications Services and Technologies (excerpts)

#### *Overview of the government's strategy*

The government's strategy for development of information services will:

- promote the further development of Australia's world class communications network;
- assist wide access to new services for all Australians;
- encourage and assist the production of Australian material for Australians and the world;
- develop further the use of information services and Australian material in education.

#### *Government support for production of Australian material*

The government has long supported the production of Australian content, particularly in the film industry and in broadcasting. In Creative Nation, the

government took the lead by announcing a range of substantial initiatives aimed at stimulating content, particularly multimedia.

Over 40 million items of Australian origin are held in local and regional museums. In Distinctly Australian the government agreed with the States, Territories and Museum sector to provide support for the development of a national database (the Australian Museum Information System) to make information about the collections of local and regional museums available on the Internet. This global access will assist tourists and other visitors to Australia to find the location of these collections.

The government has also assisted with the establishment of the Publish Australia Network Internet Communications (PANIC) which provides Internet links between the 50 members of Publish Australia, Australia's business network of independent publishers. The purpose of PANIC is to reduce barriers faced by small publishers, such communications, marketing and distribution.

The government announced in Creative Nation a range of activities costing \$84 million to promote the production of Australian content for local and international consumers: the Australia Multimedia Enterprise (AME) has now been established as a wholly owned government company. The AME will fund multimedia projects. It announced the first successful projects on 23 November 1995 and will consider its next round of projects in January 1996.

The first two Co-operative Multimedia Centres were announced on 29 August 1995. The centres will undertake projects to support the multimedia industry and develop education and training programmes. Further centres will be announced shortly.

On 30 August 1995, funding for the first five titles under the Australia on CD programme were announced. The remaining five titles are expected to be announced by the end of the year.

The government has provided resources to the Australian Film Commission, the Australian Film, Television and Radio School and the Australian Children's Television Foundation to develop multimedia projects.

### ***Canada***

- "Competition and culture on Canada's information highway: managing the realities of transition". Report of the Canadian Radio-television and Telecommunications Commission, 19 May 1995

One of the characteristics of the new information environment will be the availability of electronic video stores offering true VOD programming services, including movies. Clear guidelines as to how these services might best contribute to Canadian cultural objectives should be articulated now.

Because of their nature and scale, however, certain mass-appeal, on-demand applications such as movies can and should be regulated where this would contribute materially to the cultural objectives of the Broadcasting Act. VOD services of this type will require significant financial resources to launch and market, will involve the acquisition of program rights, and will likely have an organisational structure similar to those of licensed broadcasters today. ... As licensed VOD programming services develop, they should be expected to offer the maximum practicable number of Canadian titles in the program categories offered by the licensee. Further, they should be expected to make direct contributions to the development and production of Canadian programs. The specific measures for implementing these policies should be determined at the relevant licensing proceedings.

Applicants proposing licensed VOD programming undertakings should be encouraged to employ a [navigation] system that gives priority to Canadian programs in the various categories their systems may offer. The Commission recommends that the design of Canadian navigation/menu systems be a priority and be supported by government policy.

*Licensing approach for new programming undertakings  
in a competitive environment*

The Commission foresees competition within the pay-per-view, near VOD and true VOD industries. Further, the Commission expects that the pay television sector will evolve into a more viable competitive structure, particularly with the advent of VOD and direct-to-home pay-per-view. When licensing competitive pay-per-view or VOD undertakings offering feature films, it would be reasonable to impose conditions of licence prohibiting the acquisition of exclusive Canadian rights for any foreign or domestic film. Also, concerns raised by the licensees of existing programming undertakings with respect to the potential impact on their services of new programming services would be addressed by the Commission at the time it considers applications for such licences.

*New distribution undertakings*

There is no doubt that fair competition among distribution undertakings will bring many benefits to Canada. Subscribers will enjoy an even greater range of choice in programming and non-programming services. Canadian producers and service providers will have additional ways to reach their audiences. Consumers will benefit from better prices and services as distributors compete for market share.

However, if distributors are to play their part in contributing to the objectives of the Broadcasting Act, they must ensure that their subscribers are offered Canadian choices in a manner that makes those services accessible and attractive. In addition, licensed distributors should play a role in supporting the production of Canadian programming, and in ensuring that citizens of the

communities they serve have opportunities to access public services and use the distribution networks to encourage community expression and dialogue.

#### *Francophone markets*

The Commission agrees that Francophones should be able to access packages of French-language discretionary services, and notes that the deployment of addressable technology should permit distributors to offer distinct packages of services tailored to the needs of their Francophone subscribers.

#### *Contributions to Canadian programming*

New technologies and competitive distribution systems will have the effect of expanding the number of Canadian programming services. Considerable quantities of new Canadian programming must be available if these services are to fulfil the objectives of the Broadcasting Act. As the new distribution technologies are refined, Canadian consumers will increasingly have the ability to choose programmes on demand. In this environment, Canadian programmes must be of the highest quality and relevance if they are to be chosen and, as a consequence, contribute to the government's cultural and industrial objectives.

The European Commission considers that all new licensed distribution undertakings should make a contribution to the development and production of Canadian programming.

#### **Germany**

- Information and Communication Services Act (IuKDG), August 1, 1997

The Act does not deal with issues like political and cultural pluralism in the new services.

#### **The Netherlands**

- Ministry of Education, Culture and Science, "New media and cultural policy in the Netherlands", 1998 (excerpts)

On 29 May 1998 the International V2 Media Lab, a laboratory for explorations and experiments of all kinds in the field of what V2-Director Alex Adriaenssens calls 'the unstable media', opened its physical and virtual doors in Rotterdam.

A second, still fairly recent new media project in the Netherlands is the Virtual Platform, that has been in existence since 1995 [which is] funded by the Dutch Ministry of Education, Culture and Science.

The V2 Media Lab stands for the important research and development-factor, whereas the Virtual Platform is the network of independent arts organisations,

that tries to follow, analyse and structure the dynamic developments in the new media field.

One could say that organisations such as those that make up the Virtual Platform are the conscience of the new media industry and the guardians of the public domain. They share a conviction that the cultural and social dimensions of the so-called Information Society are being largely ignored in favour of technological and economic considerations and that the work of artists, performers, media activists, designers, theorists and others involved in new media culture have a vital role to play in maintaining a critical approach to these developments. For example, the Virtual Platform has demanded improved access to the mass media and the availability of bandwidth on the networks.

The Virtual Platform is made up of nine organisations [which] reflect various aspects of new media cultural activity in the Netherlands, from the development of new instruments for software and performance, to interface design, to training, to debate. Each of these organisations has a successful track record in its field, its contacts both nationally and internationally and its links within the arts world and with other sectors, including education, industry, the media, and technology.

#### *The Virtual Platform and Dutch cultural policy*

An important role of the Virtual Platform, and one of the reasons why it is funded by the Dutch Government, is that it also serves as a focus for the Ministry of Education, Culture and Science and other national organisations.

The ministry encouraged the development of the platform in the conviction that it is important for the government to establish a counterpart for the future development of national innovation policy. "The government's task is principally to support networks and intermediary connections" and "there is no need for new institutions specifically developed for new media". These principles were formulated in the Virtual Platform's first policy document, *From Dada to Data*, published in 1996, and they are shared by the ministry.

In 1997 the Virtual Platform organised the conference *Towards a New Media Culture: From Practice to Policy*, partly funded by the ministry. The resulting Amsterdam Agenda was a list of policy recommendations made on the basis of discussions about current practice in the field of new media in Europe.

The Amsterdam Agenda calls for the recognition of media culture as a field of cultural activity alongside the more traditional arts. It calls for the adaptation of funding and policy-making structures to the interdisciplinary nature of new media culture and its relation to industry, to the ad hoc, small scale, international nature of much of the research and development being carried out. One of the key messages to come out of the Practice to Policy conference was that much is already being achieved, but that it often remains invisible to the outside world, which undoubtedly is the wrong kind of "virtuality".

The Virtual Platform received three years' funding to continue its network tasks as well as to advise the ministry on a strategy for putting into practice some of the policy recommendations made in the Amsterdam Agenda. The Platform is currently making a survey of activities and projects in the field of new media and culture in the Netherlands, which will serve as the basis for policy advice in view of the next 4-yearly Cultural Policy Document (government funding policy for arts organisations) as well as for policy makers in the fields of economy, welfare, education and technology, both in the Netherlands and internationally. The Virtual Platform will also be producing a website/shared workspace, providing information about Dutch new media culture, and a book based on the Practice to Policy conference due to be published in March 1999. In the longer term, the Virtual Platform will be producing a follow-up to Practice to Policy. The debate can thus continue on a European level, and if the Virtual Platform gets its way, this debate will be markedly less abstract and fuzzy than most European policy debates seem by necessity to be.

### *Policy considerations*

The Dutch "polder-model" for the new media, as described above, it seems to be the nature of the new media itself that calls for a new attitude on the part of the government. This new attitude differs considerably from the traditional governmental role in the field of the arts, literature, media, etc. What is needed is a facilitating role which is as dynamic and flexible as the new media. This new attitude sometimes comes as a shock to those involved in government policy on more traditional fields. They are more accustomed to regulating static institutions rather than facilitating dynamic projects. Still that is what is needed. And besides, from the traditional regulating point of view, the new media would probably be as hard to keep track of as artistic, scientific and technological creativity itself.

But with the Virtual Platform the Dutch government has the advantage of a high-profiled, internationally oriented, multi-disciplinary discussion partner, that is both a centre of expertise and a living organism of critical co-operation, in which the laboratory function, the educational function and the critical function is well represented. The Netherlands is no different from its neighbours in wanting to lead the way in new media development in Europe. But next to the technological and social-economic perspective, I hope that it can also lead the way in prioritising the cultural sector's role in the development of the new media.

### **Norway**

In 1997, the Norwegian Parliament passed a new law about monitoring acquisitions in daily press and broadcasting. The law provides a new board with the authority to stop – or to state conditions for – obtaining part-ownership in daily press or broadcasting companies. The parliament chose to establish a new Ownership Supervision Board, which was given a completely independent position from the government. Any rulings from the Ownership Supervision Board may be appealed to an appeals board, which also has an independent position from the government.

The Ownership Board may act against acquisitions of media which mean that the owner alone, or in co-operation with others, obtain a significant ownership position, and this position endangers freedom of speech, real opportunities to be heard and a diverse media picture. It is stated that the criterion for preventive action is met if one party wants to obtain more than a third of the total daily press circulation or if the acquisition means cross-ownership between media companies that each have more than 10% of the daily press circulation. The criterion may also be met if one media company obtains a too dominating position in a local or regional area.

Currently, the law only covers the main media, which form public opinion (newspapers and broadcasting). An evaluation is to be made on whether the law also should cover the new electronic media.

### ***Portugal***

- Ministry of Culture. Iniciativa Mosaico. "Portuguese Culture and The Information Society" (excerpts)

It is clear today in the overall context that Europe can and should act in the Information Society through the construction of a solid content industry. In Portugal, we are contributing to the construction of this industry following two main lines.

We are initiating the foundations for a national network for management of the Portuguese cultural heritage. For this we are making use of the new technologies and of community funds allotted to them in Portugal, such as Pratic, that should be adapted in a manner to better permit supporting the multimedia industry for cultural content. This is the Mosaico Network, a project of national importance.

We are supporting the technological reconversion of the ancillary organisations of the Ministry of Culture, such as the Biblioteca Nacional (National Library) or the Arquivos Nacionais Torre do Tombo (National Archives).

We are, jointly with the Instituto Português do Património Arquitectónico and Arqueológico (IPPAR – Portuguese Institute of the Architectonic and Archaeological Heritage), preparing important operations about the structural heritage, making use of the most advanced technologies of multimedia and Virtual Reality.

We are supporting the reconversion of the presence on the Internet of other ancillary organisations of the Ministry of Culture, such as IPPAR, the Instituto Português de Museus (IPM – Portuguese Institute of Museums) or the Biblioteca Nacional.

We are supporting the artists who, in their work, make use of the new technologies as a means of expression. This is done with the belief that access to



the information and communication technologies for artistic creators not only creates direct effects in the appearance of new forms of artistic expression, but also motivates at the level of innovation and creativity in the production for Multimedia.

We are producing the foundations for the future existence in Portugal of a Workshop for Communication, Technology and Art directed towards artists, creators and producers in the area of multimedia. This is similar to models already existing in other European countries and in the USA, in a delineation of public/private co-operation.

We are supporting festivals, meetings and prizes in the area of multimedia and of art and technology as a way to promote and stimulate the quality of Portuguese output in this area.

Supporting production serves no purpose without always keeping in mind access to the market, the decisive factor in determining the success of a multimedia product. The intervention of the State in the market, however, is being accomplished only through the creation of mechanisms for stimulation or for the support of the emergence of new networks for distribution and commercialisation.

We are, jointly with IPPAR and IPM, preparing the introduction of multimedia areas in the shops of national monuments and museums.

We are participating in the consortium that administers the national nucleus for MidasNet, the network for dissemination and sensitisation for the multimedia supported by the community program in the area of the multimedia industry for contents, INFO2000.

The motto of Mosaico has been defined, to introduce Portuguese culture into the Information Society.

### ***Sweden***

- Committee to suggest legislation against media concentration

The Media Concentration Committee has delivered its report "Freedom of speech and competition" with suggestions for legislation to ensure the plurality of Swedish media and to counter the concentration of ownership and power within mass media. "This will be harmful for a free and wide exchange of opinions and information", according to a press release from the Ministry of Culture.

The committee suggests a separate law on media concentration, and the press announcement states that "[when it comes to] the concentration of ownership in the most influential media for formation of the public opinion, the newspapers (paper and electronic editions), radio and TV, the committee suggests a special law on media concentration. The committee argues that technical

developments and future considerations concerning questions of convergence may make it necessary to extend the application area to cover new companies”.

The law will cover both public and private companies, regardless of whether the company is Swedish or foreign, if it is active in Sweden. Constitutional changes are required, according to the committee, in order to “ensure the application of competition legislation and enable legal action in the area of media concentration. The laws on freedom of speech and freedom of the press are currently hard to interpret in these instances”.

The committee has also examined the cable TV companies and states that these “have an almost monopoly position and that changes in the law on freedom of speech making it possible to give subscribers influence over the programme offering on the cable networks should be considered. At the moment, the committee suggests a new clause in the radio and TV law regarding connection agreements and restrictions in the right to install or use a different cable TV connection or to install illegal satellite dishes”. It takes time to make changes to the constitution. Thus, the committee suggests that “the main part of the new rules take effect on 1 January 2003. One of the suggested changes to the competition law and the suggestion which covers the radio and TV legislation are not dependent on constitutional changes, and are proposed to take effect from 1 January 2000”.

## **USA**

According to a new study by Forrester Research Inc., minorities are getting onto the Internet at an enormously increasing rate due to the dropping costs of computers and increased access to the Internet at schools. 64% of Asian-American households are online – by year’s end, Forrester estimates that 43% of Hispanic-Americans households and 42% of African-American households will be online. (44% of all homes are expected to be online by the end of the year). An access gap between those who can afford online access and those who cannot still exists, but by 2003, Forrester predicts that gap will close. A factor contributing to the increasing number of minorities online is the US government’s authorisation of almost \$2 billion to give low-cost Internet access to schools and libraries, with priority going to lower-income and rural areas.

## **Appendix**

### ***The language on the World Wide Web in Europe***

English is definitely not the first language on the World Wide Web at least for company sites, but the second. The first languages on the World Wide Web in Europe are the national languages.

Table 1 shows the estimated overall distribution of the languages on the World Wide Web in Europe, based on a random sample of about 1% of the European

websites (825 overall, 615 in the EU countries). The sample has been chosen by selecting from each European country about 1% of the websites. Only commercial sites, that is sites opened by companies (not by sites within the .com domain) have been selected, no academic or non-profit websites have been visited.

**Table 1. Distribution of languages on the World Wide Web in Europe, based on a sample of 1% of visited company websites**

	Number	%	Number	%	Total	%
	of EU websites		of non-EU websites		Number of websites	
Native tongue: non-English-speaking countries	261	42	72	33	333	40
English only (UK and Ireland)	84	14	0	0	84	11
English only (outside UK and Ireland)	71	11	27	12	98	12
Total English only	155	25	27	12	182	23
Bilingual (Native tongue and English)	150	25	90	43	240	29
Multilingual	49	8	21	10	70	8
Total	615	100	210	100	825	100

Source: Databank Consulting, 1997.

This trend is confirmed in all EU countries. Even Nordic countries, which are known “to be the most English-speaking European countries show a high number of websites in the national language only (60% in Sweden, 50% in Denmark 47% in Finland and 42% in the Netherlands). Outside English-speaking countries, only Flemish-speaking Belgium (47%), Greece (35%) and Luxembourg (30%) revealed a high share of English-only websites. No English-only websites have been detected in France and in French-speaking Belgium, and only 3% in Spain. The highest share of multilingual commercial sites (more than two different languages) has been detected in Luxembourg (60%).

The share of English-only websites strongly decreases when analysing the data for nine non-EU countries: Norway, Switzerland, Poland, Russia (.ru), Czech Republic, Hungary, ex Soviet Union (.su), Slovenia and Iceland.

The share of bilingual and multilingual sites is higher in countries with relatively small internal markets, in general countries with no more than few millions of inhabitants, such as Luxembourg (90%), Iceland (80%), Greece (75%) and Norway (63%). Poor Internet penetration doesn’t facilitate the creation of web pages in native languages as well, as in the case of most part of the Eastern

countries under examination more than 55% of the visited websites are bilingual or multilingual), with the only exception of Slovenia (45%).

Two preliminary conclusions can be drawn:

- the World Wide Web is quickly going towards a strong regionalisation. Companies approach the World Wide Web in a non-global commercial perspective;
- the World Wide Web is quickly transforming the Internet into a real mass market which will probably soon start to develop peculiar national or regional characteristics in terms of structure, offer, content and information deployment.



## **Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet<sup>115</sup>**

*(Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling that States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights – ETS No. 5) have undertaken to secure to everyone within their jurisdiction the human rights and fundamental freedoms defined in the Convention;

Mindful of the particular roles and responsibilities of member states in securing the protection and promotion of these rights and freedoms;

Noting that information and communication technologies (ICTs) can, on the one hand, significantly enhance the exercise of human rights and fundamental freedoms, such as the right to freedom of expression, information and communication, the right to education, the right to assembly, and the right to free elections, while, on the other hand, they may adversely affect these and other rights, freedoms and values, such as the respect for private life and secrecy of correspondence, the dignity of human beings and even the right to life;

Concerned by the risk of harm posed by content and communications on the Internet and other ICTs as well as by the threats of cybercrime to the exercise and enjoyment of human rights and fundamental freedoms, and recalling in this regard the Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189) and the specific provisions in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201);

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115. Karol Jakubowicz was commissioned by the Steering Committee for the Media and New Communication Services to prepare a draft of this recommendation, subsequently approved by the CDMC and adopted by the Committee of Ministers. It grew out of earlier work in this field done by Karol Jakubowicz and the CDMC and served as a Council of Europe contribution to the Internet Governance Forum in Rio de Janeiro in 2007.

Aware that communication using new information and communication technologies and services must respect the right to privacy as guaranteed by Article 8 of the European Convention on Human Rights and by the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), and as elaborated by Recommendation No. R(99)5 of the Committee of Ministers to member states on the protection of privacy on the Internet;

Noting that the outcome documents of the World Summit on the Information Society (WSIS) (Geneva 2003 – Tunis 2005) recognise the right for everyone to benefit from the information society and reaffirmed the desire and commitment of participating states to build a people-centred, inclusive and development-oriented information society, respecting fully and upholding the Universal Declaration of Human Rights, as well as the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms, including the right to development;

Convinced that access to and the capacity and ability to use the Internet should be regarded as indispensable for the full exercise and enjoyment of human rights and fundamental freedoms in the information society;

Recalling the 2003 UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace, which calls on member states and international organisations to promote access to the Internet as a service of public interest;

Recalling the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies, and which calls on Parties to encourage individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions;

Aware that the media landscape is rapidly changing and that the Internet is playing an increasingly important role in providing and promoting diverse sources of information to the public, including user-generated content;

Noting that our societies are rapidly moving into a new phase of development, towards a ubiquitous information society, and therefore that the Internet constitutes a new pervasive social and public space which should have an ethical dimension, which should foster justice, dignity and respect for the human being and which should be based on respect for human rights and fundamental freedoms, democracy and the rule of law;

Recalling the currently accepted working definition of Internet governance, as the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules,

decision-making procedures and programmes that shape the evolution and use of the Internet;

Convinced therefore that the governance of the Internet should be people-centred and pursue public policy goals which protect human rights, democracy and the rule of law on the Internet and other ICTs;

Aware of the public service value of the Internet, understood as people's significant reliance on the Internet as an essential tool for their everyday activities (communication, information, knowledge, commercial transactions) and the resulting legitimate expectation that Internet services be accessible and affordable, secure, reliable and ongoing;

Firmly convinced that the Internet and other ICT services have high public service value in that they serve to promote the exercise and enjoyment of human rights and fundamental freedoms for all who use them, and that their protection should be a priority with regard to the governance of the Internet,

Recommends that, having regard to the guidelines in the appendix to this recommendation, the governments of member states, in co-operation, where appropriate, with all relevant stakeholders, take all necessary measures to promote the public service value of the Internet by:

- upholding human rights, democracy and the rule of law on the Internet and promoting social cohesion, respect for cultural diversity and trust between individuals and between peoples in the use of ICTs, and in particular, the Internet;
- elaborating and delineating the boundaries of the roles and responsibilities of all key stakeholders within a clear legal framework, using complementary regulatory frameworks;
- encouraging the private sector to acknowledge and familiarise itself with its evolving ethical roles and responsibilities, and to co-operate in reviewing and, where necessary, adjusting its key actions and decisions which may impact on individual rights and freedoms;
- encouraging in this regard the private sector to develop, where appropriate and in co-operation with other stakeholders, new forms of open and transparent self- and co-regulation on the basis of which key actors can be held accountable;
- encouraging the private sector to contribute to achieving the goals set out in this recommendation and developing public policies to supplement the operation of market forces where these are insufficient;
- bringing this recommendation to the attention of all relevant stakeholders, in particular the private sector and civil society, so that all necessary measures are taken to contribute to the implementation of its objectives.



## **Appendix to the recommendation**

### **I. Human rights and democracy**

#### *Human rights*

Member states should adopt or develop policies to preserve and, whenever possible, enhance the protection of human rights and respect for the rule of law in the information society. In this regard, particular attention should be paid to:

- the right to freedom of expression, information and communication on the Internet and via other ICTs promoted, *inter alia*, by ensuring access to them;
- the need to ensure that there are no restrictions to the abovementioned right (for example in the form of censorship) other than to the extent permitted by Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights;
- the right to private life and private correspondence on the Internet and in the use of other ICTs, including the respect for the will of users not to disclose their identity, promoted by encouraging individual users and Internet service and content providers to share the responsibility for this;
- the right to education, including media and information literacy;
- the fundamental values of pluralism, cultural and linguistic diversity, and non-discriminatory access to different means of communication via the Internet and other ICTs;
- the dignity and integrity of the human being with regard to the trafficking of human beings carried out using ICTs and by signing and ratifying the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197);
- the right to the presumption of innocence, which should be respected in the digital environment, and the right to a fair trial and the principle according to which there should be no punishment without law, which should be upheld by developing and encouraging legal, and also self- and co-regulatory frameworks for journalists and media service providers as concerns the reporting on court proceedings;
- the freedom for all groups in society to participate in ICT-assisted assemblies and other forms of associative life, subject to no other restrictions than those provided for by Article 11 of the European Convention on Human Rights as interpreted by the European Court of Human Rights;
- the right to property, including intellectual property rights, subject to the right of the state to limit the use of property in accordance with the general interest as provided by Article 1 of The Protocol to the European Convention on Human Rights (ETS No. 9).

## Democracy

Member states should develop and implement strategies for e-democracy, e-participation and e-government that make effective use of ICTs in democratic process and debate, in relationships between public authorities and civil society, and in the provision of public services as part of an integrated approach that makes full and appropriate use of a number of communication channels, both online and offline. In particular, e-democracy and e-governance should uphold human rights, democracy and the rule of law by:

- strengthening the participation, initiative and involvement of citizens in national, regional and local public life and in decision-making processes, thereby contributing to more dynamic, inclusive and direct forms of democracy, genuine public debate, better legislation and active scrutiny of the decision-making processes;
- improving public administration and services by making them more accessible (*inter alia* through access to official documents), responsive, user-oriented, transparent, efficient and cost-effective, thus contributing to the economic and cultural vitality of society.

Member states should, where appropriate, consider introducing only e-voting systems which are secure, reliable, efficient, technically robust, open to independent verification and easily accessible to voters, in line with Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting.

Member states should encourage the use of ICTs (including online forums, weblogs, political chats, instant messaging and other forms of citizen-to-citizen communication) by citizens, non-governmental organisations and political parties to engage in democratic deliberations, e-activism and e-campaigning, put forward their concerns, ideas and initiatives, promote dialogue and deliberation with representatives and government, and to scrutinise officials and politicians in matters of public interest.

Member states should use the Internet and other ICTs in conjunction with other channels of communication to formulate and implement policies for education for democratic citizenship to enable individuals to be active and responsible citizens throughout their lives, to respect the rights of others and to contribute to the defence and development of democratic societies and cultures.

Member states should promote public discussion on the responsibilities of private actors, such as Internet service providers, content providers and users, and encourage them – in the interests of the democratic process and debate and the protection of the rights of others – to take self-regulatory and other measures to optimise the quality and reliability of information on the Internet and to promote the exercise of professional responsibility, in particular with regard to the establishment, compliance with, and monitoring of the observance of codes of conduct.

## **II. Access**

Member states should develop, in co-operation with the private sector and civil society, strategies which promote sustainable economic growth via competitive market structures in order to stimulate investment, particularly from local capital, into critical Internet resources and ICTs, especially in areas with a low communication and information infrastructure, with particular reference to:

- developing strategies which promote affordable access to ICT infrastructure, including the Internet;
- promoting technical interoperability, open standards and cultural diversity in ICT policy covering telecommunications, broadcasting and the Internet;
- promoting a diversity of software models, including proprietary, free and open source software;
- promoting affordable access to the Internet for individuals, irrespective of their age, gender, ethnic or social origin, including the following persons and groups of persons:
  - a. those on low incomes;
  - b. those in rural and geographically remote areas; and
  - c. those with special needs (for example, disabled persons), bearing in mind the importance of design and application, affordability, the need to raise awareness among these persons and groups, the appropriateness and attractiveness of Internet access and services as well as their adaptability and compatibility;
- promoting a minimum number of Internet access points and ICT services on the premises of public authorities and, where appropriate, in other public places, in line with Recommendation No. R(99)14 of the Committee of Ministers to member states on universal community service concerning new communication services;
- encouraging, where practicable, public administrations, educational institutions and private owners of access facilities to new communication and information services to enable the general public to use these facilities;
- promoting the integration of ICTs into education and promoting media and information literacy and training in formal and non-formal education sectors for children and adults in order to:
  - a. empower them to use media technologies effectively to create, access, store, retrieve and share content to meet their individual and community needs and interests;
  - b. encourage them to exercise their democratic rights and civic responsibilities effectively;
  - c. encourage them to make informed choices when using the Internet and other ICTs by using and referring to diverse media forms and content

from different cultural and institutional sources; understanding how and why media content is produced; critically analysing the techniques, language and conventions used by the media and the messages they convey; and identifying media content and services that may be unsolicited, offensive or harmful.

### **III. Openness**

Member states should affirm freedom of expression and the free circulation of information on the Internet, balancing them, where necessary, with other legitimate rights and interests, in accordance with Article 10, paragraph 2, of the European Convention on Human Rights as interpreted by the European Court of Human Rights, by:

- promoting the active participation of the public in using, and contributing content to, the Internet and other ICTs;
- promoting freedom of communication and creation on the Internet, regardless of frontiers, in particular by:
  - a. not subjecting individuals to any licensing or other requirements having a similar effect, nor any general blocking or filtering measures by public authorities, or restrictions that go further than those applied to other means of content delivery;
  - b. facilitating, where appropriate, “re-users”, meaning those wishing to exploit existing digital content resources in order to create future content or services in a way that is compatible with respect for intellectual property rights;
  - c. promoting an open offer of services and accessible, usable and exploitable content via the Internet which caters to the different needs of users and social groups, in particular by:
    - o allowing service providers to operate in a regulatory framework which guarantees them non-discriminatory access to national and international telecommunication networks;
    - o increasing the provision and transparency of their online services to citizens and businesses;
    - o engaging with the public, where appropriate, through user-generated communities rather than official websites;
    - o encouraging, where appropriate, the re-use of public data by non-commercial users, so as to allow every individual access to public information, facilitating their participation in public life and democratic processes;
    - o promoting public domain information accessibility via the Internet which includes government documents, allowing all persons to participate in the process of government; information about personal data retained by public entities; scientific and historical

data; information on the state of technology, allowing the public to consider how the information society might guard against information warfare and other threats to human rights; creative works that are part of a shared cultural base, allowing persons to participate actively in their community and cultural history;

- o adapting and extending the remit of public service media, in line with Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, so as to cover the Internet and other new communication services and so that both generalist and specialised contents and services can be offered, as well as distinct personalised interactive and on-demand services.

#### ***IV. Diversity***

Member states are encouraged to ensure that Internet and ICT content is contributed by all regions, countries and communities so as to ensure over time representation of all peoples, nations, cultures and languages, in particular by:

- encouraging and promoting the growth of national or local cultural industries, especially in the field of digital content production, including that undertaken by public service media, where necessary crossing linguistic and cultural barriers (including all potential content creators and other stakeholders), in order to encourage linguistic diversity and artistic expression on the Internet and other new communication services. This should apply also to educational, cultural, scientific, scholarly and other content which may not be commercially viable in accordance with the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions;
- developing strategies and policies and creating appropriate legal and institutional frameworks to preserve the digital heritage of lasting cultural, scientific, or other values, in co-operation with holders of copyright and neighbouring rights, and other legitimate stakeholders in order, where appropriate, to set common standards and ensure compatibility and share resources. In this regard, access to legally deposited digital heritage materials, within reasonable restrictions, should also be assured;
- developing a culture of participation and involvement, *inter alia* by providing for the creation, modification and remixing of interactive content and the transformation of consumers into active communicators and creators of content;
- promoting mechanisms for the production and distribution of user- and community-generated content (thereby facilitating online communities), *inter alia* by encouraging public service media to use such content and co-operate with such communities;

- encouraging the creation and processing of and access to educational, cultural and scientific content in digital form, so as to ensure that all cultures can express themselves and have access to the Internet in all languages, including indigenous ones;
- encouraging capacity building for the production of local and indigenous content on the Internet;
- encouraging the multilingualisation of the Internet so that everyone can use it in their own language.

## **V. Security**

Member states should engage in international legal co-operation as a means of developing and strengthening security on the Internet and observance of international law, in particular by:

- signing and ratifying the Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189), in order to be able to implement a common criminal policy aimed at the protection of society against cybercrime, to co-operate for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence, and to resolve jurisdictional problems in cases of crimes committed in other states parties to the convention;
- promoting the signature and ratification of the Convention and Additional Protocol by non-member states as well as their use as model cybercrime legislation at the national level, so that a worldwide interoperable system and framework for global co-operation in fighting cybercrime among interested countries emerges;
- enhancing network and information security to enable them to resist actions that compromise their stability as well as the availability, authenticity, integrity and confidentiality of stored or transmitted data and the related services offered by or accessible via these networks and systems;
- empowering stakeholders to protect network and information security;
- adopting legislation and establishing appropriate enforcement authorities, where necessary, to combat spam. Member states should also facilitate the development of appropriate technical solutions related to combating spam, improve education and awareness among all stakeholders and encourage industry-driven initiatives, as well as engage in cross-border spam enforcement co-operation;
- encouraging the development of common rules on the co-operation between providers of information society services and law enforcement

authorities ensuring that such co-operation has a clear legal basis and respects privacy regulations;

- protecting personal data and privacy on the Internet and other ICTs (to protect users against the unlawful storage of personal data, the storage of inaccurate personal data, or the abuse or unauthorised disclosure of such data, or against the intrusion of their privacy through, for example, unsolicited communications for direct marketing purposes) and harmonising legal frameworks in this area without unjustifiably disrupting the free flow of information, in particular by:
  - a. improving their domestic frameworks for privacy law in accordance with Article 8 of the European Convention on Human Rights and by signing and ratifying the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108);
  - b. providing appropriate safeguards for the transfer of international personal data to states which do not have an adequate level of data protection;
  - c. facilitating cross-border co-operation in privacy law enforcement;
- combating piracy in the field of copyright and neighbouring rights;
- working together with the business sector and consumer representatives to ensure e-commerce users are afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce. This may include the introduction of requirements concerning contracts which can be concluded by electronic means, in particular requirements concerning secure electronic signatures;
- promoting the safer use of the Internet and of ICTs, particularly for children, fighting against illegal content and tackling harmful and, where necessary, unwanted content through regulation, the encouragement of self-regulation, including the elaboration of codes of conduct, and the development of adequate technical standards and systems;
- promoting the signature and ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

## Comments on the draft report on access of national minorities to the media: new challenges<sup>116</sup>

### Introduction

These comments are prepared at the request of the Directorate General of Human Rights, Council of Europe, and are designed to:

- comment on the draft study while taking into account the latest developments in the area of access of national minorities to the media, in particular with regard to new advancements in the media sector;
- contribute to the identification of issues where some further reflection at an intergovernmental level would be needed and outline possible steps that the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) may wish to take in further enhancing European co-operation on the said issues.

These comments will apply the typology in Figure 1 of the purposes which should be served, according to a number of international binding and standard-setting documents, by state action to promote minority media rights. It has to be noted that the typology applies primarily to traditional media, but it can still, *mutatis mutandis*, be applied to the new media.

Professor Moring begins his report in the following way: “This study aims at supporting an informed debate on how to promote access of National Minorities to media in a changing media environment. The focus of this study is on what has been widely referred to as *New Media*. A main observation underpinning the analysis presented in this study is that new types of media and media use emerge rapidly while the existing instruments to secure access for national minorities to these media have – with some minor exceptions – remained unchanged”.

This being so, we will proceed here from the assumption that the monitoring bodies of the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages need assistance in developing criteria and benchmarks to apply in assessing implementation of the two instruments in particular countries.

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116. These comments (DH-MIN(2006)017 prov) were prepared in 2006 upon the request of the Secretariat of the Framework Convention for the Protection of National Minorities and of the DH-MIN, for the fourth meeting of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), 19-20 October 2006, Strasbourg, France. The views expressed are those of the author.



**Figure 1. Minority media rights: general overview of state obligations**

Negative goals	Positive goals	
I. "Ban, combat"	II. "Assist"	III. "Empower"
State action to prohibit, disavow, marginalise, counteract all forms of discrimination and inequality	State action to develop public policy and regulation and provide assistance and funds to guarantee the right of minorities to media in their own languages, to access to media from kin and/or neighbouring countries and to a proper representation of their identity, culture, history and interests in media content, as well as action to promote inter-cultural and inter-ethnic dialogue and understanding	State not to hinder, or to take action to ensure minority access to, and participation in, the media at the level of:
		Programming
		Work-force
		Editorial control and management
		Ownership of media
		Regulation and oversight
Legislation, public policy		

In general terms, therefore, I believe that further work on the study could benefit from:

- grounding the issues more firmly in a broader Council of Europe policy and normative framework;
- more systematic and detailed consideration of the nature of the different new media and the opportunities and challenges they create for the exercise of minority (new) media rights, especially the positive ones;
- more detailed consideration of the regulatory and policy instruments that can be applied to promote the exercise of minority media rights in the field of the new media.

1. Developing a fuller policy and normative framework for minority (new) media rights

The draft report quite properly proceeds from the two key international instruments in this field, that is, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. However, efforts to promote a debate on promoting access of national minorities to the new media can draw on a wider body of Council of Europe standards and policy orientations. Fuller recourse to this body of work may give added impetus to the debate and ensure its greater effectiveness.

The Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw on 16-17 May 2005) reiterated, in both the

Warsaw Declaration and the Action Plan, the organisation's commitment to the protection of national minorities.

The Action Plan confirmed the importance of respect for human rights in the information society, in particular freedom of expression and information and the right to respect for private life. It also contained a commitment to elaborate further principles and guidelines to ensure respect for human rights and the rule of law in the information society, as well as to address challenges created by the use of information and communication technologies (ICT) with a view to protecting human rights against violations stemming from the abuse of ICT.

The document also includes a commitment to take initiatives so that member states make use of the opportunities provided by the information society. In this connection the Council of Europe will examine how ICT can facilitate democratic reform and practice.

The Ministers of States participating in the 7th European Ministerial Conference on Mass Media Policy (Kyiv, 10-11 March 2005) adopted Resolution No. 2 "Cultural diversity and media pluralism in times of globalisation" in which they:

- resolved to maintain and promote cultural and linguistic diversity in the media, also in the interest of intercultural dialogue, paying particular attention to the interests of persons belonging to minority groups and to minority community media; and
- agreed to encourage access to the media by persons belonging to national minorities in order to promote tolerance and enhance cultural pluralism;

In Resolution No. 3 "Human rights and regulation of the media and new communication services in the Information Society", the ministers, among other things:

- welcomed technological developments in the field of communications which enhance the free flow of information within and across national borders and provide individuals with unprecedented opportunities to exercise their right to freedom of expression and information;
- expressed the conviction that the new communication services can enhance the exercise of human rights;
- reiterated their commitment to create conditions for equitable access to new communication services by all individuals in their countries in order to promote their participation in public life;
- reaffirmed their commitment, in line with the principles of the Declaration on Freedom of Communication on the Internet adopted by the Committee of Ministers on 28 May 2003, to remove, when technically feasible, any hindrances to the free flow of information through new communication services;
- undertook to ensure that the regulatory measures which they may take with regard to the media and new communication services will respect

and promote the fundamental values of pluralism and diversity, respect for human rights and non-discriminatory access; and

- undertook to step up efforts to ensure an effective and equitable access for all individuals to the new communication services, skills and knowledge, especially with a view to preventing digital exclusion.

The Action Plan adopted by the ministerial conference encompasses action to implement these standards and commitments, including examination of how different types of media can play a part in promoting social cohesion and integrating all communities and generations, and exchange of information and best practice between member states and other stakeholders on measures to promote inclusion in the Information Society, *inter alia* by encouraging access to the new communication services along the lines of the principle of universal community service, as defined in Recommendation No. R(99)14 of the Committee of Ministers.

Another line of Council of Europe work which directly bears on the issue of minority access to, and use of, the new media has to do with human rights in the information society. Mention should be made here first of all of the 2005 Declaration of the Committee of Ministers on Human Rights and the Rule of Law in the Information Society (CM(2005)56 final), and of the various Council of Europe contributions to the WSIS process.

In its Political Message to the World Summit on the Information Society (CM(2003)87 final), the Committee of Ministers stressed the importance of an equitable access to information and expressed concern about the grave risks of a “digital divide” both between nations and within nations, widening existing disadvantages such as those arising from discrimination based on gender, religion, or ethnic or racial origin. The Committee of Ministers noted that the exercise of human rights and freedoms is mediated more and more by digital technology and that therefore effective and equitable access to communications services, skills and knowledge is becoming a precondition for full citizenship of individuals.

The Committee of Ministers also expressed its belief that ICT can strengthen representative democracy by making it easier to hold fair elections and public consultations, accessible to all, help to raise the quality of public deliberation, and enable citizens and civil society to take an active part in policy making at national as well as local and regional levels. It noted that the Council of Europe’s key strategy for social cohesion is to ensure real and effective access for all to their social rights and public services, as the organisation looks to ICT for ways of overcoming the obstacles that prevent people from effectively claiming their rights and for improving the quality of life of vulnerable people such as the elderly, the chronically ill, people with disabilities and all who are at risk of social marginalisation.

The Political Message notes that the preservation and promotion of cultural and linguistic diversity, and active intercultural dialogue are hallmarks of a thriving information society.

More recently, the Council of Europe Submission to the Internet Governance Forum (Athens, 30 October to 2 November 2006) notes that for the Council of Europe, it is crucial and indispensable for the issues of the openness, diversity and security of the Internet, as well as access to it, to be addressed from a people-centred perspective and for them to be underpinned by the core values of the Council of Europe, namely to protect and promote human rights, democracy and the rule of law based on shared values and respect for national and cultural specificities. Commenting on the public service value of the Internet, the submission states that everyone should be entitled to expect the delivery of a minimum level of Internet services (for example effective and affordable access, a suitable environment for businesses to operate, etc.). It goes on to say that the state will have to play a growing part in the delivery of the public service aspects of the Internet, by facilitating a multi-stakeholder framework within which the private sector can operate and, where necessary, should adopt measures to fill gaps left by private operators.

Nevertheless, the document continues, there are a number of services which are already, or will be, provided directly by states through the Internet with respect to, for example, initiatives concerning e-government, education and culture, as well as the use of the Internet to facilitate participation in public matters and democratic processes (e-democracy), the Internet as a means of eliminating inequalities (for example distance work for persons with disabilities), etc. Such initiatives are increasingly important as they aim to improve access to information by all, and enhance the opportunities for all, including people with disabilities, to participate in education and in political, cultural and social life. Participation and access to information are essential elements of democracy and citizenship, and it is a permanent duty of the state to facilitate them.

The submission further notes that the state can discharge many of its responsibilities by promoting new forms of solidarity, partnership and co-operation. Through open discussions and exchanges of information, a multi-stakeholder governance approach will help to shape regulatory and non-regulatory models and address challenges and problems arising from the rapid development of the information society.

These normative, policy and regulatory orientations could usefully be drawn upon in developing the study on "Access of national minorities to the media: new challenges" in that they represent stated Council of Europe policy and commitments in areas directly related to, and underpinning, issues covered in the report. Another source of ideas could be found in the report on "Media pluralism in the digital environment" (MM-S-PL (2000) 10), adopted by the Group of Specialists on Media Pluralism, operating under the authority of the CDMM, in 2000.

The documents cited above suggest that perhaps the title of the study should be "Access of national minorities to the media in the information society: new challenges and opportunities". This would frame the issue more fully than now,

also pointing to the fact that the ICTs bring not only challenges, but also many opportunities.

Analogue new media (cable and satellite) multiply the number of available channels and eliminate space as a factor in communication, thus assisting many aspects of minority media access and use. Digital broadcasting multiplies the number of available channels in terrestrial broadcasting, also boosting prospects for active minority access to broadcasting.

However, if we concentrate solely on “the media” – that is, organisations which collect and develop information and other content and disseminate it – we are likely to miss the fact that the information society offers individuals not only enhanced media, but also electronic communication technologies (also known as information and communication technologies – ICTs).

“Access” to the media is too often discussed in the sense of passive access which can at best allow exercise of the right to information and content. The question then becomes of how to regulate the media to make sure that minorities receive content appropriate to their needs. Active access to communication, meaning the ability to develop and disseminate content by each individual or group,<sup>117</sup> or in other words the ability to enjoy freedom of expression, is much more difficult to achieve in relation to the media. I share Tarlach McGonagle’s emphasis on the importance of freedom of expression in discussing minority rights.

And this is where the advent of the information society can make all the difference. It means not only a quantitative, but also a qualitative change: a new situation as regards active access is arising and it must be approached as such. We live in what someone has described as an age of “semiotic democracy” – anyone with the right equipment and skills can be a communicator on the Internet, and the differences between communication “professionals” and “amateurs” is becoming blurred.

With the new ICTs, very many (though, of course, not all) barriers to active access disappear. Freedom of expression on a societal and even global scale is becoming possible for individuals and groups.

Another qualitative change brought about by the information society is the manner of exercising the right to freedom of expression. ICT impact on freedom of expression is such that it is extended and enriched, indeed redefined, by adding cyberspace as a new universe for its exercise. Hence, it is an ICT-enhanced right, going far beyond its form in the old analogue media world. Many other human rights are also profoundly affected by the ICTs, as shown in Figure 2.

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117. Jakubowicz K., “A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1988-2003)” in *Filling the frame. five years of monitoring the Framework Convention for the Protection of National Minorities*. Council of Europe Publishing, Strasbourg, pp. 113-43.

**Figure 2. ICT impact on human rights (ECHR)**

<b>Form of ICT impact</b>	<b>Articles of the Convention</b>
<b>Quantitative impact</b> (multiplier effect)	Article 4 – Prohibition of slavery and forced labour Article 6 – Right to a fair trial Article 8 – Right to respect for private and family life Article 14 – Prohibition of discrimination Protocol No. 12 Article 1 – General prohibition of discrimination Protocol 1, Article 1 – Protection of property
<b>Qualitative impact</b> (ICTs create new forms of human rights violation, exercise or protection)	Article 4 – Prohibition of slavery and forced labour Article 7 – No punishment without law Protocol 1, Article 1 – Protection of property
<b>Redefinition of a human right,</b> primarily by adding cyberspace as a new universe for its exercise;	Article 11 – Freedom of assembly and association Protocol No. 1, Article 3 – Right to free elections Protocol No. 4, Article 2 – Freedom of movement
ICT-enhanced human rights	Article 10 – Freedom of expression Protocol 1, Article 2 – Right to education Protocol No. 4 Article 2 – Freedom of movement

Source: Karol Jakubowicz, "Human rights and the information society: a preliminary overview". A working paper for the Preparatory Group on Human Rights and the Rule of Law in the Information Society. Integrated Project 1 "Making democratic institutions work", IP1(2004)47, Strasbourg, 7 September 2004.

This is why Birgitte Kofod Olsen, in a recent paper "Ensuring minority rights in a pluralistic and 'liquid' information society",<sup>118</sup> talks about "digitizing minority rights". She says that "the right to enjoy the cultural life of the minority and to participate in the cultural, social and economic life of society may be effectively facilitated by the Internet and other ICTs" (pp. 271-2). And she adds:

When focusing on the special features of the information society, the Internet and other information and communication devices, may play an important role in de facto strengthening and furthering the enjoyment of minority rights. The setting up of Web sites, chat rooms, and virtual conferences

118. Kofod Olsen B., "Ensuring minority rights in a pluralistic and 'liquid' information society" in Jørgensen R. F. (ed.) *Human rights in the global information society*. The MIT Press, Cambridge, Mass, pp. 263-280.

enables members of minority groups [to] spread throughout a country, or a region, or across borders, to stay in contact and thereby actively maintain and develop their specific identity and culture. Moreover, it creates a basis for a new perspective on structuring a pluralistic society that acknowledges the right of minorities to live in accordance with their own norms and traditions within their ethnic or religious group or community. (p. 274)

Thus, the information society and the ICTs add an entirely new dimension to the issue of minority rights. Of course, none of this is entirely unproblematic.

For the minorities themselves, these new opportunities can create an added challenge to integration, if the new technologies are used to create an impermeable “walled garden”, locking individuals into a virtual community of language and culture, with little or no contact with those of their host countries and societies.

For the authorities, they create both many challenges in terms of combating violations of minority rights via the ICTs, and in implementing what Birgitte Kofod Olsen calls a “positive obligation” to provide access to the Internet and other ICTs for all. However, as shown by the British report on media literacy among adults from minority ethnic groups<sup>119</sup> (cited also in Tarlach McGonagle’s comments), in the UK, at least, minority ethnic groups have somewhat higher levels of media literacy across the digital platforms; there is higher ownership of digital TV among minority ethnic groups; home access to, and use of the Internet, as well as to 3G mobile phones and take-up of broadband are higher among minority ethnic groups than in the population as a whole. It would therefore seem that minorities are very adept at using the chances and opportunities offered by the ICTS.

### ***“New media”: unravelling the concept***

The term “new media” has been around for some time and has thus been employed to denote quite different generations of technologies. Generally speaking, the term refers to:

- analogue (old) “new media”: cable and satellite television, the VCR;
- digital (new) “new media”: digital broadcasting in its various forms (DVB-T, DVB-C, DVB-S, DVB-H, that is terrestrial, cable, satellite and reception of mobile television on a handheld device, that is, a cellular phone, or a PDA), interactive broadcasting, the Internet, mobile telephony, new platforms for content delivery (IPTV, xDSL, etc.), and so on.

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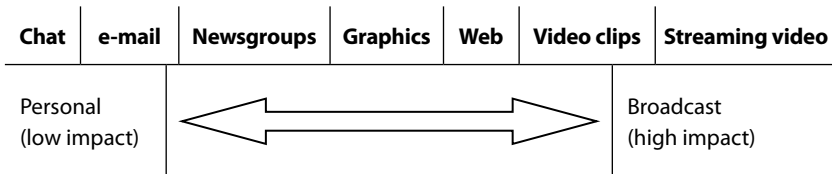
119. OFCOM, Media Literacy Audit: Report on media literacy amongst adults from minority ethnic groups, London, 2006.

Digital new media are also known as information and communication technologies (ICTs), or “new communication services”.

What accounts for the difference between analogue and digital “new media” is the process of convergence which by means of digitisation integrates telecommunications, broadcasting and informatics into what may be described as “convergent digital communication”.

According to the European Commission’s *Green book on convergence*, the process described by this term leads to the ability of different network platforms to carry essentially similar kinds of services, for example, television signals may be distributed terrestrially, via cable, xDSL systems (for example, via telecommunications lines, such as the telephone) or via the Internet. The Internet confirms this by offering types of content also available from many network platforms (see Fig. 3).

**Figure 3. Range of material available on the Internet**



Source: David Mitchell and Mark Armstrong “Broadcasting regulatory mechanisms and the internet”, *Intermedia*, Dec. 2001, Vol. 29, No. 5/6.

Mueller<sup>120</sup> views convergence as a takeover of all forms of media by one technology: digital computers, a technological system with solid-state integrated circuits (ICs) at its core, supplemented by photonic components (lasers and optical filters) and applications of mathematical information theory, capable of handling multimedia content. The computing power of information technology invests the digital media with the ability to process content potentially without any restrictions.

Telecommunication networks provide diverse and distant people with connectivity and access to content anywhere.

Digitisation additionally makes possible signal compression, reprocessibility of content as data, text, audio, video and its transference across distribution networks. This changes or eliminates constraints heretofore limiting communication, such as bandwidth, interactivity and network architecture.

120. Mueller M. “Digital convergence and its consequences”, *The Public/Javnost*, 1999, Vol. VI, 3, pp. 11-28.



**Figure 4. Some differences between analogue and digital communications**

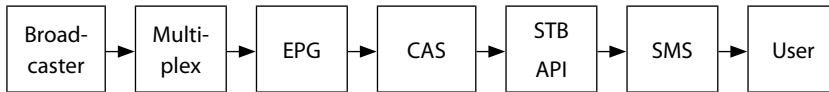
20th century – analogue	21st century – digital
1 network – 1 service	1 network – many services
Limited content delivery/channel scarcity	Abundant delivery capacity/channel proliferation
High social impact of mass broadcasting	Wide choice of content providers: narrowcasting, VOD, PVRs
no/low user control and interactivity	Higher user control, full interactivity

VOD = Video on Demand; PVR = personal video recorder (a digital VCR with a hard disk for storage of recorded programming)

Source: Directorate General for Education and Culture (n.d.) Audiovisual Content in the Digital Age. Brussels: European Commission.

Given that in accordance with a recent ITU decision, analogue broadcasting is to be phased out in Europe by 2015, the modalities of digital broadcasting acquire growing importance, also in terms of minority media rights. Figure 5 shows the main elements of the system.

**Figure 5. Path from broadcaster to user in digital broadcasting**



Multiplex – a system used to combine multiple compressed digital signals for transmission over a single frequency

EPG – Electronic Programme Guide

CAS – Conditional Access System

STB – Set-top box, commonly used to receive and decode digital television broadcasts for display on analogue television sets (or computers)

API – Application Programme Interface (set-top box software)

SMS – Subscriber Management System

The appearance of these “digital gateways” or “bottlenecks” along the way from the broadcaster to the receiver in itself creates a host of regulatory problems and explains why regulation is more and more concerned with technical issues. Holznagel<sup>121</sup> (1998-99: 6-7) points out in this regard: “The most important goal of all regulatory efforts in the field of digital TV must be to overcome the above described “gatekeeper” or “bottleneck” problem by providing open access to these techniques. Only if these key positions are open to multiple providers, the demands for pluralism, a diversity of opinions and a fair competition can be achieved”.

121. Bernd Holznagel “New challenges: convergence of markets, divergence of the laws? Questions regarding the future communications regulation”. *International Journal of Communications Law and Policy*, Issue 2, Winter 1998/99.

Convergent digital communication has the following features:

- its multimedia nature;
- interactivity; interchangeable sender/receive roles; user ability to order, choose or distribute self-generated content;
- passive linear communication (push technology: “Take what is offered when it is available”) is replaced by active non-linear communication (pull technology: “Take what you want, whenever you want”);
- asynchronous communication: content can be stored and await the user’s decision to access it;
- individualisation/personalisation, signifying the twin elements of both the sender’s and the user’s ability to guide communication flows in such a way that the sender can address to individual users content suited to their choices and interests, or users can select content from what is on offer for the same purpose;
- disintermediation (any communicator can access any receiver directly, without the need for intermediaries, that is, the media, and vice versa) and neo-intermediation (for example, emergence of new intermediaries on the Internet: portals, search machines which aggregate and organise information, and provide access to it).

With fast technological change, one can also distinguish different stages within the digital new media, especially the Internet. This is known for short as the difference between “Web 1.0” and “Web 2.0”.<sup>122</sup> Web 2.0 is based on what is described as the “architecture of participation”, a built-in ethic of co-operation, in which the service acts primarily as an intelligent broker, harnessing the power of the users themselves.

The best-known feature of Web 2.0 is its openness to user-generated content, including blogs,<sup>123</sup> photographs, films (YouTube), news by “citizen reporters” (as on OhmyNews),<sup>124</sup> social networking sites (MySpace), etc. This is described as introducing a new era of “semiotic democracy”: “Anyone can now become a creator, a publisher, an author via this new form of cultural discourse, a platform to publish to the world at large that grants near instant publication and access.”<sup>125</sup> “Personal media” have long been talked about, but are now becoming a reality. Of course, it is also true that “Certainly, digital media will create new stars and new businesses, but making high-quality video content will always

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122. See Tim O’Reilly, *What Is Web 2.0 design patterns and business models for the next generation of software*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008839](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008839)

123. See Sifry D., *State of the blogosphere*, August 2006, [www.sifry.com/alerts/](http://www.sifry.com/alerts/)

124. See Kim E-G., Hamilton J. W. (2006) “Capitulation to capital ? OhmyNews as alternative media”, *Media, Culture & Society*, 28(4), pp. 541-560.

125. See Stark E. (2006) *Free culture and the internet: a new semiotic democracy*, [www.opendemocracy.net/arts-commons/semiotic\\_3662.jsp#](http://www.opendemocracy.net/arts-commons/semiotic_3662.jsp#).

be a daunting and expensive task. Music or a blog can be composed from a bedroom, but not an episode of "Friends".<sup>126</sup>

Nevertheless, the phenomenon of disintermediation and the development of Web 2.0 should be given attention in the context of national minority (new) media rights for two reasons:

- they open many new opportunities of self-expression and communication for individuals and groups within various national minorities,<sup>127</sup> as long as they are not on the wrong side of the digital divide; and thus may to some extent alleviate the problem of national minority active access to the media;
- and they require a new approach on the part of the authorities, as this is no longer a matter of regulation of media outlets subject to a licensing and regulatory regime, so entirely new methods are required.

One possible approach is described by Harrison and Wessels:

The innovative use of new media is revealing reconfigured forms of social relations and media usage which are often organized around communities of interest within a networking environment. These developments occur at ultra-local level (the neighbourhood) or at the city or sub-region level. As such, we call them "ground-up". The "ground-up" approach to PSB complements the 'top-down' approach to PSB. Both point to rethinking the concept of a media user (real or potentially).

This activity is organised in local government, the private sector, voluntary agencies and user-group partnerships, which is resulting in new relationships between producers, users and audiences. They are increasing in number and also gaining recognition as a source of public service communication and are fostering new forms of audience engagement and participation.

Examination of the institutional arrangements of both traditional and new media environments allow us to argue that the phrase "audience fragmentation" hides the sense of audience participation produced by new forms of engagement within a reconfigured media environment. This environment stimulates the expression of a pluralism generated by the activities of diverse individuals and groups from different social, cultural and political milieu.<sup>128</sup>

Thus, the digital new media and their global reach can empower national minorities and make them more self-reliant in all the forms of media access and use mentioned in the report. The report on "Media pluralism in the digital

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126. "Don't write off Hollywood and the big media groups just yet", *The Economist*, 19 January, 2006.

127. Sawhney H. and Lee S., "Arenas of innovation: understanding new configurational potentialities of communication technologies", *Media, Culture & Society*, 2005, Vol. 27(3), pp. 391-414.

128. See also Harrison J. and Wessels B., "A new public service communication environment? Public service broadcasting in the reconfiguring media", *New Media & Society*, 2005. 7(6), pp. 834-53.

environment” notes that entry barriers to the Internet world are very low and it is easy for companies/individuals to enter this market. This is so, provided, of course, that individuals belonging to national minorities have the capacity and skills to use those new media actively. Where this is not the case, public authorities should institute measures to promote digital inclusion for national minorities.

Professor Moring correctly points out that media development has so far been cumulative and not substitutive, meaning that new media and technologies of communication have not replaced older ones, but have found a place in the communication ecology alongside them. There is some evidence now from the UK that the so called “networked generation” is devoting less time to the traditional media than previously,<sup>129</sup> but no doubt old and new media will continue to co-exist in the foreseeable future. Accordingly, efforts to promote national minority media rights should continue to cover all types of media, though in a differentiated manner, in view of the different opportunities and challenges represented by each category of media, as well as of the different regulatory frameworks applying to them.

### ***New regulatory framework for the new media***

Analogue new media are subject to the same regulatory framework as traditional broadcasting.

As for digital new media, a distinction needs to be made between digital broadcasting and the non-broadcast platforms, especially the Internet and the “information society services” defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

Convergence – thanks to creating conditions for multichannel radio and television, interactivity, individualisation, personalisation and the user’s ability to access content on demand – introduces new considerations and criteria into content regulation, known as a proportional, graduated approach. It also brings to the fore the concepts of self-regulation and co-regulation, especially as regards the so-called “information society services”.

The difference between the old and new approach can be illustrated on the example of the change of the regulatory model proposed in the draft new Audiovisual Media Services directive and in debates on the revision of the European Convention on Transfrontier Television:

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129. OFCOM, *The communications market 2006*, Office of Communications, London (2006) [www.ofcom.org.uk](http://www.ofcom.org.uk).

**Figure 6. Old and new models of regulation**

Old model	New model
Content regulation of broadcasting	Horizontal, technologically-neutral, graduated regulation of audiovisual content services/electronic media involving – where appropriate – self- and co-regulation

One argument in favour of the new model of regulation is that “When there are many more channels available to the mass of viewers, and as the degree of viewer control over those channels increases, there may be a case for moving towards a lighter touch approach to content regulation”. According to this view, there could be a graduated approach depending on the

- extent of the availability and “publicness” of the service;
- degree of viewer control over the act of reception;
- and consciousness of the choice that is made to receive the service.<sup>130</sup>

This would then, as shown in Figure 7, provide a broad spectrum of content regulation from an extremely light touch for most services to a more rigorous approach for mainstream free-to-air TV networks.

**Figure 7. Graduated regulation**

Nature of service	Degree of regulation
On-demand services, interactive TV services, the Internet	Relying mainly on self regulation and international co-operation in addition to the requirements of national civil and criminal law
Multi-channel/pay-TV services where viewers generally choose what they subscribe to	Requiring light touch, taste and decency regulation
Mainstream, free-to-air networks enjoying spectrum privileges	Requiring reasonably rigorous regulation

Source: BBC, 1998.

130. BBC Response to the EU Green Paper “The convergence of the telecommunications, media and information technology sectors and the implications for regulation” (1998).

One example of this approach is the German regulatory system, covering new services of the digital era.

**Figure 8. Broadcasting, media- and tele-services: features and regulation in Germany**

<b>Programme services</b>	<b>Information society services</b>	
	<b>Media services</b>	<b>Tele services</b>
Interstate Treaty on Broadcasting	Interstate Treaty on Media Services	Tele Services Act
Point-to-multipoint Fixed programming schedule	Point-to-multipoint, Point-to-point, relevant editorial content	Point-to-point No relevant editorial content
TV (and radio) programmes Free TV and Pay TV services	On-demand TV services; Teletext Online magazines and websites (i.e. CNN.com)	e-Commerce transaction services, (i.e. online banking) Online databases
<b>High-level content regulation</b>	<b>Low-level content regulation</b>	<b>No significant content regulation</b>
Licensing requirement Concentration control Standards of journalism Programming quotas Access rights Listed events Advertising restrictions Sponsoring restrictions Protection of youth Right of reply Privacy (Pay TV)	Notification requirement Transparency Standards of journalism (Minor) restrictions on advertising and sponsoring Protection of youth Right of reply Liability for content Privacy	Notification requirement Liability for "content"

Source: Grünwald A., "What future for broadcasting in the digital era?" paper presented during an expert seminar on The European Convention on Transfrontier Television in an Evolving Broadcasting Environment, Strasbourg. (2001)

Some content services, especially on the Internet, cannot easily, or at all, be regulated or supervised under hitherto existing regulatory frameworks. In such cases, self-regulation by service providers becomes the best option.

Figure 9 shows the recommended model of self-regulation on the Internet, as far as protection against illegal and harmful content is concerned.<sup>131</sup>

**Figure 9. International system of self-regulation and youth protection on the Internet**

		Legal but harmful content
Internet industry Codes of conduct Financing of other self-regulatory initiatives (hotlines, self-rating, filtering) Promotion to users	Self-rating/filtering Development of an international self-rating/filtering system Secure cross-cultural consensus	
Law enforcement Fighting illegal content Co-operation with national hotlines (and online industry) Supporting self-regulatory efforts	Hotlines Information about illegal and harmful content Forwarding to host country Co-operation with prosecution	
Illegal content		

Source: Self-regulation of Internet content, 1999, p. 56.

While very much in line with what in Figure 1 we called “negative goals of state obligations in the field of minority media rights,” this system would need to be developed to be applicable to positive goals in the area of minority active access to, and use of, the Internet. It does, however, indicate the difference in the regulatory approach between traditional broadcasting and the Internet.

Schulz and Held note that the reverse of traditional regulation is self-regulation, where the state refrains from interfering with a process because it assumes that social processes will lead to a result which will achieve the objectives of regulation all on its own. Private arrangements are made without any interference by the state. In some areas, such as journalistic ethics, for example, self-regulation is the only option available, as state interference would be harmful. Elsewhere, self-regulation – when different players agree to rules regulating their activities and they define and enact codes of conduct (“intentional self-regulation”) – is necessary also for heretofore regulated activities, such as provision of media content by new means.

The following modes of self- and co-regulation can be distinguished:

- “self-regulation”, where the state has no role to play;

131. *Self-regulation of Internet content*, Bertelsmann Foundation, Gütersloh (1999).

- “regulated self-regulation”: it fits in with a legal framework or has a basis laid down in law. This approach focuses on the instruments the state can apply to regulate a self-regulatory process;
- “co-regulation” indicates situations in which the regulator would be actively involved in securing that an acceptable and effective solution is achieved. The regulator may for example set objectives which are to be achieved, or provide support for the sanctions available, while still leaving space for self-regulatory initiatives by industry, taking due account of the interests and views of other stakeholders, to meet the objectives in the most efficient way. The regulator will in any such case have scope to impose more formal regulation if the response of industry is ineffective or not forthcoming in a sufficiently timely manner.<sup>132</sup>

Regulated self-regulation makes use of the advantages of both self-regulation as well as of command-and-control regulation. An example of such a combination is the law on the media and on telecommunications. To achieve the objectives of regulation, self-regulation is supported by traditional, imperative instruments. Additionally, flexible, evolutionary elements provide a supplement to traditional, imperative regulation. The state structures the frame to enable self-regulation. It intervenes if the objectives are not met by self-regulation, or if there are undesirable side effects.

This offers a range of instruments which must be different from those applied to traditional broadcasters and rely much more on the co-operation of content and service providers.

In order to ensure that implementation of the Framework Convention for the Protection of National Minorities (FCNM) and of the European Charter for Regional or Minority Languages keeps abreast of new technological developments and patterns of communication in the information society, the methodology used by the monitoring bodies of the two instruments should be developed and modernised, and the practical meaning and application of the standards laid down in them should be extended and enriched. On this basis, the monitoring bodies could then advise governments on how those standards should be understood and implemented in the information society, and what policy, regulatory and practical measures should be taken to these ends.

It should also be remembered in this context that the ICTs may make the job of DH-MIN, as well as of the bodies behind the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, more difficult. After all, national governments may now be

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132. Schultz W. and Held T., “Regulated self-regulation as a form of modern government”, Interim report, Hans Bredow Institute for Media Research, Hamburg, (2001). For a thorough treatment of co-regulation, see “Final report. study on co-regulation measures in the media sector”, study for the European Commission, Directorate Information Society and Media Unit A1 Audiovisual and Media Policies, Hans Bredow Institute for Media Research, Hamburg (2006).



tempted to say: these documents are outdated and the Internet will solve all remaining problems.

In the future, it may therefore be necessary to add new language to the two instruments dealing with new communication technologies and what needs to be done in this area to protect minority rights. Many Council of Europe standards are now being reassessed and in some cases revised to ensure their continued relevance and effectiveness in the information society. This may also be necessary one day in relation to the Convention and the charter.

But even if things do not go so far, the important point is that there should be a policy to promote passive and active access of the national minorities to the media, as well as their active use of new communication technologies. What instruments are used to implement this policy is always a matter of judging what is necessary in the particular circumstances of each country.

### ***Brief conclusions***

1. Analogue new media (cable and satellite) multiply the number of available channels and eliminate space as a factor in communication, thus assisting many aspects of minority media access and use. They are subject to traditional broadcasting regulation.
2. Digital broadcasting multiplies the number of available channels in terrestrial broadcasting (how much depends on the standard of signal applied), also boosting prospects for active minority access to broadcasting. Depending on the legal framework in place in a given country, it may be subject to a mixture of broadcasting and telecommunications regulation (the latter applying to some telecom operators involved in the process). Many of the opportunities and challenges in the field of media pluralism (and by extension of minority access to digital broadcasting) created by digital broadcasting are discussed in the report on "Media pluralism in the digital environment".
3. The Internet and other digital new media are not (and cannot be) covered by a state-administered consistent non-technical and human rights-oriented regulatory framework, though some elements, like the Cybercrime Convention, are emerging. They pose many challenges in terms of the negative goals of state action to promote minority (new) media rights, and also offer many opportunities in terms of the exercise of those rights by the individuals and groups concerned. Efforts by member states in this area could serve the following goals:
  - a. developing legal and administrative systems for the prosecution of illegal content which violates national minority rights;
  - b. developing systems of co-regulation or regulated self-regulation serving the elimination of Internet content harmful to national minorities;

- c. promoting digital inclusion for national minorities, as part of a broader effort to promote the emergence of the information society, in ways that would enable them to obtain capacity and skills needed in bottom-up communication via the Internet and other ICTs;
- d. developing online public services in ways designed, inter alia, to promote minority media rights.

In order to ensure that implementation of the FCNM and of the European Charter for Regional or Minority Languages keeps abreast of new technological developments and patterns of communication in the information society, DH-MIN could usefully discuss the opportunities and challenges created by the new media, as well as the regulatory issues involved in dealing with them. This could be a point of departure for developing and modernising the methodology used by the monitoring bodies of the two instruments, as well as for extending and enriching the practical meaning and application of the standards laid down in them. On this basis, the monitoring bodies could then advise governments on how those standards should be understood and implemented in the information society, and what policy, regulatory and practical measures should be taken to these ends.



## **Part IV. Creating and protecting democratic media systems**



## Post-communist central and eastern Europe: promoting the emergence of open and pluralist media systems

*Memorandum, written by Karol Jakubowicz, presented during the third European Ministerial Conference on Mass Media Policy, Cyprus, 1991, as the contribution of the Polish delegation.*

The old centralised command system of mass communication is being dismantled in central and eastern Europe. Communication and information monopolies are disappearing. De-monopolisation and deregulation of the broadcast media, which gained momentum in western Europe some 10 years ago, is now sweeping the rest of the continent.

As shown by the western European experience, this process, which has widespread social ramifications, is a difficult and prolonged one. In central and eastern Europe, these difficulties are compounded beyond measure by the tradition of subordinating all aspects of the media's operation to political goals. The result was a low level of professionalism, lack of managerial skills, ill-conceived organisational and financial structures and lack of long-term planning and development – in short, immensely complex, wasteful and inefficient media systems which have to be profoundly restructured and in many respects redesigned from scratch.

An additional level of difficulty is created by the fact that the realignment of media policies and systems is taking place at a time of rapid social, political and economic change involved in the dismantling of the communist system.

The fact that central and eastern European countries lag behind in economic and technological development places still further barriers before their mass media and especially telecommunications systems.

Add to this the explosive social, economic and nationalities crises which are rocking central and eastern European countries and it becomes obvious that the remodelling of communication systems will be a very protracted process, fraught with exceptional difficulty, yielding unpredictable results – and in some cases may even be reversed.

Particular central and eastern European countries are dismantling the communist system at a different pace, and some are much more advanced than others. This will extend the transition period even more. At various times during this process particular countries will be faced with similar problems and choices and will have to find their own solutions.

## **Goals**

All the opposition movements in communist countries were committed to creating media systems that are truly open – giving access to the media to all who require it – and plural, that is, marked by pluriformity (accommodating many media ownership patterns) and pluralism (providing a forum, within the law, for all ideologies, points of view and beliefs, as well as for general diversity of content).

This is very much in line with the call contained in the Council of Europe's 1982 Declaration on the Freedom of Expression and Information for the existence in democratic countries of "a wide variety of independent and autonomous media, permitting the reflection of a diversity of ideas and opinions".

In practical terms, what this means for the broadcasting systems of those countries, for example, is that they should be composed of three sectors:

- the public service sector – serving as a mainstay of parliamentary democracy and operating in line with the public service remit, but also attuned to operation in a market economy, capable of competing with commercial broadcasting media (that is, financially secure, thanks to a system of financing freeing it from excessive reliance on advertising revenue);
- the civic sector – socially-motivated privately or collectively owned stations, mostly local and community ones, speaking for, on behalf of, or to various groups, parties, organisations, movements, minorities, territorial groups and communities (at this time of fast social and political change in post-communist countries, there is an unusually high level of need for opportunities for active communication, especially in the field of political communication);
- the commercial sector.

It is clear that decisive regulation is required for such a system to emerge. It has to be safeguarded by an active policy of supporting and bolstering both the public and civic sectors and containing media concentration. This is not always fully realised in post-communist countries.

As for newspapers and periodicals, no affirmative programme of action is being foreseen. While it is true that papers once monopolised by the Communist Party are in some cases purposely sold to newly emerging political parties representing various ideological orientations, thus to promote press pluralism, these papers will stand or fail depending solely on their sales (or, possibly, whatever subsidies their parent organisations, if any, can provide).

So far as the new communication media (video, satellite and cable television) are concerned, the state and/or public sector is not really involved in developing them. This is purely the domain of private enterprise. The new information media and telematics are being developed with state participation, but with

primary reliance on foreign technology and capital, in the full knowledge that otherwise the goal of catching up with the west will be hard to achieve.

### ***The impediments***

The list of difficulties faced by post-communist countries in remodelling their media systems provided at the beginning of this memorandum is by no means complete.

The programme of “socialising” the media (and especially the broadcast media), that is, subordinating them to social control and orientating their goals towards a much more extensive programme of public service than in the west), once espoused by opposition movements in communist countries, is increasingly coming into conflict with the goal of privatising the media system. There are several reasons for this:

- strong and understandable distrust of all forms of public regulation and control of areas of social life as a legacy of the communist system in which they were all discredited as ultimately serving the purpose of party dominance;
- rejection of the dominance of the state or public sector, taking the form originally of the principle of the “equality of sectors”, but then evolving into the principle of the “primacy of the private sector”, with the concomitant triumph of the free market mentality.

On the other hand, in some instances there is a clear desire on the part of some governments or power elites to maintain a considerable degree of direct or indirect control over particularly the broadcast media and to delay de-monopolisation.

Thus, there is hardly a propitious social climate for the kind of purposeful policy making needed to promote and safeguard genuine openness and pluralism in the media. There may be some exceptions, but broadcasting in central and eastern European countries may develop into a bipolar system, combining weak state or public media organisations with straight commercial enterprises and very little in between. Reliance on foreign sources for start-up capital in launching new radio and television stations may preclude other forms of ownership – like community stations or those owned and financed partly by political parties, organisations or local government – from appearing. They would simply be unable to hold their own in competition with foreign-supported stations.

The goal of transforming the media system to serve as a mainstay of parliamentary democracy, in part through impartial, balanced reporting and coverage of political and social issues and providing access to the air for all trends of opinion and all political orientations, may be hindered by the volatility of the economic and political situation in at least some central and eastern European countries. It may lead to crises, shifting political alliances, unstable governing coalitions and



possibly frequent changes of government. This may reduce their willingness to adopt the kind of hands-off policy, at least with regard to the main national broadcasting systems, which is needed to safeguard their autonomy.

In central and eastern European countries, mass communication presented a strange combination of over-regulation (state monopoly of broadcasting) and under-regulation (many aspects of the state media were left unregulated so as to make possible their control by extra-legal means and manipulation dictated by political expediency). Thus, transforming the old, centralised command system of broadcasting into an open, pluralistic and democratic one is an immensely complex process, which must involve:

- deregulation;
- re-regulation (that is, rewriting the old laws and regulations which have governed mass communication so far);
- and regulation for the first time not only of private and commercial media, but also of the previously unregulated aspects of the old state system now to be turned into a public service system of broadcasting.

The adoption of media, press or broadcasting laws now being drafted in central and eastern European countries will by no means complete the process of creating the regulatory regime for the media in that region. As in western Europe, laws will have to be regularly revised in keeping with the changing audiovisual landscape and the development of the new information and communication technologies will pose ever new legal conundrums to solve.

### ***An all-European issue***

The emergence of open, plural, upgraded and modernised communication systems in central and eastern Europe is a prerequisite for the development of the audiovisual area of greater Europe. That in turn is crucial to the success of all-European integration.

Thus all European countries have a major stake in promoting the comprehensive compatibility of media systems between central/eastern and western Europe without which the audiovisual area of greater Europe cannot be created. Compatibility does not necessitate loss of identity, but does imply similarity of the fundamental principles on which media systems are based, as well as of their legal and institutional structures. Moreover, it encompasses similar operating procedures, technical equipment, management and financial and accounting systems, making possible easy and unhindered co-operation and exchange, and eventually promoting relatively balanced flows of programmes and services. This would eventually turn the European audiovisual industry into a much larger and stronger one, alleviating its structural constraints and inadequacy of supply, creating conditions for the sharing of risks, promoting the programme industry and bolstering its production potential, strengthening its position vis-à-vis other regions.

Western Europe and its organisations now in effect concentrate on promoting, through assistance, training and other schemes, compatibility in the sphere of law, management and operating procedures. Elimination of barriers to technology transfers also helps promote compatibility, even though a great deal still remains to be done in this field. Central and eastern European countries would profit from intensification of these efforts and especially from not only greater western investment in the broadcast media, but particularly from the creation of an extensive infrastructure of co-operation, co-productions, trade and exchange. They must obviously strive to develop that infrastructure themselves, but all forms of support and encouragement would be of great assistance. However, careful consideration of central and eastern Europe's needs will also reveal other possible forms of fostering communication compatibility.

Post-communist countries are embarking on media deregulation and de-monopolisation similar to the process which gained momentum in western Europe in the early 1980s. For reasons described above, it implies a much more decisive break with the past than in western Europe and there is a much greater danger of the pendulum swinging to the other extreme. As the western European experience shows, the goal of promoting the existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions requires more than mere de-monopolisation.

As post-communist countries grapple with the multitude of issues involved in reforming and remodelling their media systems, they need and indeed seek guidance on:

1. the minimum criteria by which a media system can be recognised as truly democratic, as well as practical policies and measures serving the attainment of that goal;
2. the strengths and weaknesses, desired and unforeseen results of media de-monopolisation and deregulation in western Europe;
3. methods of preventing or counteracting such phenomena as uncontrolled media concentration and the impact of financing from advertising and sponsorship as the most powerful determining factor of the directions of media development and evolution, potentially reducing political and cultural pluralism in their countries.

What is needed is a more concentrated effort on the part of western European countries and European organisations to define more clearly the criteria democratic media systems must meet in terms of making possible observance of human rights in this sphere and serving the process of democratic governance. This, together with more extensive reflection on the process of the change western European media systems have undergone in the last decade and its consequences, could go a long way to providing the input needed by post-communist countries in redesigning their own media systems in ways suited to their social conditions and needs.

This would be a major contribution to promoting media compatibility in Europe without running the risk of models and solutions being imposed on anybody.

Given the all-European importance of processes unfolding in the media systems of post-communist countries, this set of issues deserves careful study and considered action as a major project in its own right, in addition to all other forms of assistance. It would answer the profound and urgent needs of central and eastern European countries.

## Media concentrations and foreign media presence in central and eastern Europe<sup>133</sup>

### Introduction

The question of media concentrations and their effect on patterns of social communication is the object of intense interest in Europe today. The Council of Europe, the Commission of the European Communities and the European Institute for the Media have all conducted separate full-fledged studies of the issue with a view to ascertaining the possible positive and negative consequences of the process of media concentrations and to assessing the need for possible policy-making and action in this area. It will take some time yet for European bodies and organisations to analyse the results of these studies (cf. "Study on media concentrations in Europe (legal analysis)", 1991; "Etude sur les concentrations des media en Europe (analyse économique)", 1992; "Pluralism and media concentrations in the internal market", 1992; Sanchez-Tabernero et al., in print) and decide what action, if any, to take in regard of media concentrations.

There is by no means any unanimity among European countries on this question, nor are the results conclusive enough to indicate clearly what effects media concentrations really have. It is probably for this reason that the Green Paper of the Commission of the European Communities on "Pluralism and media concentration in the internal market", which undertook the study of the issue at the prompting of the European Parliament (which was motivated by conviction

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133. This study, completed in April 1994 and commissioned from Karol Jakubowicz by the Steering Committee on the Mass Media, could not have been prepared without the support and assistance of a number of individuals and institutions. Jozef Darmo of the Slovak Republic, Milan Jakobec of the Czech Republic, Mihaela Popa and Stefana Steriade of Romania, Mile Setincs of Slovenia kindly responded to a questionnaire distributed by the author of this study. Additional information was provided by Professor Walery Pisarek, Press Research Centre and Professor Tomasz Goban-Klas, both of the Jagiellonian University, Krakow, Poland, Milan Smid of Charles University in Prague, Jaroslav Bazant of IP in Prague, Arturas Baublys of Lithuanian Television and Paul Rebane of Estonian Television. A great deal of up-to-date information was available from papers presented during the Bertelsmann/IAMCR Electronic Media in Seminar in Warsaw, March 1993, co-organised by Professor Wolfgang Kleinwaecher, and a conference on Re-structuring Television in Central and Eastern Europe, organised in November 1993 at the University of Westminster, London, by Colin Sparks and Anna Reading. The European Institute for the Media, its East-West Co-operation Committee and its quarterly publication *The Bulletin* were an important source of data and information. Above all, however, this study could not have been written without the continuing encouragement, support and assistance of the Media Division of the Directorate of Human Rights, Council of Europe. Wherever possible, the source of information used here is cited in order to give credit to the many authors whose work was helpful in preparing this report. Naturally, any shortcomings of this study – other than those arising out of the general paucity of information – are the sole responsibility of its author.

that monopolisation of the media must be prevented), presented a full range of options regarding possible action by the EU:

1. take no action at all;
2. enhance transparency by passing an instrument to achieve greater disclosure of information on media ownership and control in the Community, so as to improve knowledge of the level of media concentration;
3. adopt a Council of Europe directive or regulation to harmonise laws on media ownership in the Community.

In September 1993, the Economic and Social Committee of the European Communities adopted an Opinion on the Green Paper on "Pluralism and media concentration in the internal market" (93/C 304/07). In it, the committee rejected the first option and found that action proposed under the second option would be inadequate. It expressed the view that ownership restrictions limiting media concentrations are not necessarily incompatible with Community law because they help guarantee or safeguard pluralism and that "the safeguarding of pluralism and freedom of opinion in programmes essentially depends on rules designed to prevent media concentration processes which could lead to monopoly-type mergers". Therefore, it came to the conclusion that rules on national and trans-national media companies, which achieved monopoly-type dominance of broad sectors in certain countries "are considered by the Committee to be necessary". On this basis, it made the following proposals:

1. "... In view of the existence of international Multi-media corporations, ownership restrictions must also be introduced in respect of the press.
2. Neither media nor non-media enterprises must be allowed to dominate the market in several media sectors (television, radio press) in one or more national markets: similarly, no such enterprise that already controls a national media sector must be allowed to extend its market dominance.
3. Media or non-media companies already dominating the market in one national media sector should not be allowed to acquire a majority holding in media companies elsewhere in the Community.
4. Before a media company that is already active in one media sector is allowed to operate in another media sector, all its holdings and cross-ownership arrangements must be disclosed in full".

On this basis, it called for the introduction of legal provisions to harmonise national restrictions on media holdings by means of a directive.

In January 1994, the European Parliament adopted Resolution A3-0435/93 on the Commission Green Paper "Pluralism and media concentration in the internal market" in which it, too, called on the commission to "submit a proposal for a directive firstly harmonising national restrictions on media concentration and secondly enabling the Community in the event of concentration which

endangers pluralism on a European scale". In the European Parliament's view, such a directive:

- should cover the entire media sector, including the print media;
- must not be based on the issue of formal ownership alone, but also make possible investigation of a "dominant influence";
- should exclude certain groups/companies (for example, advertising agencies) from participation in particular media sectors;
- should provide for strict application of the law on competition to cross-ownership involving programme suppliers and broadcasters;
- should enforce the principle of absolute transparency of ownership.

Whether these calls for far-reaching action will be heeded by the Commission remains to be seen, but it is clear that there are vocal supporters of such action also within the European Union itself.

The third European Ministerial Conference on Mass Media Policy (organised by the Council of Europe in Nicosia, Cyprus, on 9-10 October 1991) called in its Resolution No. 1 for a balanced assessment of the process of media concentrations in terms of its impact on the existence of a plurality of independent and autonomous media and cultural pluralism in Europe. Subsequently, the Committee of Experts on Media Concentration and Pluralism appointed by the Council's Steering Committee on the Mass Media, called for the preparation of a study to analyse the evolution of the concentration process in both the written press and the broadcasting sectors, and the ways in which foreign media companies enter the market of Council of Europe member countries in central and eastern Europe, covering Bulgaria, Hungary and Poland, but including also the Czech and Slovak Republics. Every effort will also be made here to cover Romania, Slovenia and the Baltic States as well, as available data allow.

The topic has not so far been the subject of extensive studies. Where it exists at all, information on the above processes is scattered and non-standardised. Therefore, the main goal of this study is to compile existing and available data as a first step towards a possible more thorough analysis of the process. It is to be hoped that with time and increased availability of reliable, comprehensive and internationally comparable data, it will be possible to study the issue in a more exhaustive and in-depth way.

The special feature of the media systems in central and eastern Europe is that they were monopolised and highly concentrated only very recently. Market-driven concentration is beginning almost immediately after the effects of politically-driven monopolisation of the media were reversed. Therefore, the process by which media systems evolved from monopoly to the dismantling or collapse of monopoly and finally to the beginnings of renewed concentration must be taken into account in this study. It either facilitated or impeded the

process of concentration, depending also on the degree of deconcentration it brought about, and the point at which foreign capital appeared on the market and media concentrations began anew.

Accordingly, this report will seek to cover, as well as available data allow, the following areas:

1. the legal and institutional form of communist media monopolies in central and eastern Europe;
2. main provisions of laws and regulations on de-monopolising the media (where applicable);
3. presence in press and broadcasting markets of foreign media companies;
4. concentration between national media companies;
5. anti-monopoly provisions in new media legislation in central and eastern European countries.

We will concern ourselves here with the state/public media sector (which in any case survives mostly in the area of broadcasting) only to the extent to which developments there are relevant to the issue of media concentrations or foreign media presence.

To cover the issue of media concentrations thoroughly, any study of the subject should deal with at least the four basic types of the process:

1. concentrations within media industries, potentially leading to the creation of commercially driven monopolies or oligopolies within particular media (or disappearance of competitors, for example, because of bankruptcies);
2. single media concentrations within media markets, leading to monopoly or oligopoly within one media industry in particular markets: local, regional, national;
3. multimedia concentrations within media markets: concentration of control over all or most media in one market (local, regional, national) in one company;
4. international integration: acquisition, takeover of media establishments by those of other countries.

However, media concentrations are only beginning in central and eastern Europe and have a long way to go before they produce large-scale media monopolies or oligopolies. Accordingly, central and eastern Europe display only rudimentary forms of media concentrations known from other regions. It will be possible to identify the four types only where they exist or where the body of available evidence makes it possible to describe them. For example, multimedia concentrations can hardly occur where the licensing of private radio and television has not yet started. Accordingly, it could be said that the following study is largely one of the internationalisation of the media in central and

eastern Europe. Such internationalisation takes place at many different levels (see Negrine, Papathanassopoulos, 1991):

- at an organisational level (such as the creation of international media; transnational ownership of media systems);
- at the content level (such as the trade in media content leading to the prominent presence of foreign content in national media; the practice of co-productions);
- at a funding level (the importance of advertising revenue internationally; the movement of capital across frontiers);
- at the regulatory level (such as the involvement of supranational bodies, such as the European Community in defining international regulatory standards adoption of international or foreign standards in the national legislation);
- at the reception level (exposure of the national audience to foreign or international media).

All these forms of media internationalisation are clearly present in central and eastern Europe. We will be concerned primarily with the organisational level of this process.

### ***Media transformation in central and eastern Europe***

The communist state created what has been called the centralised command media system, whose main features were:

- state monopoly of the media (or a ban on opposition media);
- financial control;
- administrative control (of appointments, defining media goals, allocation of frequencies and newsprint);
- monopoly of press distribution;
- media functions: hegemony, dominance, ideological homogenisation of the audience, reproduction of the existing social order;
- pre-publication political censorship (leading to self-censorship);
- laws banning critical (“subversive”, “seditious”) journalism;
- barriers to international information flows (jamming of foreign radio stations, bans on imports and distribution of foreign newspapers, periodicals and books, etc.).

Jakab, Galik et al. (1991) and Galik and Denes (1992) add the following specific features of the Hungarian system up until 1987, which in one way or another were replicated in other communist countries:

- direct personal dependence of journalists upon the party;



- centralised censorship and news management;
- the licensing of newspapers;
- the unsettled issue of ownership, allowing the state and the party to usurp full political and managerial control (and, incidentally, making post-1989 restructuring of the media system extremely difficult);
- incomplete recognition and protection of intangible assets, such as the good will of a company or the existence of contracts with subscribers, etc. (resulting from the Marxist economic theory and the fact that no media were ever sold, which contributed to underestimating the real value of the media once the free market was introduced and local and foreign companies started buying them);
- deficiencies of legislation on the media, making possible their manipulation at will and creating a legal vacuum which now has to be filled with a very extensive body of new legislation, difficult enough to develop under normal circumstances, but especially so at a time of intense political conflict among various elements of the body politic.

The extent of state and party control over the Hungarian media can be clearly seen from the following table of “functional parameters of the press and broadcasting prescribed by the authorities” developed by Jakab, Galik et al. (1991) and Galik and Denes (1992):

**Table 1. Instruments of control over the media in communist-ruled Hungary**

Press	Broadcasting
The amount of newsprint available	Frequencies and transmitters available
The average press run per week	The amount of transmission time
The price of a copy	The licence fee
The highest acceptable proportion of copies unsold	The part of licence fee revenue transferred to radio and television
Costs of distribution per copy	Costs of transmission
Funds for investments and research and development	
The total cost of using cars for business purposes	
The total amount of wages	

Thus political control translated into full economic and financial control. And vice versa: political control was also used, as in the case of the Polish publishing concern *RSW Prasa-Ksiazka-Ruch* (nominally a co-operative of legal persons, but in fact fully controlled by the Polish United Workers’ Party), to obtain funds to finance the operation of the party.

Once the collapse of the communist system began, the speed with which the process happened also caught the opposition (and subsequently new government) leaders quite unprepared, in terms of media policy. They had expected a much longer battle, and so left the development of detailed blueprints for the future, also in the media field, for later. Dissenters to the communist rule gave insufficient thought to the creation of commercial media and generally of a free market in mass communications; much of their advance thinking and preparation in planning the social order of the post-communist era (insofar as they did that at all) was conceived in vaguely social-democratic terms. Consequently, they did not think through, and were not prepared for, the implications of the introduction of the free market. The quite sudden and totally unexpected triumph of neo-liberalism and the free market left central and eastern European societies groping in the dark for some solutions which were quite different from those they had imagined previously.

Thus, in country after country in central and eastern Europe, the collapse of the party's domination over the media created a vacuum, leading to a scramble for strategies and blueprints of practical action.

At the same time, developments in the media took on a life of their own. First of all, there was in most cases an explosion on the press scene as controls on newspaper publishing were lifted. Hundreds, or indeed thousands, of new titles appeared, representing a much wider spectrum of newspaper types and profiles, not to mention political orientations, than before. Abolition of censorship and the dismantling of the system of state and party control of the media created a rather curious situation as far as the underground press and book publishers were concerned: issues which had been their exclusive domain were now widely discussed everywhere and every publisher or publication was free to publish authors or deal with subjects which had once been taboo. Some underground periodicals and publishers came in from the cold, but not very many of them actually survived.

Some of the new policy making in mass communications happened by default. The more democratic new governments were reluctant to regulate the media strictly, for fear of repeating the mistakes of the past. Accordingly, except for dismantling the old system of controls as far as the print media were concerned they were unable and/or unwilling to develop any policy stance on change and reform in broadcasting, with the new political forces and governments seeking to gain as much access to, and control and influence on the broadcast media as they could. Meanwhile, several processes began to unfold:

- political parties obtained existing newspapers (as part of a policy of re-arranging the press scene so that major new parties should be allotted or allowed to buy some newspapers in order to develop a pluralistic press system) or founded new ones in order to gain publicity, popularity and voters. This largely accounted for the first “press boom” in many countries

as organisations of civil society, long denied access to social communication, seized on new opportunities;

- the second boom, which usually followed a year later, sprang from the introduction of many new titles by commercially-oriented publishers, seeking to exploit a market niche. Meanwhile, many of the new politically or socially-oriented new newspapers went out of business for lack of sufficient interest on the part of the readers;
- the press scene grew and diversified with a great number of new titles, many of them short-lived;
- newspapers controlled by the communist party or government in many cases registered huge drops in circulation;
- underground newspapers went public or died;
- the burgeoning domestic business community also sought both to own the media and affect public opinion through them;
- the pressure for de-monopolisation of broadcasting began to grow;
- advertisers began, as an entirely new force, to affect media development by their choice of media outlets as vehicles for advertising;
- east-west communication flows and exchanges intensified far beyond anything previously possible. This took four main forms:
  1. a western “rush to the east” began. Foreign capital began to move in, buying into or in some cases simply taking over newspapers by consent of their staffs. Also in the field of broadcasting private companies tried to gain a market share in eastern Europe;
  2. “Certain Western governments, through media organisations they control[led], tried to extend their influence in the East, for example by obtaining from the new authorities the broadcasting of their radio or television programs” (Semelin, n.d.: 10). This process was in fact actively encouraged by some of the new governments in central and eastern Europe for a number of reasons: to repay what was perceived as a debt to stations like Radio Free Europe which had opposed the Communist system for decades, and to provide evidence of change in broadcasting policy;
  3. western satellite channels and video cassettes began to flood central and eastern Europe;
  4. eastern European television systems started showing western programming in great profusion (of course, some of them had already been doing that for years).
- there were no provisions governing foreign involvement in the press or against concentration of capital, nor any policies to encourage, promote or assist publications catering to, and speaking for minorities or special

interest groups. In other words, the press scene was largely left to the operation of market laws.

In broadcasting, the situation has been somewhat different. While the need to re-regulate broadcasting was widely recognised, the process of developing new laws was and remains politically contentious and therefore protracted. Many beleaguered and insecure new governments, which in many cases do not have a stable parliamentary majority or a secure power base in society, have in some cases been reluctant to promote speedy transformation of existing government-controlled broadcasting systems into autonomous public service systems (in any case the concept is largely unknown). There has also in some cases been a desire to delay de-monopolising radio and television which would give their political opponents a chance to start broadcasting to the population. Where these factors played less of a role, equally effective barriers to progress and change were created by genuine constitutional issues.

The institutional arrangements for regulating and overseeing public and private broadcasting usually reflect a country's system of government – and this is far from finally settled in post-communist countries. Areas of competence and division of power between the various state authorities and branches of the government are yet to be agreed upon. As shown, for example, by the Hungarian conflict between the prime minister and the president over the nomination of top executives for Hungarian Radio and Hungarian Television (Pataki, 1992; Hankiss, 1993; Arato, 1993), or political battles over the control of Slovak Television (Kalniczky, 1992), this poses major difficulties as far as developing the new system of broadcasting is concerned. So, debates about broadcasting laws are more debates about the shape of that system than about broadcasting itself. A broadcasting law, where it has been passed, is a record of the current state of play in remodelling the state and relations between its political forces and organs of power. Where no agreement on these things has been reached, no broadcasting law is possible.

The Romanian sociologist, Pavel Campeanu (1993: 3) has pointed out that:

the great historical achievement of the 1989 revolutions remains the irrevocable overthrow of the Stalinist dictatorship. Yet the great disappointment East Europeans feel in 1993 results from the shattering of the illusion that the overthrow of that dictatorship equals the establishment of democracy. In fact, it means the beginning [not of democracy] but of democratization ... democratization is characterized by a relative quickness which, however, hasn't yet led to its realization.

This is true of the media as well. If we adapt for our purposes Denis McQuail's (1992) concept of a set of basic communication values – freedom, justice/equality and order – which serve as a framework of principle for media assessment, we will see that that the media system developing in central and eastern

Europe today is far from what opposition movements under the communist system defined as a democratic system of social communication.

In rejecting the centralised command system based on the value of order, they hoped to introduce a fully democratic one based on the values of communicative justice for, and equality of, all participants in social communication. In reality, the situation is different. The press, as has been said, was almost immediately and completely liberalised in most central and eastern European countries, and thus left to the operation of market laws in a system based on the value of freedom. Old and new newspapers, desperate for credibility and popularity, found it easiest to win it by being aggressively critical of the authorities.

**Table 2. Communication values and corresponding media systems**

<b>Basic value</b>	<b>Freedom</b>	<b>Justice/ Equality</b>	<b>Solidarity (bottom-up)</b>	<b>Order (top-down)</b>
<b>Social Context</b>	Free market system	(Social) democratic model	Media attached to various sub-groups of society	Totalitarian/ authoritarian system
<b>Goal</b>	Unrestricted freedom of communication	Equal, fair access to media, fair reflection in media of society in all diversity	Increasing commonality and sharing of outlook, voluntary attachment	Control/ compliance/ conformity
<b>Main regulatory mechanism</b>	Light regulation, market mechanism prevails	Heavy regulation: public interventionism to ensure equality in access to, and use of, means of communication	Heavy regulation: arrangements for access and positive representation of sub-groups in society	Totalitarian regulation: centralised, command system
<b>Underlying Philosophy</b>	Market-driven exclusion, negative freedom	Inclusion, democracy, positive freedom	Sympathetic recognition of alternative perspectives	Political exclusion, hegemony, homogenisation
<b>Communicators</b>	Everyone with the means to do so	All social groups	All sub-groups	Only "approved" voices

Adapted from McQuail, 1992.

The new governments were taken aback and stung by what they considered to be completely unjustified treatment from the press. They felt cut off from public opinion and unable to deliver their message to the public. So, they can perhaps be forgiven for feeling that they needed support from at least some media and

were not happy about the prospect of losing those they could still control. Also the new political parties, seeking to win public attention and to establish their identity and gain support in competition with dozens of other parties, exerted what pressure they could on the broadcast media and protested against any case of real or imagined discrimination. Hankiss (1993: 3-4) explains what some of the consequences of that situation were:

In those countries where – after the collapse of the communist regime – a dominant party, or a dominant personality came to power, public television and radio could not escape government or presidential control. This was, or has been, the case in Czecho-Slovakia, Poland, Romania, Bulgaria, Serbia, Croatia, Slovenia. There were good and bad reasons for exercising control over the media. Among the good, or at least not entirely wrong ones, let me mention the argument according to which the extremely difficult process of transition to democracy and market economy calls for common goals, national unity, the broad national support of government plans and policies. For the success of this strategy of national unity and mobilization television and radio are indispensable.

So, while in the print media the media system based on the value of freedom has been introduced in most countries, little has changed in broadcasting in some of them, meaning that it is still dedicated to some form of order, though in a much weaker form and pursued by different means today. One could actually say that the old broadcasting systems which had previously been controlled by the communist party are in some cases being “re-nationalised” and turned into a government agency or, at best, a national, politicised and quasi-commercial public broadcasting system. So, “as a result of state- and market-commercial logic of the social and media restructuring, a kind of paternal-commercial media system is developing” (Splichal, 1992: 21).

However, even the market-dominated print media, to say nothing of the broadcast media, are sufficiently affected by the general intense politicisation of life in the particular countries for the process known as the “Italianisation” of the media to take place. This means that:

1. the media are under a strong state control, either directly, as in the case of state-owned television, or indirectly through various forms of state-owned and/or economically supported press;
2. the degree of mass media partisanship is strong: the political parties are often involved in editorial choices and structures of mass media;
3. equally strong is the degree of integration of the media and political elites; for example, there is a strong professional mobility between the worlds of politics and journalism;
4. there is no consolidated and shared professional ethic among media professionals.

If we look at these developments in terms of the whole concept of civil society and media freedom, it will become clear that while great progress on the way to democracy has of course been made, civil society as a social space for self-organisation of society to counteract the expansionist policy of the state has lost much ground. Among the reasons for this are the following:

- a deliberate policy pursued by governments in some countries of discouraging social participation in public and political life, that is, of mobilising the population for the purpose of elections or other short-lived campaigns, and dampening their enthusiasm at other times;
- a feeling of anti-climax among the population, following the inevitable disappointment of hope that abolition of communism would help solve other problems easily;
- disillusionment with the new governments in consequence of their adoption of tough liberal economic policies;
- disappointment with the media because of the sometimes stridently propagandistic tone of both broadcasting and the new advocacy press, their inability to cover developments so as to make sense of developments unfolding in the country (competent, unbiased, impartial reporting and analysis of public life are hard to find) and their inadequacy in performing the watchdog function.

Splichal (1992: 36) notes that the revitalisation of civil society is again blocked because:

having overthrown the old undemocratic regimes, [civil society] lost its own autonomy ... Decisions of public consequence are, as they were in the former system, removed from the public and the citizens lose their ability to participate in political processes. The access of both oppositional parties and particularly autonomous groups from civil society to national broadcast media and mainstream print media is being limited ... parliamentary mechanisms of party pluralism and formal democracy are considered as the only legitimate way to articulate the interests and opinions of "society", while non-institutional arrangements of civil society are ignored.

In addition to the expansion of the state, civil society is also in retreat because the population has largely opted out of public life, discouraged by lack of progress in solving the particular countries' problems and by what it perceives to be the interminable power struggle of politicians concentrating on issues without relevance to the everyday life of the people.

As a result of all these processes, policy making in the field of the media is often left at the mercy of vagaries of day-to-day politics. The same goes for the process of privatisation of the media which at the beginning was conducted in a way described by Slavko Splichal (1992: 9):

In addition to ideological legitimation, it is much more important that contemporary privatisation policies in Eastern Europe are mainly related to the question of the redistribution of political power and control over economy ... privatisation of property is a political feature [and] may be considered as a kind of "social engineering".

Once the free market was introduced into any media, the market mechanism largely took over, but – as we will see below – political considerations often still determine developments in this field and the degree of a country's openness to foreign media capital.

### ***Dismantling the monopoly***

#### ***The print media***

We will concentrate here on the period between, roughly, 1989 and 1991, by which time the old press system was gone – whether because of deliberate policies designed to abolish it, or simply of spontaneous processes set in motion by the disintegration of the old system of control.

#### *Poland*

Poland was probably the only country which set about the dismantling of the communist publishing monopoly in a systematic fashion. *RSW Prasa-Ksiazka-Ruch* is a huge publishing conglomerate controlled by the Polish United Workers' Party. In its heyday it employed nearly 100 000 people and controlled newspapers and periodicals accounting for the great majority of the press market, all bookshops and the entire press distribution system, and incorporated major printing facilities, some book publishers, news and photographic agencies and so on. The political importance of eliminating it, along with censorship (under a law adopted in April 1990) and other forms of state and party control of the print media was such that a special Act of Parliament to this effect was passed in March 1990. This was also required by the manner of the conglomerate's growth in the past, which it achieved by virtually appropriating existing companies and enterprises to gain control of successive areas of the market. That had produced such a tangled legal situation that it would have been impossible to unravel it in any other way – and the Liquidating Commission appointed to perform the task has still not finished. It decided that 71 of the 170 newspapers and periodicals whose fate it was to decide would be handed over to co-operatives formed by their staff; the rest – including the biggest dailies – were to be sold, though not always to the highest bidder. The great majority of newspapers went in one way or another to forces emerging out of "Solidarity", representing a wide spectrum of political orientations. However, the social democratic party which emerged out of the former communist party was also able to buy some former party newspapers.

Another politically motivated action was to give precedence to French over German capital in selecting foreign bidders for Polish newspapers. Hersant bought into six Polish newspapers and has since acquired stock in two more dailies.



That method of demonopolisation was significant in that it fragmented the press market and produced extreme deconcentration, with some 160 single title newspaper publishers appearing in the place of one conglomerate. Meanwhile, of course, the press market, now free from all former restrictions (amendments to the 1984 Press Law passed in 1989 and 1990 abolished the old newspaper licensing system and replaced it with simple registration of new titles) was booming, with hundreds of new publications of every description coming out (and many of them going bankrupt, of course).

Previously neglected types of press publications are now appearing in great numbers, including educational and popular science publications, those for hobbyists, women, young people, entertainment-oriented publications, advertising free-sheets (over 100 titles), erotic and yellow journalism titles. So do local and sub-local newspapers, with some 1 900 titles appearing on the market in the years 1989-91 (some of them only for a short time). These newspapers cover a multitude of types and serve a wide variety of needs, including those of various minorities. While many titles were originally brought out by local government authorities and various parties and organisations, newspapers published by private publishers have been gaining in importance since late 1991.

The 1993 *Catalogue of the Polish press* (Dziki et al., 1993), the most comprehensive and authoritative, though no doubt inexhaustive portrayal of the Polish print media (every year some 600 new titles appear; some are never registered when first published; many then go out of business), lists 2644 titles. Their breakdown by type is as follows:

**Table 3. Newspapers and periodicals in Poland (1993)**

National general interest dailies	12
National special interest dailies	10
Regional and local dailies	62
National weeklies	113
Regional weeklies	110
National fortnightlies	66
Regional fortnightlies	40
National monthlies	483
Regional monthlies	83
National bi-monthlies	105
Regional bi-monthlies	15
Quarterlies and others	404
Sub-local newspapers	883
Suspended newspapers	258

Source: Dziki et al., 1993.

Press distribution is still largely controlled by the old state company which once held monopoly in this field. There are some 40 private press distribution companies, but they account for only 5-7% of the overall volume.

The print media are largely deregulated and there is practically no state or government intervention in their operation.

A draft of a new press law has been prepared, including limits on media concentrations and cross-media ownership. Its future is uncertain, however.

### *Hungary*

Here, the press boom began in 1989, following the abolition in 1988 (as part of a liberalisation process) of the Department for Agitation and Propaganda of the Central Committee of the Hungarian Socialist Workers' Party, and the abolition of the system of licensing the press, radio and television in 1989. In consequence, the number of newspapers and periodicals on the market trebled within 18 months (to reach some 3 000), with anyone free to establish any publication they wanted.

Meanwhile, the old press system collapsed, with the Hungarian Socialist Party (successor to the Hungarian Socialist Workers' Party) announcing in July 1990, for example, that it would sell all the 11 local newspapers it still owned (it had already lost six such newspapers after their staff seized upon the confusion and legal vacuum and signed contracts with Springer, transferring property to the German publisher). Foreign interests could acquire up to 49% of the stock, up to 30 per cent of local interests and at least 10% per cent was to be offered to their employees. In a separate move, the Hungarian Socialist Party announced that it was giving up ownership of the former main party organ, the daily *Nepszabadsag*, transferring it to a Free Press Foundation. Subsequently Bertelsmann A.G. bought 41% of the newspaper's stock. Also the publishing house Hirlapkiado Vallalat, which belonged to the Hungarian Socialist Party was transferred to the state administration.

### *Czechoslovakia*

In March 1990 the Federal Assembly of what was still one Czechoslovakia passed an amendment to the 1966 law on periodicals and other mass media, restoring the 1968 amendments that had liberalised the original law and deleting references to the leading role of the Communist Party in the media sphere, officially abolishing censorship (which in fact had had no legal foundation: it had been abolished already in 1967, but was then reintroduced by purely political and administrative means and largely fell apart in November 1989), and lifting all restrictions on the publication of newspapers and periodicals. In July 1990 the Federal Office for Press and Information was abolished. In January 1991, a constitutional law defining the list of basic rights and freedoms of Czechoslovak

citizens was passed. It guarantees freedom of expression and the right to information and bans censorship.

The press boom in Czechoslovakia (for example, in Slovakia in 1989, 314 press titles appeared and in 1990 a further 200 were launched) was affected by the introduction in January 1991 of a 22% turnover tax for the press which, together with rising newsprint and printing prices, drove many newspapers to bankruptcy. The old state press distribution company, PNS, still retains its dominant position and operates in a highly inefficient way. Old newspapers, like *Pravda* and *Praca* have the backbone of their readership in home subscriptions, delivered through the post, giving them a clear advantage over new titles which must become established on the market through news-stand sales. Despite some efforts, privatisation has not touched DanubiaPrint, the state-owned printing company which prints almost all Slovak dailies and many other periodicals. This limits the freedom of newspapers and keeps printing quality low, as the company lacks the capital to upgrade its old plant.

### *Bulgaria*

Progress in legislation and in other fields has been slower here. There have been several attempts to draft a press law – in 1970, 1987-88 and then in 1990, when first a group of journalists and then the government produced draft press laws, but these were not considered by Parliament. However, as in other countries, relaxation of controls and collapse of the apparatus by means of which the Communist Party ruled the country, meant that restrictions on press freedom largely disappeared. Censors remained in their posts for several months after the overthrow of Todor Zhivkov, the communist leader, but their role was negligible. State allocation of newsprint was ended in April 1991 and privately-owned newspapers started appearing in 1991, that is, quite late, compared to other countries of the region. Opposition parties began publishing their newspapers and periodicals long before that and in June 1990 there were 25 licensed opposition papers and some unlicensed ones. Nevertheless, the prevailing opinion was that most newspapers and periodicals were not really free as they were controlled either by political parties or the trade unions. There was less of a press boom in Bulgaria than elsewhere, with some 120 new dailies and 70 magazines appearing on the market in early 1991.

### *Romania*

There is still no new legislation on the print media. The 1974 press law, which still remains in force, had long been disregarded by both the communist regime and the journalists themselves. A first draft of the new law had to be withdrawn in the spring of 1991 after opposition deputies had denounced it as undemocratic. In June 1992 the parliament started debating a new draft, which, according to some reports (see Ionescu, 1992), immediately provoked an outcry from the media. It included provisions putting the media under an obligation to publish free of charge and without delay any official documents received from

the top authorities and provided for prison terms for slandering officials and for preventing the armed forces from performing their duties. Meanwhile the 1971 Ceausescu-era law on protecting state secrets still remains in force and has in fact already been invoked in some cases.

After December 1989 both censorship and the obligation to licence newspapers were abolished; for a time there was no obligation even to register newly launched newspapers and periodicals.

Like other central and eastern European countries, Romania experienced a press boom, with the number of titles rising from some 30 before the revolution to some 900-1400 afterwards. The number of titles and their circulation started to decline following the elections of May 1990, due to lack of newsprint and higher prices of newspapers as the purchasing power of the population fell. Newspaper distribution is highly inefficient, with the old distribution company Rodipet still retaining virtual monopoly.

### *Slovenia*

According to information received in February 1994, a draft media law was about to be given its second reading in Parliament, to replace those inherited from the time Slovenia was part of Yugoslavia. The new law on public media has come under some criticism in Slovenia itself (Splichal, 1993) as being weighted in favour of the state.

A little over 1 000 titles – newspapers, magazines and other periodicals – are published in Slovenia. Of these some 500 are aimed at the general or professional public; the remainder are published by companies, parties and organisations of various kinds, and aimed primarily at their members. There are over 230 publishers in Slovenia of which nearly 200 are in private hands.

### *Estonia*

The media began evolving as far back as 1986, with the advent of *glasnost*. The independent press began to blossom in 1989, with more than 1 000 publications appearing that year. Like many post-communist countries, Estonia has difficulty developing new press legislation. Together with all other post-Soviet countries, it inherited the 1990 Soviet law on the press and other media of mass information which while declaring freedom of the press and abolishing censorship still contained provisions incompatible with genuine press freedom. In 1991, the Media Commission of the Estonian Supreme Council presented a draft press law which was excessively punitive and strict in regulating the press and journalists (Kionka, 1992). It was never adopted, because it was thought that a new constitution, proclaiming all the civil rights and liberties should be passed first (Harro, 1993), and as a result Estonia still has no press legislation.

In addition to the emergence of new privately-owned press titles, former state-owned newspapers are being privatised. The Tartu-based *Postimees*, privatised in 1991, has continued to be the country's largest circulation daily, with a press run of 57 000 copies. *Rahva Haal*, the second-largest newspaper, was awarded to a little-known metal trade company Maag, closely connected to the ruling right-wing Fatherland party. The case ended up in court. The case was brought by another bidder, and the Tallinn City Court ruled in September 1993 that the privatisation agency had acted improperly in taking a decision which would have turned the newspaper into the party's mouthpiece. The deal was annulled. The government decided to close down the news magazine *Aja Puls* for which there were no bidders when it was put on the market.

### *Latvia*

A Law on the Press and other Mass Media was passed in 1990. Liberalisation of the press was noticeable already in 1988, following the foundation of the People's Front of Latvia. The declaration of the newly elected Latvian legislators on 4 May 1990 that they would pursue a course leading to the restoration of the independent and democratic Republic of Latvia (the country claimed its independence a year later, in August 1991) was taken by journalists as an endorsement of the freedom of the press. In 1990, the Supreme Council voted to restore government control over the Press Building, the main newspaper publishing house in Latvia. It had been taken over in the 1960s by the Latvian Communist Party, giving it direct control of most of the newspaper and magazine publishing in the country, as well as direct access to the profits of the publishing industry, used from then on (in much the same way as in Poland) to finance the party. The party sent Soviet riot police to seize the Press Building and it was only after the birth of independent Latvia that the situation normalised again.

In any case, with censorship, the old system of control and even the old "official" press (which largely disappeared after the banning of the Communist Party) no longer in evidence, the way to the operation of privately owned print media was open. In 1989, there were 129 newspapers and periodicals in Latvia with a total circulation of 2 772 000 copies, of which 78 (circulation 2 008 000 copies) were in Latvian (Bungs, 1992: 30). By February 1992, nearly 800 newspapers and periodicals were published in the country. At that time, A Week Without the Press, an action by the country's print media to protest the scarcity of newsprint threatening to disrupt the whole industry forced the government to take steps to ensure steady and reliable supplies, saving many titles from extinction.

### *Lithuania*

Liberalisation of the press began in 1988, when after the rise of Sajudis the Lithuanian Communist Party was forced to relinquish its monopoly on the press. By mid-1989 censorship and government supervision had ceased almost entirely. In February 1990 the Lithuanian Parliament passed a law on the mass information media banning censorship and proclaiming freedom of the press,

including the right of individuals to publish newspapers and periodicals. Subsequently, many formerly state-owned newspapers were turned into closed joint-stock companies (with the stock not available to the public) which eliminated many of the old legal and administrative – and political – controls over them. In any case, many of the old communist-dominated newspapers changed their titles and publishers.

### ***Broadcasting***

#### *Poland*

The process of writing new broadcasting legislation actually started in 1988. With the wind of change already gathering momentum, a draft of a new bill was prepared, but was then shelved. The process began anew in autumn 1989, after the Solidarity-led government of Tadeusz Mazowiecki took over power. After several false starts, the new Broadcasting Act was finally adopted in December 1992 and entered into force on 1 March 1993.

It seeks to separate regulatory activities in the field of broadcasting and the broadcasting activity itself, vesting administrative functions in the National Broadcasting Council, appointed by both houses of parliament and the president. Government-controlled Polish radio and television will be transformed into public service broadcasting organisations. The National Broadcasting Council will license private broadcasters. As for cable television, the simultaneous retransmission of complete and unchanged programme services for reception by the general public does not require a licence but is subject to notification.

While the debate on the Broadcasting Act continued, pirate stations went on the air. As it entered into force, there were over 100 pirate radio stations and some 25 pirate television stations. To that number three private radio stations and one private television station should be added, which received quasi-legal temporary authorisations in 1990 and over 40 radio stations operated by the Roman Catholic Church which under the State-Church Relations Act of 1989 could receive frequencies from telecommunications authorities and legally start broadcasting (with the act in force, it will now have to apply for a licence like every other applicant).

#### *Hungary*

A fierce political struggle over control of broadcasting has so far prevented the passage of a broadcasting act (Pataki, 1992; Sukosd, 1992; Hankiss, 1993). A moratorium on the allocation of broadcasting frequencies was imposed on 3 July 1989, by the country's last communist government and was upheld in 1990 by the new democratic government and Parliament, pending the adoption of a new broadcasting act. A handful of private stations were founded before that. They included Calypso Radio, a Hungarian-English joint venture;

Radio Bridge, a Hungarian-American joint venture devoted primarily to rebroadcasting the Voice of America; Radio Danubius, a commercial station established by Hungarian Radio; Siok TV, in the provincial town of Siok, and NAP TV, which broadcasts breakfast television on the frequency of Hungarian Television. A special case is Radio Tilos, a pirate radio station in Budapest established in 1991, which is still on the air under a changed name, Piros Radio (Szephegyi, 1993). A new addition to the Hungarian broadcasting scene is Duna Television, a satellite channel broadcast via a Eutelsat satellite by a special, cultural private foundation wholly financed by the Hungarian government (Kovats, Tolgyesi, 1993). Its stated goal is to reach out to Hungarian minorities in other European countries, but it also means the addition of a new channel to the television offer available to the Hungarian population (over half of the Hungarian population has access to satellite television, cable, or both).

Plans have been announced to launch a Hungarian satellite before the opening of the Universal Expo in 1996, capable of beaming 16 channels to central Europe and the Middle East.

The deadlock preventing the licensing of new stations was finally eliminated in 1993 by taking advantage of the 1986 press law which in effect de-monopolised broadcasting by mentioning in Section 9 that "a provision of the law may also authorise other organisations [other than Hungarian Radio and Hungarian Television] to produce or make public a radio or television programme", and specifically mentions "local studios" established by bodies other than the state broadcaster as lawful elements of the broadcasting system. A law on frequencies was passed by Parliament in early 1993 (Kovats, Tolgyesi, 1993), providing a legal foundation for allocating frequencies to private broadcasters. As a result, applications for local stations (defined as ones reaching 500 000 people in Budapest and 100 000 elsewhere) were invited, resulting in 400 bids for radio and television licences (Engel, 1993). It was reported in September 1993 that the government would award 103 licences: 41 for television and 62 for radio. Preference was to be given to Hungarian applicants proposing non-commercial stations with stations promoting "national cultural values" (*Media and Marketing Europe*, September 1993).

The legal operation of some 300 cable television systems (sanctioned already in the late 1980s by the then communist government), geared to retransmitting television from neighbouring countries (Webster, 1993), but also in many cases providing local-origination and specially composed channels, contributed to eroding the monopoly of Hungarian Radio and Hungarian Television.

### *Czechoslovakia*

A Federal Law on Broadcasting of the Czech and Slovak Republic was adopted quite early on, in October 1991 (preceded in the spring of 1991 by the new broadcasting laws of the Czech and Slovak Republics). That legally established the dual broadcasting system in Czechoslovakia, though before that various interdepartmental government commissions at the federal level and in the

Czech Republic had already granted, without any real legal basis or regulation of the licensing system, a total of 36 radio licences – 13 in Prague and 23 in the rest of the country (Kovar, 1993). And so in March 1991 (the following information is taken from Jakobec 1993a) the first licences for private broadcasting by Czech radio stations in Prague and its environs (earlier some foreign stations were allowed to broadcast on Czech territory; see below): Hallow World, Radio I, Bonton, Vox, Evropa 2, Collegium/Independent and Rio. Later in 1991 and 1992, a further five licences were granted to Prague stations: Golem, InterPrague, Bohemia, Kobra and HiFi Klub-Voa, as well as 22 licences to the following Czech and Moravian regional broadcasting stations: Radio Most, Radio Contact Liberec, Radio Faktor, Czeske Budejovice, Radio 21 Ceske Budejovice, Radio Plus Plzen, Radio Agara Chomutov, Radio Hady Brno, Radio 96.7 Brno, Radio Profil Pardubice, Radio Orion Ostrava, Radiohrad Karvina, Radio Rubio Unicov, Radio Decin, Radio Morava Frydek-Mistek, Radio Dragon (Karlove Vary), Radio Diana Karlovy Vary, Radio Egrensis Cheb, Radio Hana Olomouc, Radio Zlin, Radio Ekol S Trinec, Radio C Kladno, Radio Harmonie Usti n. L.

In mid-1992 (by which time the Federal Radio and Television Broadcasting Council, established under the new Federal Broadcasting Law, was in operation), a total of 42 operators held radio broadcasting licences (35 in the Czech Republic and seven in the Slovak Republic).

The Radio and Television Broadcasting Council of the Czech Republic, established in February 1992, issued the following licences in the FM II band before March 1993: Radio West Plzen, Radio Labe Hradec Kralove, Radio Euro K Liberec, Radio Cerna Hora Trutnov, Radio Sprint Ostrava, Radio Panag Pardubice.

On medium wave it licensed Radio Country for Central Bohemia. In March 1993 it licensed nationwide radio services in the FM II band: Radio Alfa, owned by the Kaskol Company and RG Frekvence I, of which the main shareholders are Europa I and Radio Golem of Prague. Radio Alfa, owned solely by Czech capital, started broadcasting on October 13, 1993, as the first private station able to offer competition to Czech Radio. Drawing on the resources of the Czech News Agency, Reuters and its own correspondents, it is a news and current affairs oriented station, with a schedule consisting of news, commentaries, round table discussions and press surveys, as well as a weekly selection of the most interesting programmes from the BBC, the VOA and Deutsche Welle.

As for television, the council's work was impeded by the reservations of the government of the Slovak Republic concerning any plans to set up a commercial network encompassing both republics (Jakobec, 1993a). In general, the Slovak government originally pursued a policy of delaying the introduction of commercial broadcasting: "to facilitate recovery in the state sector", Deputy Prime Minister Jan Carnogursky stated in 1991, "we will hold back granting private broadcasting licences in our republic for a time" ("Decentralize is the Czech and Slovak motto", 1991: 40). As a result, private television was first licensed in the Czech Republic. Premiera TV, a station covering Prague and the



central Bohemian region, was licensed in November 1992. In January 1993 the council granted a national television licence to Central European Television for the 21st Century (CET 21), backed by the Canadian-American Central European Development Corporation (CEDC), which also holds a television licence in Berlin for Land Brandenburg. The new channel, Nova, which went on the air in February 1994, is operated by the Czech Independent Television Company formed by CEDC (66% of the stock), with the Czech Savings Bank holding 22% of the stock and CET-21 holding 12% (Jakobec, 1993b; Becker, 1993; Smid, 1993).

After the separation of the Czech and Slovak Republics, plans were announced for Czech Television to divest itself of two of its three channels, with CT2 to be privatised as of 1994 and CT3 (formerly OK3) as of 1996. This will give more scope to the private sector.

After the split of the Czech and Slovak Republics, both countries passed laws accepting the relevant provisions of the federal law on broadcasting as valid in their legal systems.

### *Bulgaria*

There is still no new broadcasting law. A draft was prepared in 1991 but was rejected by Parliament. A new bill was presented to Parliament in 1993, providing for the creation of a Council for Radio and Television, a broadcasting regulatory body, membership of which would be incompatible with being an M.P. The bill also provides for turning state into public radio and television.

In January 1991, Basic Provisions of the Status of Bulgarian Radio and Bulgarian Television were adopted by the Bulgarian Parliament, vesting direct authority over state broadcasting in a Standing Parliamentary Commission on Radio and Television. In 1990, the Council of Ministers issued the regulations of an Interdepartmental Commission on Radio Frequencies, empowering it to allocate frequencies to new broadcasters. On 18 June 1992, the Posts and Telecommunications Committee issued Ordinance No. 1 specifying the rules and procedures for creating new stations. An applicant must obtain:

- a broadcasting licence from a Temporary Council for Radio Frequencies and Television Channels (a body created under Ordinance No. 1);
- allocation of a frequency by the Interdepartmental Commission on Radio Frequencies;
- permission to develop, construct and import broadcasting equipment from the Interdepartmental Commission on Radio Frequencies;
- and on the basis of the foregoing, permission to use a radio or television station from the Posts and Telecommunications Committee.

A permanent licensing regime for radio and television stations is set out in a telecommunications bill now before Parliament.

Thirty-seven applicants for local radio licences have received positive “recommendations” from the council, but so far only a few of them have gone on the air, including six stations in Sofia (FM, Express, Tangra, Radio 99, Vitosha and Darik) and stations in Plovdiv, Varna and Ruse. In September 1993, the first private television station (Rhodopi) was licensed, though many more applicants are waiting to receive licences. There are also some unlicensed stations in areas inhabited by the Turkish minority, relaying Turkish television services (Jordanova, 1993).

Bulgarian Television operates two channels (with the other two national television frequencies used to retransmit Russian Ostankino Television and TV5 Europe). Plans call for the creation of regional stations in the towns of Plovdiv, Varna, Russe, Blagoyevgrad and Haskovo. Bulgarian Television will have 25% of the stock in these stations (Dziadul, 1993a).

### *Romania*

The new Audiovisual Law of the Republic of Romania was adopted by both chambers of Parliament on March 5, 1992. It established an 11-member National Audiovisual Council which is responsible for broadcasting policy and for licensing private broadcasters, starting with the preliminary technical approval by the Ministry of Communications and then forwarding this with an application for a broadcasting licence to the National Audiovisual Council.

Passage of the law was to be followed by the adoption of a separate law reorganising state broadcasting. However, no such law has been submitted to Parliament which means that Romanian Radio (three national channels) and Romanian Television (two national channels, though reportedly plans exist to establish a third channel to be operated jointly with a private company on a strictly commercial basis; Albu, 1994) continue functioning with the same old institutional structures as before and are subordinated to the government in exactly the same way.

Even before the audiovisual law was passed, 12 independent local television stations emerged in Romania soon after December 1989, broadcasting at night on the frequencies of the two channels of state television after their sign-off time. In 1992, 14 private radio stations and 14 private television stations were registered (European Institute for the Media (EIM), 1992). Later, some of the private television stations (those in Timisoara, Oradea, Brasov and Constanza) were denied a permanent licence and stopped broadcasting on 31 December 1992 (Constantinescu, 1993).

All in all, the National Audiovisual Council has so far invited applications for 74 TV channels in 56 towns and 149 radio channels in 70 towns, representing in sum 67% of frequencies made available by the Ministry of Communications for the first round of the licensing process (Report, undated). As of 10 March 1993, it awarded 35 local radio licences (Licence Holders for Radio Broadcasting

Stations, undated), 25 local television licences (Licence Holders for Television Broadcasting Stations, undated), 68 licences for cable systems (Licence Holders for Cable Transmitting Stations, undated) and four licences for television stations operated by universities (Licence Holders for University Television Broadcasting Stations, undated).

By November 1993, the number of licences grew to 98 for radio stations and 67 for local radio stations (Statement by the Romanian Delegation, 1993). The number of cable systems is estimated at some 90 (Webster, 1993). It must be noted that all these are local stations which means that Romanian Radio and Romanian Television still hold a monopoly on national broadcasting. Not all licensed stations have gone on the air. In some cases, competing applicants were licensed to use the same frequency on a shared basis.

### *Slovenia*

There is still no new broadcasting law. It was not even possible to establish a private broadcasting company until the end of 1991, when the new constitution was adopted. Once that happened, the road to private broadcasting was open. There is one commercial regional television station, Kanal A, 10 private cable television companies and several private radio stations (Radio Morje, Radio Gama, MM, Radio Salomon, Radio Capris). There are in addition some 18 local radio stations (including Voice of Ljubljana and Radio Student), which are in the process of privatisation.

### *Estonia*

This is another country without a broadcasting law. Originally, a private radio station owner – Peter Laing – and Estonian Television were requested by the authorities to submit their drafts of a broadcasting law. Parliament took on board the draft produced by Peter Laing, but then criticism by the state broadcaster that the draft was too supportive of the private sector led to ETV producing two further drafts (one for radio and another for television), designed to protect public service broadcasting. The debate continues. As it stood at the beginning of 1994, the bill provided for a merger of state radio and television into the Estonian National Broadcasting Corporation, its nine-member governing council to be nominated by the government and confirmed by Parliament. The corporation would be financed by licence fees (so far non-existent in Estonia), state grants and advertising.

Meanwhile, a licensing procedure has been put in place. Before March 1992, broadcasting licences were awarded by the Transport and Communication Ministry; now this is the job of the Ministry of Culture and Education which considers an application once the applicant has received the promise of a frequency allocation from the Electric Communication Authority (established in early 1992). Once the broadcasting licence has been granted, the licensee returns to ECA for permission

to build the station and co-ordinate spectrum use with neighbouring countries. The technical licence is valid for a year; the broadcasting licence for three years.

Altogether the ministry has granted 45 licences for private radio and television stations. As of January 1994, 15 radio and nine television stations had gone on the air, the other licensees are still looking for money to start operations. There are 15 local FM commercial radio stations in Estonia, the best known of which are Radio Kuku (broadcasting since March 1992) and Radio Tallinn (broadcasting since November 1992), both owned by Trio Ltd.

Eesti Televisioon (ETV), the state television service, broadcasts one channel. There is also the Russian Ostankino channel, as Ostankino is prepared to pay retransmission costs. Its frequency is shared by BDF Reklaamiklubi, which offers a Friday morning show. The two remaining channels once used by Soviet/Russian television have been turned over to private stations. Reklamitelevisioon, broadcasting on the frequency once used by Russian Television (RTR) transmits five hours of programming each Saturday and Sunday. EVTV, a 51:49 joint venture between Eesti Video and the Swedish company Kinneivk, transmits four hours of programming daily and retransmits CNNI for an additional two hours each week. Kanal Kaks (Channel 2), a service owned by Taska LTD and US investor Harold Nathan, is available to viewers in Tallinn, Narva, Kohtala-Jarve and Tartu. Estonia also has a private Russian-language service, Orsent. Another, Marakov, was reported in November 1993 to be in the planning stage (Dziadul, 1993c).

There are an estimated 1 000 cable television and Master Antenna TV systems in Estonia. Cable television is dominated by Levi Communications launched on the island of Kuressaare in 1989, it now has 12 000 subscribers in 13 locations and plans to expand into the capital.

### *Latvia*

A Law on Radio and Television of the Republic of Latvia was adopted in May 1992. The law established a 25-member Latvian Radio and Television and Television Board, which is responsible for broadcasting policy and for allocating frequencies and granting licences. It separated state radio from state television (with their directors to be appointed by Parliament).

Some 20 private radio stations have been licensed (Webster, 1993). The Riga Independent Broadcasting Company set up Radio 2A in September 1990, one of the first private radio stations on the then Soviet territory. It subsequently put on the air another station, Radio 2.

It is reported that 35 private television companies operate, including those in Liepaja, Ogre, Malpils, Smiltene, Roja, Rezekne (Leja, 1993; Labanovskis, 1994). There is also a local Russian-language station, Krijevas TV. The second channel of public television (LRT) transmits programming by independent stations – Latgale TV, Vidzemes TV and Kurzemes TV – which are themselves

partly owned by LRT. The arrangement may also be extended to private broadcasters IGE TV and NTV-5. The LRT also has an arrangement with other private stations – Legats/SPS, KS Video, Prisma Prim and IK Baltica, allowing them to use its transmitters.

An interesting new development is the launch of Baltcom, the first wireless cable service in the Baltic region which offers a range of western satellite channels within a 30 km. radius of Riga.

### *Lithuania*

Lithuania does not have a new broadcasting law yet, but under the 1990 law on the mass information media has instituted a provisional system for granting licences to private broadcasters. Responsibility for supervision of broadcasting has been vested in a Radio and Television Board appointed by Parliament, which is also empowered to grant broadcasting licences. A private company wishing to start broadcasting must first register as a “mass medium” with the Board for Press Control and apply to the board for a licence. If, however, it has already obtained the right to use a frequency (which is not a frequency allocation, but the right to use a state-owned frequency) and has its own transmitter, it does not need a licence. Supervision of private broadcasters is carried out by the Board of Press Control.

On 1 January 1992, a nationwide network of FM transmitters, previously used to relay Radio 1 from Moscow, was turned over to Lithuanian broadcasters, including two independent ones, Radio M-1 and Radiofonas Vilniaus Varpas (“Broadcasting in Transition”, 1992). Private broadcasters also include Radiocentras (with transmitters in five major Lithuanian cities), radio Tau in Kaunas, Baltic TV (previously TV-26), TELE-3 (which rebroadcasts mostly western satellite programming, with local news in English), television AR in Kaunas, Fifth Channel in Klaipeda, as well as stations Pan TV and Titanika.

The beginning of 1994 saw considerable restructuring in Lithuanian television, instituted by the country’s broadcasting regulatory body, the Lithuanian Board of Radio and TV. The first channel is still occupied by the state company, Lithuanian Television (LTVR), but at night, after LTVR has signed off, its channel is used by private local television stations – AR in Kaunas, Channel 5 in Klaipeda. LTVR has also entered into a 51:49 joint venture with the Swedish media company Kinnevik to operate Channel 11, a service covering Vilnius and the surrounding region. The second national channel continues to be allocated to the Russian Ostankino company, but the arrangement would be discontinued if Ostankino should stop paying for the retransmission of its service in Lithuania. The third national channel is in the hands of Tele 3 which has signed a contract with a new locally-owned television company Litpollinter, which uses Tele 3’s channel for eight hours twice a week in order to broadcast its own locally produced programming.

### **Presence of foreign media companies and media concentrations**

Before we look at the situation in particular countries, let us note that foreign capital moved into eastern European markets on a broad front. The following two tables are simply an illustration of this trend.

Table 4 shows how the French company Hersant became established in several countries in the early 1990s.

**Table 4. Hersant holdings in central and eastern European newspapers and periodicals**

<b>Poland</b>			
<b>Title</b>	<b>Description</b>	<b>Circulation</b>	<b>Share of stock %</b>
<i>Rzeczpospolita</i>	Major national	236 000	49
<i>Tempo</i>	Sports daily	75 000	70
<i>Dziennik Baltyck</i>	Regional daily	80 000	51
<i>Dziennik Lodzki</i>	Regional daily	63 000	approx. 70
<i>Dziennik Zachodni</i>	Regional daily	110 000	50
<i>Express Ilustrowany</i>	Regional daily	50 000	72
<i>Gazeta Krakowska</i>	Regional daily	82 000	51
<i>Wieczor Wybrzeza</i>	Regional daily	45 000	39
<i>Businessman</i> magazine	Monthly	50 000	-
<i>Trybuna Slaska</i>	Regional daily		indirect control
<b>Hungary</b>			
<i>Magyar Nemzet</i>	Daily	121 000	41
<b>Czech Republic</b>			
<i>Mlada Fronta Dnes</i>	Daily	400 000	48
<i>Severocesky Denik</i>	Daily		
( <i>Brno and Ostrava</i> )	Regional dailies		

Table 5 shows how foreign publishers contributed to the emergence of a new type of publication, the need for which appeared with the introduction of market economy in post-communist countries.

**Table 5. Ownership of business newspapers and magazines in central and eastern Europe**

<b>Country</b>	<b>Title</b> (W = weekly; D = daily)	<b>Buyer (B) or Founder</b> (F)	<b>Circulation</b>
Bulgaria	<i>Cash</i>	Ringier (F)	no data
Hungary	<i>Figyelo</i> (W)	EurExpansion (B)	25 000
	<i>Vilaggzdasag</i>	EurExpansion (B)	no data
	<i>Kape</i>	Ringier (F)	no data
Poland	<i>Gazeta Bankowa</i> (W)	EurExpansion (B)	35 000
	<i>Cash</i>	Ringier (F)	no data
Czechoslovakia	<i>Hospodarske Noviny</i> (D)	EurExpansion (B)	150 000
	<i>HN Ekonom</i> (W)	EurExpansion (B)	105 000
	<i>Profit</i> (W)	Ringier (F)	30 000
Romania	<i>Capital</i>	Ringier (F)	no data
Russia	<i>Business in USSR</i>	Hersant (F)	no data
	<i>Kommersant</i> (W)	EurExpansion (B)	50 000

Source: Lochon, 1992. Note: In 1994 Ringier formed a 50:50 joint venture with the Gannett Corporation of the US, to manage the weekly financial papers. Ringier publishes in Bulgaria, Hungary, Poland and Romania.

### *Poland*

There is a lively media market in Poland which offers evidence of fast growth, emerging concentration and foreign media presence.

A number of press publishers have achieved considerable expansion and a strong position on the market. They are listed in Table 6.

The success of these publishers is all the more remarkable for the fact that they are all new companies (incorporating, in some cases, already existing titles), founded after 1989 and the dismantling of RSW Prasa-Ksiazka-Ruch (see above). Some publishers, such as Wydawnictwo Ludowe (dailies and periodicals representing the farmers' movement with a total press run of 323 000 copies); Wydawnictwo NOT-Sigma (nine technical periodicals with a total press run of 250 000) survived more or less intact. There are also some new publishing groups of local dailies and periodicals, such as Drogowiec S.A. (eight titles with a total press run of 100 000 copies) or Wydawnictwo Pomorskie (seven titles, a total of 150 000 copies).

**Table 6. Emerging Polish press concerns**

<b>Name and description of publisher</b>	<b>Titles</b>	<b>Press run</b>
Proszynski i spolka (monthlies and quarterlies: advice, entertainment, science fiction, for children, leisure-time, interest periodicals)	<i>Poradnik domowy</i>	approx. 4 000 000
	<i>Zwierzaki</i>	240 000
	<i>Cztery Katy</i>	300 000
	<i>Nowa Fantastyka</i>	100 000
	<i>Bec</i>	100 000
	<i>Fenix</i>	41 000
	<i>Komiks</i>	50 000
	<i>Funsports</i>	
	<i>Fantazja</i>	
	<i>Swiat nauki</i>	
	<i>Wiedza i Zycie</i>	100 000
	<i>Studio</i>	
	<i>Moto Magazyn</i>	130 000
	<i>Juz czytam</i>	80 000
	<i>Zwierzaki-Plakat</i>	100 000
<i>Gazeta rodzinna</i>	400 000	
Oferta dla kazdego (women's and legal magazines)	<i>Przyjaciolka</i>	2 250 000
	<i>Sezam</i>	
	<i>Prawo i interesy</i>	
	<i>Magazyn ilustrowany "Przyjaciolki"</i>	
	<i>Prawo i Zycie</i>	
Interster (scandal sheets, sports, magazine for dog lovers, erotica)	<i>Super Skandale bez kurtyny</i>	1 510 000
	<i>Wszystko o milosci</i>	
	<i>Wrozka</i>	
	<i>Auto-Kram</i>	
Kobieta i Mezczyzna (family and children's magazines)	<i>Jachting</i>	
	<i>Kobieta i Mezczyzna</i>	1 250 000
	<i>Magazyn KiM</i>	
	<i>Pentliczek</i>	



Kobieta i Zycie (women's magazines)	<i>Kobieta i Zycie</i>	1 050 000
	<i>Pani</i>	
	<i>101 Porad – Wykroje i wzory</i>	
Twoj Styl	<i>Twoj Styl</i>	850 000
(quality women's magazines)	<i>Fryzury</i>	
	<i>Modny drobiazg</i>	
	<i>Sekrety Mlodosci i Urody</i>	
Agora (leading national daily with 21 local supplements; literary periodical)	<i>Gazeta Wyborcza</i>	up to 500 000
	<i>Zeszyty Literackie</i>	700 000 (week-ends)

Source: Bajka, 1993.

Some media companies are expanding in many directions. Proszynski i Spolka publishes a considerable number of periodicals, has started a few book series (easy-to-read books; books for women, travelogues), is planning to launch more monthlies (for example, *Sowa – The Owl* – with crosswords and puzzles) and has shares in a printing house.

Thus, the process of concentration in the print media has already begun and is certain to continue. Of course, it has yet to produce press or media concerns capable of dominating on the national scene.

As for foreign investment into Polish print media, in early 1993 four out of 12 national general interest dailies had foreign partners; this also went for all three major national sports magazines; 17 out of 62 regional dailies; 11 national weeklies, four national bi-weeklies; 40 monthlies, two bi-monthlies and 12 quarterlies. Since then, foreign investment has grown.

The largest foreign investors into the Polish dailies and weeklies are shown in Table 7.

**Table 7. Major foreign holdings in Polish dailies and weeklies**

Title	Description	Circulation	% of shares
<b>Hersant</b>			
<i>Rzeczpospolita</i>	Major national daily	236 000	49
<i>Tempo</i>	Sports daily	75 000	70
<i>Dziennik Baltycki</i>	Regional daily	80 000	51
<i>Dziennik Lodzki</i>	Regional daily	63 000	approx. 70

<i>Dziennik Zachodni</i>	Regional daily	110 000	50
<i>Express Ilustrowany</i>	Regional daily	50 000	72
<i>Gazeta Krakowska</i>	Regional daily	82 000	51
<i>Wieczor Wybrzeza</i>	Regional daily	45 000	39
<i>Businessman</i> magazine	Monthly	50 000	–
<i>Trybuna Slaska</i>	Regional daily	700 000	indirect control
<b>Fibak-Noma-Press</b>			
Sport	Sports daily	100 000	n.d.
<i>Dziennik Beskidzki</i>	Regional daily	30 000	n.d.
<i>Dziennik Slaski</i>	Regional daily	30 000	n.d.
<i>Gazeta Poznanska</i>	Regional daily	100 000	n.d.
<i>Ekran</i>	Media weekly	45 000	n.d.
<i>Panorama</i>	General interest weekly	100 000	n.d.
<i>Express Wieczorny</i> (with JMG Ost Presse Holding AG, Switzerland)	Warsaw evening daily	400 000 (week-ends)	n.d.
<i>Sztandar Mlodych</i> (with JMG Ost Presse Holding AG, Switzerland)	National daily	130 000 week-ends 450 000	
<i>Narty</i>	Skiing periodical		
<b>Various German publishers</b>			
<i>Dziennik Szczecinski</i>	Regional daily	30 000	n.d.
<i>Dziennik Wieczorny</i>	Regional daily	31 000	n.d.
<i>Goniec Pomorski</i>	Regional daily	50 000	n.d.
<i>Slowo Polskie</i>	Regional daily	45 000	n.d.
<b>Stei (Nicola Grauso, Sardinia)</b>			
<i>Zycie Warszawy</i>	National daily	200 000	80
<i>Zycie Czestochowy</i>	Local daily	15 000	
<i>Zycie Radomskie</i>	Local daily	18 000	
<b>Il Sole 24 Ore (Italy)</b>			
<i>Nova Europa</i>	Financial daily		53.85
<b>Cox Enterprises (USA)</b>			
<i>Gazeta Wyborcza</i>	Poland's leading daily		12.5
<b>Bayard Presse, des Publications de la Vie Catholique, Quest France</b>			
<i>Tygodnik Powszechny</i>	Poland's leading Catholic weekly		40

Source: Bajka 1993 (with later additions).

Though German capital was originally kept out of the Polish market when RSW Prasa-Ksiazka-Ruch was being dismantled, it has since established itself in force, especially among the monthlies. In early 1994, periodicals for women and teenagers, in many cases simply Polish versions of German originals, published by German companies in Poland had a total press run of some 20 million.

**Table 8. Major German holdings in Polish periodicals**

<b>Title</b>	<b>Description</b>	<b>Circulation</b>
<b>Phoenix Intermedia (company with German capital), Wroclaw</b>		
<i>Auto International</i>	Monthly about cars	120 000
<i>Dziewczyna</i>	Monthly for teenage girls	500 000
<i>Ela</i>	Monthly for teenage girls	100 000
<i>Hip</i>	Monthly devoted to music	200 000
<i>Popcorn</i>	Monthly about music for teenagers	545 000
<i>Pramo</i>		80 000
<i>Strick und Schick</i>		120 000
<b>Inter-Media joint-venture company (most likely with German capital), Warsaw</b>		
<i>Auto-Sukces</i>	Monthly about cars	90 000
<i>Bestseller</i>	Monthly	100 000
<i>Sukces</i>	Business monthly	200 000
<i>Zdrowie i sukces</i>	Health (monthly)	50 000
<i>Gwiazdy Hollywoodu</i>	Film quarterly	100 000
<b>H. Bauer Ltd. (Polish-German joint venture), Warsaw</b>		
<i>Bravo</i>	Forthnightly for teenagers	900 000
<i>Twoj weekend</i>	Leisure-time monthly	320 000
<b>Jahr-Verlag GmbH (Polish-German joint venture), Warsaw</b>		
<i>Claudia</i>	Monthly for teenage girls	150 000
<i>Esox</i>	Monthly for anglers	150 000
<i>Flora</i>	Monthly about gardening	30 000
<i>Moje mieszkanie</i>	Monthly about house-keeping	100 000
<i>Rodzice i dziecko</i>	Family magazine (monthly)	150 000
<i>Sekrety kuchni</i>	Cooking, house-keeping (monthly)	150 000
<b>Scandinavia-Poland Publishing House (Scandinavian capital)</b>		
<i>Cats</i>	Erotic monthly	285 000
<i>Extra Raport</i>	Erotic monthly	150 000
<i>Playstar International</i>	Pornography	200 000
<i>Nie z tej ziemi</i>	Science fiction	220 000

<b>PP-U "Makler" (Polish-German joint venture), Wroclaw</b>		
<i>Bez tajemnic</i>	Fortnightly devoted to sexual education	200 000
<i>Mala Diana</i>	Monthly for teenage girls	140 000
<i>Moja kuchnia</i>	Monthly about cooking	200 000
<i>Sabrina</i>	Monthly for teenage girls	100 000
<b>Connecta Ltd., Sopot (German capital)</b>		
<i>AS Sekretarka</i>	Monthly for career girls	15 000
<i>BEA Collection</i>	Fashion quarterly	65 000
<i>BEA Slub 91</i>	Wedding gowns	50 000
<i>Mini BEA Collection</i>	Fashion for children	75 000

Source: Bajka, 1993.

Apart from that, several other publishers part-owned by German capital bring out nine periodicals with a total press run of 1.5 million copies; five publishers part-owned by French capital bring out five titles with a total press run of 295 000 copies; publishers involving American capital – four periodicals with a total press run of 136 000 copies; and publishers part-owned by British capital – two periodicals with a total press run of 60 000 copies.

In many cases, vertical integration goes along with horizontal integration, in that publishers own printing facilities or other upstream or downstream companies involved in press and book publishing and/or distribution.

In broadcasting, two of the three radio stations set up in 1990 in a quasi-legal way involved foreign capital: Radio Solidarity in Warsaw (today Radio Eska) had British investors (who are said to have invested 0.5 million dollars into the station) and Radio Malopolska Fun in Krakow (now Radio RFM-FM, also available via the Astra 1A satellite) – a French partner: Radio FUN (which is said to have invested 1 million francs, but later left the company). Little is known about the ownership of the over 100 pirate radio stations, but it is safe to assume that some of them involve foreign capital. The Roman Catholic church is the largest single non-state broadcaster, with a total of some 40 radio stations all over the country.

Radio Z in Warsaw, another of the only three private radio stations which started operating in a quasi-legal way in 1990, is a success story on the verge of major expansion in Poland and beyond. The station which now has solely Polish shareholders, is planning to apply for a national radio licence, distributing its signal via satellite and 25 local affiliates. In addition, it has received licences in Lithuania (to operate a station for the Polish minority in which it would have 42% of the stock), in north-eastern Poland for the Lithuanian minority, in the Ukraine (to run local stations in Lvov and Kiev), in Bulgaria (as part of a Polish-English-Bulgarian consortium which is to operate six local radio stations) and in Belarus (a national licence). Other plans include setting up two radio stations

(together with the German station Radio Salu) in Frankfurt on the Oder and Cottbus broadcasting in Polish and German (Skawronska, 1993). In order to be able to finance those development plans, Radio Z would sell 33% of its stock to the French station Radio Europa 1.

In television, the Sardinian company STEI is a 33% owner of a network of private (and unlicensed in all cases but one) stations which potentially reach 20 million Poles. STEI has set up a joint programme company, Polonia 1, which supplies all the 12 stations with six hours of common programming a day (largely bought from Berlusconi's network, Reteitalia), and has signed a contract with Publitalia, the Berlusconi advertising agency, as its exclusive agent for national and international advertising. Thus, the 12 stations have been joined into a sub-national network.

A Polish company, POLSAT, broadcasts a satellite channel which – in order not to fall foul of Polish laws – was originally uplinked from Holland. However, it has already obtained a licence to uplink the channel to Eutelsat II F3 from Polish territory.

In the summer of 1993, the National Broadcasting Council (that is, the new broadcasting regulatory authority, set up under the Broadcasting Act of 1993) launched the process of licensing new private radio and television stations. It advertised 92 frequencies on medium waves for low power (under 1 kw) radio stations; 109 frequencies for low power FM radio stations in the 66-74 MHz range; two frequencies for high-power (over 1 kw) FM radio stations; 214 frequencies for low power and 124 frequencies for high power FM radio stations in the 87.5-108 MHz range (at the moment 90% of Polish radio sets cannot receive broadcasts in this range, so full use of it will be made only in the future; some of these frequencies will be used for DAB broadcasts); 85 frequencies for low power television stations and 30 frequencies for high power television stations.

The line-up of major foreign media corporations interested in obtaining (in partnership with Polish interests, since foreign companies can legally hold only 33% of the equity in any broadcasting establishment) the national terrestrial commercial television licence (see Appendix) shows that they regard the Polish market as promising both in terms of size (some 40 million people) and potential advertising revenue.

The council awarded the one national terrestrial television licence to POLSAT and announced it would favourably consider the application of a company with the participation of Canal Plus for local frequencies to set up a pay-tv service in the country's main cities. It awarded three national radio licences: to Radio Zet (Warsaw), Radio RFM FM (Krakow) and Radio Maryja (a Catholic network operated by the Redemptorist order). In addition, it will award some 100 local radio and television licences.

All the national licences have been awarded to purely Polish companies. That was part of a deliberate policy of the council to support the development of

Polish broadcasters and enable them to grow, amass capital and stand on their feet before potentially finding foreign partners to operate their stations (as some intend doing).

In cable television, a leading position is held by Polska Telewizja Kablowa, a joint venture between Chase Enterprises (an American company owned by a Polish-American), which holds 90% of the stock, and the PTT. The company had ambitious plans of cabling 13 cities and hooking up 6 million subscribers by 1996 (Dziadul, 1991), but financial difficulties slowed progress and in 1992 the company came close to selling its franchise (Dempsey, 1992). Altogether, some 7.5% of the population can watch cable television and some 15% have satellite dishes or are hooked up to a SMATV system. Some 350 cable systems are registered in Poland, but their total number may reach 1 000.

### *Hungary*

It has long been cited as a country in which the print media have been taken over by foreign interests. In consequence of the process, whose beginnings were described above, much of the press has indeed gained foreign partners (it is estimated that western investment accounts for some 80% of the capital assets of the Hungarian press; Webster, 1993: 31), including in many cases majority partners with controlling interests. This is shown in the tables 9, 10 and 11. They all refer to the situation in 1991, the early period when the foreign takeover of the press was still in progress.

**Table 9. Foreign capital involvement in the national Hungarian daily press (1991)**

<b>Company</b>	<b>Title</b>	<b>Share of stock %</b>	<b>Market share</b>
News Corp. (Murdoch)	<i>Mai Nap</i>	50	12.7
Mirror Holdings Ltd (Maxwell) *	<i>Magyar Hirlap</i>	40	7.1
	<i>Esti Hirlap</i>	40	8.4
Bertelsmann	<i>Nepszabadsag</i>	41.2	29.7
Hersant Communication	<i>Magyar Nemzet</i>	42.3	11
Denton AG	<i>Kurir</i>	20	12.2
Pesti Hirlap Co. Ltd. **	<i>Pesti Hirlap</i>		2.5

\* Later Robert Maxwell's holdings were taken over by the Swiss company Marquard.

\*\* 82% of the company's capital was owned by Hungarian Co. Ltd., a German-Hungarian joint venture.

Source: Jakab, Galik, et al., 1991.

The second 1991 table presents a fuller picture of western investment into the Hungarian press.

**Table 10. Western investment into the Hungarian press**

<b>Western publisher</b>	<b>Hungarian newspaper</b>	<b>Share of stock</b>	<b>Type</b>	<b>Circulation</b>
News International	<i>Mai Nap</i>	50%	Daily	140 000
	<i>Reform</i>	50%	weekly	380 000
Maxwell Communication Corp.	<i>Magyar Hirlap</i>	40%	Daily	78 000
	<i>Esti Hirlap</i>	40%	Daily	93 000
Hersant (France)	<i>Magyar Nemzet</i>	41%	Daily	121 000
Eurexpansion (France)	<i>Figyelo</i>	45%	Economic newspaper	26 000
Axel Springer + Verlag Ferenczy (Germany)	Six regional newspapers	40%		
	TV guide, car magazine	10%		
Bertelsmann (Ger.)	<i>Nepszabadsag</i>	41	Daily	327 000
Bonnier (Switz.)	<i>Uzlet</i>	100	Daily	20 000
Associated Newspapers (U.K.)	<i>Kisalfold</i>	40	Regional daily	94 000
Funk, Verlang & Druckerei GmbH	Three regional newspapers			
Westdeutscher Allgemeine Zeitung	<i>Vas Nepe</i>	49	Regional daily	66 000
Krone Verlag GmbH (Germany)	Two regional newspapers	49		
Oscar Bonner GmbH (Austria)	Two regional newspapers	40		
Nice Press Invest	<i>Del Magyarorszag</i>	49	Regional daily	57 000

Source: Gergely, 1991.

The third table focuses on the situation in the regional press.

**Table 11. Ownership structure of the regional press in 18 counties of Hungary**

Country	Foreign Buyer	% of stock owned by		
		Foreign buyer	The staff	Other Hungarians
Gyor-Sopron	Associated Newspapers (UK)	40	30	30
Vas	Westdeutscher Allgemeine Zeitung	49	30	21
Zala	Krone Verlag GmbH	49	30	21
Veszprem	Krone Verlag GmbH	49	30	21
Fejer	Westdeutscher Allgemeine Zeitung	30	50	20
Komarom	Axel Springer Budapest Ltd.	100		
Somogy	AS-B	100		
Tolna	AS-B	100		
Baranya	AS-B	100		
Nograd	AS-B	100		
Heves	AS-B	100		
Szolnok	AS-B	100		
Csongrad	Nice Press	49	51	
Bekes	Bronner	40	40	20
Hajdy-Bihar	Funk, Verlang & Druckerei (Austria)	49	30	21
Borsod-Abajj-Zemplen	Funk, Verlang & Druckerei	49	20	31
Szabolcs-Szatmar	Funk, Verlang & Druckerei	49	30	21
Bacs-Kiskun	Bronner	40	40	20

Source: Jakab, Galik, et al., 1991.

In an interesting development, Rupert Murdoch's News Corporation has sold its 90% share in *Reform* and *Mai Nap*, reportedly because they did not achieve the expected level of circulation and profitability. A clause in the 1990 contract provided for a bank buyback in the event Murdoch decided to pull out and indeed the shares were bought by the Hungarian Credit Bank.



So far as broadcasting is concerned, the imposition of the frequency moratorium early on in 1989 prevented the development of the private sector and by the same token the processes of media concentrations. Some foreign investment has taken place. In 1990, Radio Bridge, a joint venture of Hungarian and American interests, with 50% owned by Svecia Balticum Ltd, a private Delaware holding company, and the other 50% by two Hungarian citizens ("Hungarian FM to feature American sound", 1990). Later it changed its name to Radio 102 FM, dropped its VOA feed (which had taken up 80% of air time) and switched to a completely Hungarian language format. Following an outcry that it was thus evading the frequency moratorium, the station reverted to its old name and reintroduced VOA Europe news bulletins, while retaining its new Hungarian format.

In television, NAP TV, which broadcasts breakfast television on the frequency of Hungarian Television was, when established, 14% owned by Mai Nap, the daily which in turn is 50% owned by News Corporation (with 58% owned by Ribbon Ltd., a Hungarian publisher and printer; 14% by MTI, the Hungarian News Agency and 14% by MOVI, a film and video company; Szekfu, Valko, 1990). By 1993, the situation had changed: 57% is now owned by one the station's original founders, Tamas Gyarfas, with MTI and Mai Nap retaining their 14% holdings, and a Japanese consortium including Fuji TV purchasing 15% (Nadler, 1993).

Among the Hungarian cable systems, the largest is Kabelkom, owned by American corporations (Time Warner, US West and TCI) which runs systems in four towns: Pecs, Debrecen, Veszprem and Dunaujvsros (Childs, 1991).

#### *Czechoslovakia and the Czech and Slovak Republics*

In 1991, a 45% interest in *Hospodarske Noviny* (25% was taken by the official news Agency CTK and the rest by Czechoslovak banks) was acquired in 1991 by Eurexpansion, a company owned by the French press group Expansion (58%), the German *Handelsblatt* and *Business Week* and Dow Jones of the US. (Muller, 1992), which later also acquired *HN Ekonom* (Lochon, 1993). It was the first stage of a process which has put many Czech newspapers, especially local and regional ones, under foreign control.

Several media companies from abroad are active on the Czech press scene. In 1992, Hersant's company Socpresse purchased 48% of *Mlada Fronta Dnes*, formerly the daily newspaper of the communist youth movement, later transformed into a joint stock company, owned by its employees. With a circulation of some 400 000 copies and a market reach of some 30%, it is one of the country's major dailies. Later that year, Socpress also bought a minority share in *Severocesky Denik*, published in Usti nad Labem, as well as shares in regional dailies published in Brno and Ostrava (Monrois, 1992).

A major force in Czech publishing is constituted by Ringier, a Swiss company (which has a joint venture with Kirch of Germany to operate in the Czech Republic and Slovakia). In January 1992 it was reported to have 51% shareholdings

in 12 dailies and weeklies in the Czech Republic (with a total circulation of 2.5 million copies), especially in Moravia, the eastern part of the country (Muller, 1992). According to available information, its titles include: *Profit*, an economic weekly, *Teletip* (a television programme guide), *Televizia* and *Rozhlas*, television and radio guides), *Blesk* (the country's first colour tabloid, launched by Ringier), *Lidove Noviny* (in which it owns 51%), *Reflex* (see, for example, Plichta, 1993a). It was reported in March 1994 that 15 of the 25 most widely read dailies in the country are foreign-controlled.

The list of foreign media companies operating in the Czech press was reported in June 1993 to include Springer, Frankverlag, Passauer Neue Presse, Hans Kopfinger and Passau from Germany; Eurexpansion, Hersant and Socpresse from France, Ringier from Switzerland and Austria Holdings from Austria (Muller, 1993).

The largest foreign press owner in the Czech Republic is probably Neue Passauer Presse of Germany, sole or majority owner of four publishing houses (Vltava, Labe, PNPress and Risk) which together own, among other things, 28 local newspapers in various parts of the country, as shown in Table 12.

**Table 12. Czech local and regional newspapers owned by publishers controlled by Neue Passauer Presse (as of January 1993)**

Region	Title	Publisher
West	<i>Domazlické noviny</i> <i>Chebský deník</i> <i>Karlovarské noviny</i> <i>Klatovsko</i> <i>Plzeňský deník</i> <i>Rokycansko</i> <i>Sumava</i>	Vltava
South	<i>Astra</i> <i>Ceskokrumlovsko</i> <i>Hlas Vysociny</i> <i>Hranicár</i> <i>Jihoceska Pravda Palcat</i> <i>Stit</i> <i>Zitrek</i>	Vltava
East	<i>Hradecké Noviny – deník Pochoden</i> <i>Krkonoské noviny</i> <i>Listy Podorlicka</i> <i>Noviny Jicinska</i> <i>Pardubické noviny – Zar</i>	PNPress
North	<i>Litomericko</i> <i>Sever-report</i> <i>Dnesní Jablonecko</i>	Labe

Centre	<i>Berounsko</i> <i>Kladensko</i> <i>Mladoboleslavsko</i> <i>Pribramsko</i>	Vltava
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Source: Miketa, 1993.

According to Jiri Muller (1993), German capital controlled 70 regional periodicals in the Czech Republic. Other cases of foreign presence in the Czech print media include:

- purchase by VNU, a Dutch publisher, of 51% of the shares of *Mona*, publisher of four women's magazines, including the *Vlasta* weekly (which has a circulation of 400 000 and is a leader in its market) and three monthlies with circulation ranging between 80 000 and 300 000 copies;
- German holdings in such magazines as *Autotip* (Springer), *Cinema* and *Kvety*;
- a British holding of 30% in *Telegraf*, a new daily launched in 1992.

Patzold and Roper (1993) sum up German investments in Czech periodicals in Table 13.

**Table 13. German investments in Czech periodicals**

Title	Periodical	Circulation 1 000s	German investor	Share %
<i>Auto Tip</i>		35	Springer	60
<i>Bravo</i>	Monthly	450	Bauer-Verlag	
<i>Neude Mode</i>	Monthly	85	Bauer-Verlag	
<i>Bussi Bar</i>	Monthly	40	Bauer-Verlag	
<i>Hospodarske Noviny</i>			Holtzbrink	c. 10
<i>Burda Moden</i>	Monthly	100 000	Aenne Burda	15
<i>Profit</i>	Weekly	100	Kirch	c. 30
<i>Televizia</i>	Weekly	280	Kirch	49
<i>Teletip</i>	Weekly	400	Kirch	49
<i>Rozhlas</i>	Weekly	70	Kirch	49
<i>Reflex (Blesk)</i>		250 000	Kirch	49
<i>Cinema</i>			Verlagsgr. Milchstrasse	joint venture
<i>Verena</i>	Monthly	40	Aenne Burda	

Source: Patzold and Roper, 1993.

In May 1990, Czechoslovak Television stopped retransmitting Soviet Television on its third channel and turned it into OK3, a channel devoted entirely to retrans-

mitting programming from western satellite channels, including TV5 Europe, La Sept, Worldnet, CNN, Screensport, RTL Plus, MTV, etc. In 1991, its Slovak equivalent, channel TA3, was created.

The direct presence of foreign broadcasting began when in June 1990 the Czechoslovak government allocated nationwide medium-wave frequencies, and the use of Czech Radio transmitters, to Radio Free Europe which started broadcasting to the whole country from Bratislava (Mass media in the world, August 1990; "Decentralize is the Czech and Slovak motto", 1991). That station was later closed down by the Slovak government, "mainly because RFE was seen to have been too critical of the Slovak government" (Bajcik, 1994: 35). In October 1990 also the BBC and Radio France Internationale (*Le Monde*, 21-22 October 1990) received authorisations to broadcast. The BBC started rebroadcasting terrestrially in the winter of 1990, with low power FM transmitters in Prague, Brno, Bratislava, Ceske Budejovice, Plzen, Pardubice, Kosice and Banska Bistrica.

Many of the radio and television stations mentioned above include western investors. Among the first private or quasi-private radio stations operating in Bohemia and Slovakia were Radio Plus, founded jointly in Prague in 1990 by the Czechoslovak News Agency and Radio France Internationale, broadcasting in Czech and French (Muller, 1991), and Radio CD International, a joint venture of Slovak Radio and the Austrian company Drehscheibe, founded in 1989 (Muller, 1990). 1990 also saw the establishment in Prague of Evropa 2, a radio station set up by the French station Europe 2, a Hachette operation engaged for some time in developing a network of sister stations ("Europe 2 s'exporte sur mesure", 1992). Evropa 2 has associated stations in Most, Plzen, Brno and Poprad in Slovakia to which it sells 19 hours of its programming a day (Murray, 1993). The first television station in Prague was NTV, which went on the air in 1991.

Later, when the licensing process started, the Czech Broadcasting Council felt free (in view of the fact that both former federal and current Czech broadcasting laws impose no limits on foreign capital involvement in Czech broadcasting establishments) to grant licences to companies with significant foreign participation. In February 1993 it gave a national FM radio licence to RG-Frequency 1, backed by Hachette. French company Europe Developpement (which also has a network of stations in St. Petersburg, Samara, Volgograd and Nizhny-Novgorod, all in Russia, and is also involved in Radio Z in Warsaw, Poland) and Evropa 2 will each hold 25% in Frequency 1. Radio Golem (a Prague music radio station 25% owned by French capital) and the Czech National Insurance Company will also take shares. The other national FM channel was granted to Radio Alfa, established by journalists from Radio Free Europe and the daily newspaper *Lidove Noviny*, with the Czech Savings Company and unidentified American interests as additional minority partners (Plichta, 1993b). Jakobec (1993b) reports that foreign interests are also involved in Radio City Prague (49% owned by CLT Multimedia, which also has minority shares in two Bucharest stations and in one in Bratislava) and Radio Kiss Prague (85% owned by Radio Investments NV,

Dublin). The owner of Radio Kiss, Denis O'Brien, plans to develop a network of 10 to 12 stations in central and eastern Europe (Murray, 1993).

The council granted its first television licence in November 1992 to a Czech-Italian venture, *Premiera*. It broadcasts for 10 hours a day and the rest of the time it retransmits the satellite Superchannel. In a very interesting development, the Investment Bank bought out the shares of one of the Italian founders of the station, Mr. Marian Volani, in January 1994, giving Czech partners a total of 55% of the stock. It is the first time in the Czech Republic, and probably elsewhere in the region, that a formerly foreign-controlled media company reverted to local control.

The council provoked an outcry by granting a national television licence to Central European Television for the 21st Century (CET 21), backed by the Canadian-American Central European Development Corporation (CEDC) which also holds a television licence in Berlin for the Brandenburg land. The new channel, *Nova*, went on the air in February 1994 and is operated by the Czech Independent Television Company formed by CEDC (66% of the stock), with the Czech Savings Bank holding 22% of the stock and CET-21 – 12% (Jakobec, 1993b; Becker, 1993; Smid, 1993).

In February 1991, *Cable Plus*, a cable television company (one of some 30 now operating in the country) was formed by the Czech State Insurance Company, *Kratky Film* and the US company ITC, to establish cable television systems in the country. The first such system was established in Ostrava (Mass media in the world, May 1991). Since then it has created 10 subsidiaries operating in various regions of both the Czech and Slovak Republics (Dziadul, 1994) which reach some 300 000 subscribers. It has started extending its services to Prague and Brno. It owns two production studios, *Prometheus* and *G-Studio*, which produce documentaries and commercials and operates several "Info channels" providing local information to cable viewers. Together with *Scientific Atlanta*, *CI/Jerrod Communications* and *Harmony*, it has also opened the inaugural phase of the country's first fibre-optic network in Brno. By the end of 1994, it was expected to have some 80 000 subscribers.

In Slovakia, the situation is somewhat different. Like the Czech Republic it has a National Radio and Television Council, a regulatory body charged with awarding broadcasting licences (such decisions must be approved by the country's parliament. Its members can be recalled by Parliament on a motion from 15 MPs (10% of the House), approved by a simple majority (Brezka, 1993a). However, according to Druker (1994) this provision refers to the recall not of members of the National Radio and Television Council, but of members of the Boards of Slovak Radio and Slovak Television.

Private radio broadcasting began with *Fun Radio*, owned by a French company and managed by students, which got its start and operated under a special permit before the passage of the new Broadcasting Law in 1991. Following

its adoption, the council has granted 13 local radio licences (stations include Rock FM Radio, a joint venture in which Slovak Radio holds a major share, Twist, RMC, Fun Radio, Radio Rag Time in Bratislava, and stations in Dubnica, Poprad, and Banska Bystrica; there are also stations rebroadcasting BBC and RFE/FL programming).

As for television, originally, foreign investors showing some interest in Slovakian broadcasting did not "want to buy the free Channel 3 [of Slovak Television] because of its small transmission area" (Brezka, 1993b). Finally a licence for that channel was granted to two applicants (one of them being Perfects backed by CEDC, the consortium behind the CET-21 bid in Prague) on condition that they share time on it. The licence was valid until June 1992 and expired, because by that time neither licensee began broadcasting. In January 1994, the National Radio and Television Council awarded a licence to Creative Television (CTV), one of 12 applicants among whom CNN-backed CENtEur was originally favoured to get the licence. Under the Slovak law, the licence has to be confirmed by the National Council (the country's parliament), where a vote was to have been held in February 1994. The funds to establish the station (which was granted 12 hours of airtime a day – between 5 p.m. and 5 a.m. – on the second channel of Slovak Television) are to be raised by Commerzbank (Germany), Centra Corporation (UK) and the Industrial Bank (Slovakia) in exchange for a stake of up to 15% in the equity.

Cable television systems are developing apace in various towns, with local origination channels reported to exist in such towns as Prievidza, Rožnava, Spišská Nova Ves, Strba, Trenčianske Teplice, Nová Dubnica, Komsrno and others (Ivantysyn, 1993). Cable systems includes Slovak Cable backed by Siemens Österreich and Slovakabel, wholly owned by Eurokabel, backed by Cable Investments of Denver, Colorado.

### *Bulgaria*

According to available information, the greatest interest in investing into the print media was shown by Robert Maxwell who under a contract signed in April 1990 was to invest 20 million dollars in Bulgaria, with a part of this sum to be spent on newspapers belonging to the Saint Cyril and Methodius Foundation (Mass Media in the World, September 1991). In May 1991, the first issue of *Tempo*, a joint Bulgarian-Italian magazine, appeared on the market. However, it was reported in mid-1993 that among Bulgarian newspapers and periodicals there are no "foreign-owned publications like those which feature so prominently in, say, Hungary or the Czech and Slovak Republics. There have been modest interventions by Swiss and Austrian publishers but the conditions for investment, even for the long term, are far less favourable than in central European countries" (Davis, 1993: 14).

In broadcasting, a national television channel was given over to retransmitting, free of charge, the French channel TV5 Europe (and another one to Russian Television Ostankino). Turner's CNN has signed a contract for terrestrial

transmission of three hours a day to 70 000 homes in the Plovdiv region (*Screen Digest*, November 1990). In Sofia, the VOA and the BBC have received licences to broadcast 24 hours a day on local FM. There are also the broadcasts of Radio France Internationale, Deutsche Welle and Radio Free Europe.

### *Romania*

Two radio stations, Fun Radio in Bucharest (established in partnership with the French Fun Radio, with Hersant holding 69% of the equity); Radio Delta (founded by the Technical University of Bucharest with the participation of Radio France Internationale); Radio Contact (69% owned by a Belgian company, Contact S.A.); SC Amerom Television Tele-America SRL (99% cent owned by American capital) are signs of foreign interest in the country's media scene. Another is the fact that the American company Cam West Atlantic is to privatise Channel II of Romanian Television. It is also possible to detect signs of emergence of budding media concerns on the lists of radio and television licence holders, in that companies have applied for and received several licences. This includes SC Mediapro SRL (local radio licences in Bucharest and Constinesi and local television licences in Brasov and Oradea); SC Uniclub Multimedia SRL (local radio licences in Bucharest and Suceava); SC Corporatia Cultura Si Arta Intact SRL (local radio and television licences in Bucharest; it also owns some newspapers); SC Radio Contact Romania SA (local radio licences in Bucharest and Sibiu); SC Grup Investiti Si Programe (GIP) SRL (local radio licences in Galati, Iasi, Piatra Neama and Suceava); SC CMC International Impex SRL (which owns seven newspapers and has received a local radio licence in Bucharest) and so on.

### *Slovenia*

The old (federal) Law on Foreign Investments is still in force. It expressly bans foreign ownership of companies in the field of the media and telecommunications. Similarly, the law on telecommunications does not permit the allocation of broadcasting frequencies to foreign natural or legal persons. As a result, there has been practically no foreign media presence (Setinc, 1993).

### *Estonia*

Reklaamitelevision, once the commercial arm of Estonian Television, is now an independent company owned by the commercial broadcaster MTV3 of Finland and a number of Estonian investors. EVTV was set up as a 51:49 joint venture between Eesti Video (itself partly owned by Estonian Swede Andres Ktnng) and the Swedish company Kinnevik. According to later information (*Euromarketing*, 21 September, 1993), Kinnevik gained a controlling stake in the station and some stock had also been bought by Reklaamitelevision. Kanal Kaks (Channel 2) is owned by Taska Ltd. (itself controlled and owned by Estonian-born Hollywood film producer Ilmar Taska) and US investor Harold Nathan. Kanal Kaks is planning further expansion, into Helsinki, St. Petersburg and Latvia. These plans, if realised, would thus lead it into operating in three countries.

Cable television is dominated by Levi Communications, jointly owned by Finnish, Dutch and Swedish investors and it offers CNNI, MTV Europe, Eurosport, Sat1, RTL, Euronews and Superchannel.

### *Lithuania*

Tele 3, which uses the third national television channel in Lithuania, is owned by a Lithuanian-American, Liucija Baskauskas. Baltic TV (10 hours a day of local and imported news and light entertainment programming) has a major foreign shareholder, Equitable Finance Corporation from the US (49% of the stock). The Lithuanian state owns 30% and private Lithuanian investors – 21% of the stock (*Euromarketing*, 13 April, 1993). As has been mentioned, Kinnevik of Sweden is a 49% partner in Channel 11, a joint venture with Lithuanian Television, which broadcasts western movies, series and commercials.

### *Latvia*

The Baltcom wireless cable system mentioned above is a joint venture between Latvia Radio and TV and the US company International Telcell Group.

### ***Preliminary conclusions***

The unavoidable lack of clearly defined media policies when new governments took over power in or after 1989, and the fairly confused state of affairs since then, have resulted in a situation which, generally speaking, is conducive to media concentrations and foreign media presence for three reasons:

1. the free market has been introduced into press publishing, and in most cases broadcasting;
2. in most of the countries under consideration, lack of new media legislation attuned to the opportunities and dangers of free market economics means that few rules concerning media concentrations and presence of foreign media companies have been formulated;
3. politically-driven privatisation resulting in sometimes extreme de-concentration of the media, practically forces many media – given that there is little domestic capital – to search for foreign capital and leaves many start-up local media companies without the reserves necessary to survive in a competitive market.

We are, therefore, witness in central and eastern European countries to all the four forms of media concentrations we distinguished in the beginning, albeit usually in an early form. This is due to the fact that concentration as such is generally just beginning and that the emergence of the private sector of broadcasting – potentially giving rise to multimedia concentrations and cross-media ownership, is also in an initial stage. The development of incipient domestic media conglomerates operating on many media markets and across the



media (encompassing primarily the print media and broadcasting) is still in a very early stage. How much staying power they will have in competition with big outside media corporations remains to be seen. Many central and eastern European media industries are vulnerable and unable to compete (because of de-concentration, lack of capital, lack of legislation, lack of managerial skills and free market experience). They have fewer defences particularly against foreign media expansion. And indeed, of the four forms of concentrations, international integration: acquisition, takeover of media establishments by those of other countries is the most conspicuous and indeed spectacular.

Foreign media presence is most pronounced on larger and more stable markets which are open to foreign capital, and are seen to offer worthwhile and realistic business opportunities (Poland, Hungary, the Czech Republic, etc.). Some of the smaller countries may escape the attention of the major international players, but still be considered attractive from the point of view of the smaller countries, or have their media fall under the domination of marginal players from the big markets.

This can be seen quite clearly when one compares the Baltic states with Poland, Hungary and the Czech Republic. The Baltic states are so small that they are left to smaller players: Scandinavian companies and smaller groups or even individuals from the big countries. On the other hand, central European states attract some of the biggest players. In the print media, mostly European capital is involved, with Germany and France in the lead and Italian and Swiss capital following in their footsteps. American capital is barely visible. In broadcasting, on the other hand, it is present in central and eastern Europe in force – a clear indication of the global scale of its operation.

In the case of the Polish print media, it is interesting to note that German capital has gone into large circulation popular periodicals, while French, Italian and Swiss capital mostly into serious, quality newspapers and periodicals oriented to political and economic coverage.

At the same time, satellite and cable television together with domestic off-air television which shows more and more western programming (this is especially so in the case of private stations) have tilted the balance in favour of western programming as far as the total universe of television content available to central and eastern European audiences is concerned.

This is accompanied by the expansion by western public and state media, taking the form of two processes:

- media, especially satellite channels, oriented towards representing their country, spreading knowledge of the language and culture (La Sept, TV5, RAI Uno in Poland), have made their programming available to central and eastern European countries;

- external services of public and government broadcasting organisations seek to justify their continued existence by demonstrating demand for their programming in central and eastern Europe at a time when the end of the Cold War deprives them of the traditional rationale for their operation (BBC External Services, Voice of America, RFI, Radio Free Europe);

A special case is successful media companies from central and eastern Europe which seek foreign investments in order to gain capital to finance their own expansion (for example, Gazeta Wyborcza and Radio Z in Poland) and which are engaged on a programme of international expansion of their own (Radio Z in Poland). This would appear to be the likely next stage: international integration, acquisition and takeover of media where all the sides involved are from central and eastern Europe. With the larger, or more free market oriented likely to accumulate capital and develop large-scale conglomerates looking for opportunities for foreign expansion, we may see smaller or less developed countries serving as their markets, producing inequalities also within the region. This may be reinforced by the fact that many western companies treat investment in the more stable and prosperous (largely central European) countries as the first step in a long-term process of expansion, expected to extend further East when circumstances make that possible.

This may initiate an interesting process. Smaller and poorer countries may see their media come under the control of foreign corporations and end up like some developing nations, which have few media of their own to speak of. However, in larger countries, markets are able to generate more capital and advertising to sustain domestic media which are better organised, financed and able to compete. So, it will be a race between the foreign conglomerates and budding domestic concerns to see whether the former will gain control before the latter become established enough to feel secure in their own (and perhaps in other) markets. Judging, however, by the inequality of contenders in the race for the one national commercial television licence in Poland, the likelihood of a considerable degree of foreign control over the media in the larger central and eastern European countries coming at some later stage must be regarded as quite high.

The level of awareness of the whole issue of media concentrations and foreign media presence, and all their implications, is low, as yet.

There has, of course, been some debate on the matter in central and eastern Europe. In the Czech Republic, the Syndicate of Czech Journalists has pointed out that the country is the only state in Europe where almost the whole regional press is controlled by foreign capital. In July 1993, the Czech Ministry of Economic Co-operation decided that it would not allow 11 mergers of 11 regional dailies and weeklies, resulting from the transfer of additional rights to the German group Neue Passauer Presse. That decision followed after a seven month study of the regional press which established that the group owned over 20 regional

dailies and many weeklies, in addition to a major evening paper in Prague and some central magazines, as well as four printing houses.

The ministry announced that it planned to propose a bill under which owners of press publishing houses would have to be Czech natural or legal persons with a domicile or seat in the country, and would ban foreign control of such publishers. However, Prime Minister Vaclav Klaus has so far rejected all proposals for legislative or regulatory action of this kind.

In Poland, too, the influx of German media capital, especially into youth and women's periodicals, in addition to extensive foreign capital presence in other print media, has raised fears of foreign dominance. A draft press law, prepared in the spring of 1993 by a drafting group appointed by the then government, included a provision that in daily newspapers at least 51% of the equity should be in Polish hands, and that the editor should be a Polish national. However, the draft was never considered by Parliament. Later, a proposal was voiced for the establishment of a National Press Council with powers similar to those of the National Broadcasting Council, which could control the inflow of foreign capital. So far, however, no action has been taken, except in the Broadcasting Act where foreign participation in the equity of broadcasting establishments is limited to 33%.

Where debate on media concentrations and foreign media presence has begun, it has been driven by:

1. a desire to prevent commercially driven re-monopolisation of the media so soon after politically imposed information monopoly was eliminated;
2. fear in central and eastern Europe for sovereignty and independence, resulting in particular from recent experience of domination by the Soviet Union, and exacerbated by suspicion of western capital resulting from:
  - lack of understanding of how it operates (for example, that ownership of stock need not translate into day-to-day interference into the editorial process);
  - a rising tide of populist and nationalistic groupings and those which cynically prey on the fears and insecurities of large groups of the population by appealing to their xenophobia or distrust of foreigners;
3. concern in the west that central and eastern Europe should be aware of the consequences of the operation of the free market in the media, including also its negative aspects.

A special case here is those who, having lost their ideologically or politically motivated battle against big media conglomerates in their own countries in the west, now treat central and eastern Europe as a "substitute battlefield" on which to continue that struggle.

For the time being, there are no reports of clearly negative consequences of media concentrations and/or foreign media presence, probably because, with

some exceptions, neither process has so far achieved the critical mass needed for those consequences to be felt. What is noticeable today is the influx of capital, making it possible to preserve failing newspapers or establish new ventures (which would not get off the ground without it), modernisation, transfer of know-how, etc. So, possible concern for the effects of foreign capital and media presence is offset by the realisation that without them much of the media boom which followed the collapse of communism would have been impossible. So, the general public may for the time being perceive foreign media presence as a boon rather than as a danger.

There are few reports of flagrant abuses of ownership by budding domestic conglomerates or foreign companies to influence contents of central and eastern European media or manipulate public opinion for their own benefit.

In these circumstances, it is perhaps understandable that central and eastern European governments have done relatively little to regulate media concentrations or foreign media presence so as to prevent these processes from achieving a critical mass threatening potential negative consequences. At this stage, this would be politically very difficult to defend, because it would smack too much of old constraints on the freedom of the press (indeed, existing political barriers in some countries against the encroachment of foreign capital sometimes go hand in hand with constraints on freedom of the press in general). In any case, a protectionist policy would present them with a dilemma: they would deprive themselves of some of the immediate benefits of media concentrations and foreign media presence, while guarding against dangers have not been clearly defined and which are in fact questioned by some in the west. Nevertheless, it can be expected that over time the debate will become more intense and there will be more and more attempts to limit the influx of foreign capital into the media – especially if nationalistic feelings are on the rise.

This would militate in favour of developing some all-European standards in this field, to prevent excessive or unjustified curbs being placed on movement of media capital across the East-West divide. There is no danger that the proposal voiced in Poland, for similar rules and institutional structures designed to enforce them to be developed for the print media as have been created in the field of broadcasting, to be put into practice. However, it does indicate the strength of sentiment and the feeling of insecurity caused by the perceived western “invasion” of some of the media – and the authoritarian nature of solutions proposed in order to deal with it.

In any case, it would hardly be possible or justified for central and eastern European countries to act alone in trying to keep media concentrations and foreign media presence within acceptable limits (which in any case have not yet been defined). These processes obviously cross national or regional borders, so anything relating to any one region alone would simply be ineffective. Therefore, it could be argued that awareness of the region’s special situation should be seen as strengthening the case for all-European solutions.

The option to do nothing at all, mentioned in the Green Paper of the Commission of the European Communities "*Pluralism and media concentration in the internal market*", does not seem to offer any basis for a possible European response to a process which is reshaping media industries on a continental, and indeed global scale, beyond the control of any nation-state or any government.

The development of all-European solutions would seem to require a three-stage process.

### ***Stage I***

Information contained in this report suggests that central and eastern European countries are ill prepared to analyse the process of media concentrations and foreign media presence, let alone to devise any comprehensive strategy of dealing with these processes, should they decide to do so. This would point to a need for organisations like the Council of Europe to assist them in acquiring information about processes of media concentrations, and measures taken to control and limit them, in the west, as well as in developing their own regulatory regimes in this regard.

### ***Stage II***

As for Europe as a whole, measures to enhance transparency provisions are the very least of what should be done at a policy level. This should go hand in hand with the development of common European standards for monitoring and reporting on national and international trends in media ownership.

Together with this, efforts to co-ordinate and synthesise the results of studies on the consequences of media concentrations would go a long way towards raising awareness of these processes themselves and of their effects on freedom and political and cultural pluralism of the press, the ability of nations to preserve and develop their cultural identity and their cultural industries.

### ***Stage III***

Analysis of international media ownership trends, especially if it is conducted in a wider technological and economic perspective, will probably set the stage for consideration of further steps towards harmonisation of national regulation of media ownership, together with the creation of some monitoring and potentially also enforcement mechanisms.

The need for every modern nation (and, even more so, region or continent) to have its own, indigenous cultural industries is made imperative by the fact that they:

- increasingly serve as a repository of the cultural identity and a means of expressing it in the modern idiom suited to our times;

- and are an integral element of modern information and technologies which together with other high-tech industries constitute the foundation of economic growth. Lack of control of cultural industries, especially audiovisual ones, thus has long-term technological and economic consequences which may not be immediately obvious but which extend far beyond the realm of culture itself.

There is no lack of western observers who see the need for concerted international action in this field, at least in the field of broadcasting:

Without any adequate and countervailing powers European broadcasting will make the big jump from a system based on public monopoly to one where private monopoly is king, destroying in the process all that has made Europe's broadcasting tradition so distinguished and exceptional. European-level regulation is significant as much for its momentum as for its content. Facilitating the free flow of programmes across European borders and the co-production of audiovisual works cannot of itself create a thriving and competitive industry ... The very visible internationalization of broadcasting, combined with increasing private ownership of television channels in all European countries, seem to be fertile soil for a continued drive towards a shift in regulatory power over broadcasting away from the national towards the international arena. (Hirsch, Petersen, 1992: 55).

Before this can happen, however, the international community must come to share a view of the processes of media concentrations and international media expansion, which from its point of view would justify regulating them and possibly limiting their scope. In other words, some degree of consensus on just what the effects of these processes are, and they are negative rather than positive, is required before international action can be contemplated. In quite a surprising way, therefore, the situation in central and eastern Europe mirrors that in Europe as a whole in this regard. This underlines the importance of Stage II of the programme of action suggested here: its results will either provide a rationale for international action in this area, or they will lay fears to rest. The sooner it begins, therefore, it sooner the international community will know where it stands on this issue.

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## Legislative guarantees of a plurality of information sources – implementation of constitutional provisions regarding mass media in a pluralistic society<sup>134</sup>

### **Background**

Article 10 of the European Convention of Human Rights states that “Everyone has the right to freedom of expression. This shall include the right to ... impart information and ideas without interference by public authority and regardless of frontiers”. In terms of society-wide communication we must, of course, recognise freedom of the press as a basic prerequisite of a plurality of information sources. At the very least, therefore, legislative provisions in this regard must create of a legal framework providing for freedom of expression and of the press, based for example on Article 10 of the European Convention of Human Rights.

In line with this article, Resolution No. 2 “Journalistic freedoms and human rights”, adopted by the 4th Ministerial Conference on Mass Media Policy, organised by the Council of Europe in Prague (7-8 December 1994) calls for:

- unrestricted access to the journalistic profession;
- genuine editorial independence vis-à-vis political power and pressures exerted by private interest groups or by public authorities;
- and restriction of any interference by public authorities with the practice of journalism only to cases foreseen in Article 10, on the additional condition that they (i) are necessary in a democratic society, (ii) reply to a pressing social need, (iii) are laid down by law, (iv) are narrowly interpreted, and (v) are proportional to the aim pursued.

It is accepted that a democratic social system must involve the existence of a plurality of independent and autonomous media which reflect a diversity of opinions and ideas and meet the interests and expectations of the public. The Committee of Experts on Media Concentrations and Pluralism operating under the auspices of the Council of Europe has defined pluralism as the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through the mass media.

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134. Prepared for Presentation at the Round Table on Implementation of Constitutional Provisions Regarding Mass Media in a Pluralistic Society, organised by the European Commission for Democracy Through Law and the Office of the Attorney General of Cyprus, Nicosia, 16-17 December 1994, and subsequently published in “Implementation of constitutional provisions regarding mass media in a pluralist democracy. Proceedings”. Collection *Science and Technique of Democracy*, No. 13. European Commission for Democracy Through Law, Council of Europe Publishing, Strasbourg.

This concept of a plurality of information sources thus involves:

- pluriformity: the existence of different media with different ownership, goals and legal structures; and
- pluralism of content, involving the media's obligation to reflect, and provide facilities for the expression of, different points of view (political and otherwise) including critical and oppositional ones.

### ***Three models of media plurality***

In line with the above-mentioned Resolution No. 2 of the Prague Ministerial Conference, any legislative guarantees of a plurality of information sources – which do, after all, constitute a case of interference by public authorities with absolute freedom of the press<sup>135</sup> – can be justified only by being described as necessary in a democratic society.<sup>136</sup>

However, there are many who would challenge the view that such guarantees are indeed necessary and justified. It is argued that as a “free marketplace of ideas”, the media should be subject to no regulation. A corollary argument is that the media should be governed by the same rules as all other businesses and no special regulations should be applied. To this is often added the view that in any case pluralism is a natural result of economic and technical processes and that therefore no interference by public authorities to safeguard it is required.

Thus, we can distinguish three basic models for delivering media pluriformity and diversity of media content: the pure market model; the new media model and a public policy model which assumed some degree of interventionism into media operation.

We will begin with the models based on the assumption that no special action to ensure plurality is necessary.

#### *The pure market model*

This is based on the premise that the free operation of supply and demand provides access to the media for all “voices” which can pay for it, as well as

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135. Some view such interventionism and public policy designed to ensure pluralism as a restriction of the freedom of expression. The European Commission's Green Paper on “Pluralism and media concentration in the internal market” calls pluralism a “concept whose purpose is to limit in certain cases the scope of the principle of freedom of expression with a view to guaranteeing diversity of information for the public”. It may be necessary, in certain cases, to limit application of the principle of freedom of expression – the Green Paper says – because it would result in preventing another beneficiary of that freedom from using it. “Thus it is possible in the name of pluralism to refuse a broadcasting licence of permission for the takeover of a newspaper, a monolithic corporate structure, a holding in a media company, etc.” (pp. 15-17).

136. Views on what is necessary in a democracy may change with time. This is shown by the fate of the American Fairness Doctrine, introduced at one time to ensure internal pluralism in broadcast media content and then eliminated on a wave of deregulation under Reagan as unwarranted interference into the freedom of the broadcaster.

ensure a supply of content relevant to all consumers. This advertising-based pure market model is said to contribute to diversity by seeking to match the media content to the composition of the given consumer market. This results in market segmentation, with different media seeking to appeal to various groups because advertising messages must be tailored as well as possible for the given audience and match its "demographics". Since media distribution and content patterns are inclined to follow lines of income and of locality, advertisers can choose vehicles for their messages in order to reach diversified target groups in a way which suits their own needs. Since socio-economic variation also often correlates with political differentiation, the advertising market variant has some potential for meeting the main requirements of political diversity.

This is basically the model of external pluralism (also known as horizontal pluralism), in which diversity of content is provided by separate media, existing alongside one another. This model accordingly excels in producing numerical pluralism, that is, a great number of newspapers, radio and television stations, satellite and cable channels, etc., provided of course that the market can sustain them.

The pure market model naturally favours concentration of capital and ownership in the media (see Appendix for a definition and a list of types of such concentration). At a time of free trade and free movement of capital (as within the European Community, for example) and globalisation of media operations, it is argued (and not without justification) that media concentration may be needed to ensure the emergence of financially strong companies able to take part in international competition and prevent the domestic market from being taken over by foreign media. Large media groups may promote pluralism simply as a business strategy, such as by diversifying their media outlets and establishing new newspapers, radio and television channels etc. to reach various groups of the audience (for example, by creating within one conglomerate newspapers representing quite different orientations in order to achieve greater profits by serving diverse publics) and by cross-subsidising low-profit media forming part of a larger concern, which would not otherwise be able to survive in the marketplace. Also, they have the capital, management and research and development capabilities allowing them to overcome high barriers to market entry and establish new media outlets.

#### *The new media model*

This model is based on the view that the profusion of channels created by the new technologies – cable television, satellite television (now boosted by signal compression) encourages senders to seek profitability by identifying market niches and serving audiences neglected by other media. This profusion of thematic, narrow-cast, specialised channels has been said to promote the birth of "personal media", allowing viewers to select content precisely attuned to their needs, tastes and interests.



However, studies show that some minority audiences which do not constitute an attractive advertising target are still neglected by the new media. To this must be added two other consequences of new media operation which militate against pluralism in society:

1. Where the receivers do take advantage of the profusion of choice offered by the new media, they fragment the audience and promote non-communication among various groups which may live in diverse, self-contained symbolic universes;
2. Much more common, however, is a tendency of viewers to use a profusion of choices in order to screen out unfamiliar content and stay on safe, familiar territory, so the end result may be superficially varied but politically and culturally homogeneous content.

Today, with the coming of information superhighways, on-demand video and other new technologies, both types of their use will be facilitated.

#### *The public policy model*

The two models are seen by many as inadequate for the purpose of safeguarding plurality of information sources. As regards the pure market model of media pluralism a number of fundamental objections are raised:

1. Media forming part of larger groups are not independent and autonomous in their editorial policy, but are controlled by the mother company which in this situation could be described as the real "sender"; with the other media (especially as regards television) serving to a large extent as distribution channels for content produced or determined elsewhere. This may result in a reduction in the number of information sources and uniformity of content;
2. The pure market model produces freedom of the press for its owners, denying this freedom to disadvantaged individuals, groups and segments of society which cannot afford to establish their own media and do not constitute an attractive enough advertising market for someone else to establish media catering to their needs; domination of a market by some companies or groups may in general exclude new independent entrants or weaker competitors from it;
3. The pure market model does not really produce representative socio-political-cultural diversity including critical and oppositional voices; rather, the predominant trend will be in favour of the superficial variety of the same politically safe content ("corporate speech") differently packaged for different groups of consumers. Advertising as the main or only source of funding reduces the supply of "minority interest" programmes, aesthetically and intellectually challenging themes, and politically controversial material which fails to achieve top audiences;

4. Media concentrations may make small cultural entities ("small" countries, regions) dependent on the strength of major media groups, some of them foreign;
5. Considerations of pluralism apart, media concentrations give individuals or groups in control of large media conglomerates extensive power to influence or manipulate public opinion, including withholding information which is not in the interests of the owners.

In central and eastern Europe, the advertising-driven process of media pluralisation will take a long time to work, especially in broadcasting:

- small and relatively poor markets cannot sustain many specialised broadcasting outlets;
- commercial broadcasting is only beginning in central and eastern Europe which means that it will take a long time for the new companies to accumulate capital enabling them, should they want to do so, to introduce narrow-cast channels and finance them while they slowly become established;
- minorities are in many cases either small or too poor for commercial broadcasters to be interested in setting up media for them.

#### *The market-cum-public policy model*

These and other arguments are used to justify the application of the public policy model, which assumes supplementing the market model by means of public interventionism into its operation to promote pluralism. Clearly, this does not mean public ownership and control of all the media, but measures designed to correct some deficiencies of the pure market model and modify its functioning to some extent. It is based on a recognition not only of freedom of speech, but also of the need – and indeed right – of all social groups to communicate. Interventionism into the operation of the media serving to safeguard the right to communicate is seen as not only necessary in a democratic society but also necessary for the very functioning of democracy. This in turn is seen as implying an obligation on the part of public authorities to create at least minimum legal conditions for the exercise of this right. In Europe, the fundamental feature of the public policy model in the area of broadcasting is the preservation of the dual system, combining commercial stations with legally mandated and protected public service broadcasting. It is under an obligation to operate on the basis of internal pluralism (also known as vertical pluralism), in which there should be pluralism of content within one channel, or one media organisation.

Apart from that, this interventionism also takes the form of a wide variety of other legal and administrative measures designed to guarantee the desired features of the media system, also in the area of the ownership of the media.

It is interesting to note that the 1982 review of European Press Law (Statutory Regulation and Self-Regulation of the Press. Mass Media Files No. 2, Council

of Europe, Strasbourg) provides no indication that constitutional or legislative systems of press regulation existing at that time dealt with the question of media ownership or concentration.<sup>137</sup> At that time, broadcasting was still a state monopoly in most western European countries, so market-driven media concentration encompassed only the print media. Clearly, this “monomedia concentration” was not considered a major issue. A similar review published in 1992 (*Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies*. Article 19, London) shows that the issue is dealt with in the legislation of a number of countries, either in the media laws or in some other legislation.<sup>138</sup>

The difference between the two periods springs from the fact that in western Europe and elsewhere the early 1980s saw a process of liberalisation, demopolisation and “deregulation” in broadcasting, setting the stage for multi-media concentration, encompassing both the print and broadcast media. It is concerns raised by this process which most likely account for the spate of new legislation on media ownership in the second half of the 1980s.

Below we review some provisions in national laws and regulations designed to ensure a plurality of information sources in a number of ways: by promoting internal pluralism (pluralism of content within one medium); external pluralism (many different media speaking with different voices); by curbing concentrations; and by enhancing transparency of the media market.

You could say that internal pluralism is the only case of real pluralism because it exposes the whole audience to diverse content, and so promotes communication among different groups. External pluralism creates mainly communication within groups, with the groups talking to themselves, but not to one another.

Let us note here that some countries have adopted no policies to promote media plurality or curb media concentrations. Where such measures are applied, they are selected and designed in a way dictated by the conditions prevailing in the particular country. What follows is a list of options (illustrated by selected examples) from among which solutions best suited to particular countries may be chosen.

### *1. Internal pluralism*

Rules on access to possibilities of communicating include:

- a. producer access: for example, the obligation imposed the Television Without Frontiers Directive of 1989 that broadcasters devote at least 10% of

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137. In fact, such provisions existed in the legislation of some countries. They were introduced in the UK in 1973 and in Ireland in 1978. In most cases, however, regulation of ownership was indeed introduced in the 1980s.

138. These provisions must differ from those in anti-monopoly laws. Media concentrations are a special case: various media may appear to be quite different, but operate in the same field (provision of information and definitions of reality).

- airtime, or 10% of their production budget to programmes produced by independent producers, or the American prime time access rule, providing for preferred opportunities to gain access to broadcast time in prime time;
- b. access by political parties or candidates; different forms of “free expression”;
  - c. access by specific minority groups (on cable television);
  - d. conditional access: for example, the American Fairness Doctrine (no longer observed), obliging the broadcaster, when views on a controversial question of public importance are expressed in his programming, to air views of other sides of the same issue;
  - e. public access channels (on cable television).

## *2. External pluralism*

- a. Methods of facilitating market entry for potential new communicators and media and lowering financial barriers to media operation. In a technique described as “ownership access”, the Federal Communications Commission of the US adopted a policy in the 1970s that provided tax incentives and advantages in comparative hearings that would result in the transfer of some existing radio and television licences to minority owners or businesses controlled by members of minority groups. Lowering financial barriers involves the introduction of lower postal tariffs, lower VAT (for example on subscription and single copy sales) or tax exemptions for the media (for example, lower tax on advertising), reduced telephone rates etc.
- b. Provisions to modify market competition to protect weaker media organisations and ensure their continued existence. One particularly well-known example is the Swedish system of supporting the printed press which includes: exemptions from VAT; preferential tax rates with regard to advertising revenue (smaller publications are exempt from tax on advertising revenue under a certain threshold); government communications and advertisements are published in all newspapers (paid for from a tax on advertising revenue); preferential postage rates; prohibition or limitation on advertising on radio and television in order to protect the printed press; subsidies, designed to safeguard newspaper plurality by offering direct subsidies to “low coverage” newspapers, that is those with no more than 50% coverage in their place of issue (provided they have more than 200 subscribers); support for the establishment of new publications; development support – especially for press undertakings in sparsely populated areas, even if they are in a monopoly position; modernisation support in the form of credits; support for joint distribution, printing and advertising networks of newspapers, which helps cut their costs. This category also covers French associative radio, which can receive subsidies from a special fund if it declares non-commercial programme goals and undertakes to derive less than 20% of its budget from advertising.

### 3. Provisions to restrict media concentration

This includes:

- a. Restrictions on multiple ownership in the same medium: in order to prevent a situation in which a single business controls or influences several media of the same category (newspapers, radio, television), certain national laws prohibit the accumulation of radio or television broadcasting licences, holdings in other broadcasters,<sup>139</sup> or circulation in excess of a certain market share for all daily newspapers, or require that prior consent is obtained before a particular circulation figure is exceeded;
- b. Restriction on multiple ownership across several media: in order to prevent the same operator from controlling or influencing several media of different types, certain national laws prohibit the possibility of having a broadcasting licence or acquiring holdings in a broadcasting company if the applicant exceeds a certain press circulation figure.<sup>140</sup> These restrictions also exist between television and radio in some countries.<sup>141</sup>
- c. Restriction to a fixed maximum level of the first holding in a broadcasting company: some laws restrict the maximum stake of one shareholder in a television or radio broadcasting company or prevent an operator from having a decisive influence. This type of provision seeks to dilute the influence that a majority shareholder could have and to promote a diversity of shareholders, which could be reflected at the programming level by a diversity of programme content.
- d. An obligation of merging media companies to report to anti-monopoly bodies. For example, the Austrian Parliament passed in 1993 a Cartels (Merger) Act which requires merged media companies to register with the Cartel Tribunal if their joint turnover is greater than 17.5 million Austrian schillings (with other companies the threshold is 3.5 billion). The Cartel Tribunal will issue a clearance provided it can be established that there is no abuse of a dominant market position as a result of the merger, nor a threat to the variety of opinions reaching the public.

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139. In Norway, media sector companies may not hold a local radio broadcasting licence, nor own more than 49% of a local radio broadcasting body.

140. For example, in Italy it is forbidden to own a nationwide TV channel if the company also publishes or controls daily newspapers with a circulation exceeding 16% of the total circulation of daily newspapers in the country; it is forbidden to own more than one nationwide TV channel if the company also publishes daily newspapers with a circulation exceeding 8% of the total; more than two nationwide TV channels if the company publishes daily newspapers whose circulation is less than 8%.

141. In Belgium, a natural or legal person holding more than 24% of the capital of a French Community private TV service, either directly or indirectly, may not hold more than 24% of the capital of more than 5 private radio services.

#### 4. Ensuring transparency of the media market

The laws of many countries lay down requirements regarding the identification of all the operators involved in media operations.<sup>142</sup> *Guidelines on media transparency* developed within the Council of Europe recommend that member states introduce into their laws provisions obliging media undertakings to provide information on, among other things,

- a. the identity of persons or authorities participating in the structure which operates a broadcasting service or a newspaper;
- b. information on the nature and extent of the interests held by the above persons or bodies in other media enterprises;
- c. information concerning persons or bodies other than those directly involved in the structure who are likely to exercise a significant influence over the editorial or programming policy.

#### **Concluding remarks**

We are today witness to new processes, which put a somewhat different complexion on the issue of media concentration.

First of all, technological change involved in the movement to digital systems in communications means that traditional divisions among the different media are fast disappearing and the various sectors of the communications industries are converging. Once all forms of information can be stored, transmitted and displayed using the same digital language and technology, the institutional divisions between the “old” and “new” media, between the publishing industry, the telephone business, the film and television industries, the music business, or cable networks become increasingly irrelevant. Thus, digital convergence is a powerful new impetus towards greater concentration of media ownership, as companies position themselves to best advantage in the new multimedia landscape.

Secondly, disparities in anti-concentration policies and in market sizes result in a situation when regions seeking to protect plurality in national or regional markets face other regions which allow the emergence, and can sustain it, mega-companies capable of operating globally and dominating the markets where anti-concentrations regulations apply.

This has led to a change of policy in this area in a number of countries, leading to a liberalisation of hitherto existing constraints on media concentrations<sup>143</sup> (for

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142. In many cases, shares in broadcasting (especially television) companies must be nominative; share transfers above a certain level (in Italy: over 10%, or over 2% in listed companies) must be notified or cannot be effected without official consent.

143. One exception is Italy, where for reasons clearly prompted by the political situation the Constitutional Tribunal has just ruled that the existing law allowing one owner to control three television channels is unconstitutional, because it limits freedom of speech. With the broadcasting law scheduled to be revised in 1996, this ruling may affect its provisions in this regard.

example, the UK, where even the BBC has been told to “Serve the nation and compete worldwide”).

With globalisation, the frame of reference in which these matters are considered may thus have to be revised. The national framework may no longer be adequate. Regional or continental regulatory regimes (see Appendix for a summary of the debate within the European Union concerning possible international regulation of media concentrations) may be needed to deal with the challenges posed by the processes unfolding today.

## **Appendix**

### ***Definition and types of media concentrations***

The EEC Council Regulation of 21 December 1989 on the control of concentrations between undertakings said that concentration occurs when a) two or more previously independent undertakings merge, or b) when one or more persons already controlling at least one undertaking, or one more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings”.

Media undertakings seek advantages by co-operating and concluding co-operation agreements which cover combined buying and selling, exclusivity, joint ventures, non-competition agreements, specialisation, etc. While this does not involve loss of legal control by particular undertakings, it can give them a strong influence on the market, which amounts to a concentration of market power.

Concentration as such is characterised by a decrease of power of autonomy or legal control over a company. That results mainly from concentration of the industry. Another concept is the concentration of the media market, defined as a situation which happens when only one or a handful of media companies operate in any market as a result of various possible processes: acquisitions, mergers, deals with other companies or even the disappearance of competitors. Low concentration indicates a state of (full) competition and high concentration – a situation of (near) monopoly, including duopoly or a dominant market leader.

Concentration of the industry takes a number of forms, which are listed below:

1. Merger: a process in which either an undertaking is absorbed by another undertaking, or two or more undertakings unite to form a single undertaking.
2. Integration: all forms of more or less far-reaching combination or power and control over the activities of an undertaking or a group of undertakings. Integration may occur in two different forms:
  - horizontal integration: a situation in which an undertaking or a group of undertakings, controls, at executive level, several production units

of one and the same activity (for example, an undertaking controlling several printing businesses, or several titles, or several advertising agencies). In a press group, for example, horizontal integration makes it possible to realise economies of scale resulting from different operations (for example, operations to control advertising, to combine editorial segments that are common to many titles, joint printing, distribution or promotion, etc.);

- vertical integration: a situation in which an undertaking or a group of undertakings controls the different phases of a production process (for example, a press undertaking controlling newsprint, the actual publishing, the printing and the distribution). This can be a case of upstream integration, when an undertaking merges with others constituting a source of the product, or downstream concentration, when the merger is with undertakings involved in the sale or distribution of the product.
3. Multimedia integration: a situation in which an undertaking or a group of undertakings controls different media (for example, participation of press undertakings in the capital of radio or television broadcasters) – also known as cross-media ownership;
  4. Multisectoral integration: a situation in which an undertaking or a group of undertakings controls one, or several different media and is active at the same time in one or more other economic sectors (for example, an undertaking active at the same time in the building industry, the distribution domain and the media domain);
  5. International integration: a situation in which the activities of an undertaking or a group of undertakings extends over two or over several countries. In general, there are three major types of transnational media mergers, each driven by a different motivation:
    - cross-media empire building – is the merger of companies that own different types of media – book publishing, TV, radio, newspapers, magazines, record companies. Such mergers create potential synergies through expanding the markets an advertiser can reach through a single advertising package purchase, and/or expanding the potential distribution possibilities for a single creative product;
    - hardware-software marriages (for example, Sony's buy-out of Columbia Pictures and CBS Records to provide software produced in the standard of the hardware);
    - concentrated, industry-specific deals – purchase by a media company of similar media outlets in another country.

Internationalisation of the media, which results in part from international integration, takes place at many different levels of media systems:



- at the organisational level (that is, the creation of international media; transnational ownership of media systems);
- at the content level (that is, the trade in media content leading to prominent presence of foreign content in national media; the practice of co-productions);
- at a funding level (the importance of advertising revenue internationally; the movement of capital across frontiers);
- at the regulatory level (that is, the involvement of supranational bodies, such as the European Community in defining international regulatory standards adoption of international or foreign standards in the national legislation);
- at the reception level (exposure of the national audience to foreign or international media).

***Debate on possible regulation of media concentrations within the European Union***

The Green Paper of the Commission of the European Communities on “Pluralism and media concentration in the internal market” (COM(92) 480 final, December 1992) presented the following options regarding possible action by the Union:

1. take no action at all;
2. enhance transparency by passing an instrument to achieve greater disclosure of information on media ownership and control in the Community, so as to improve knowledge of the level of media concentration;
3. adopt a Council of Europe directive or regulation to harmonise laws on media ownership in the Community.

In September 1993, the Economic and Social Committee of the European Communities adopted an “Opinion on the Commission Green Paper on pluralism and media concentration in the internal market” (93/C 304/07). In it, the committee rejected the first option and found that action proposed under the second option would be inadequate. It expressed the view that ownership restrictions limiting media concentrations are not necessarily incompatible with Community law because they help guarantee or safeguard pluralism and that “the safeguarding of pluralism and freedom of opinion in programmes essentially depends on rules designed to prevent media concentration processes which could lead to monopoly-type mergers”. Therefore, it came to the conclusion that rules on national and transnational media companies, which achieved monopoly-type dominance of broad sectors in certain countries “are considered by the Committee to be necessary”.

On this basis, it made the following proposals:

- in view of the existence of international multi-media corporations, ownership restrictions must also be introduced in respect of the press;
- neither media nor non-media enterprises must be allowed to dominate the market in several media sectors (television, radio press) in one or more national markets: similarly, no such enterprise that already controls a national media sector must be allowed to extend its market dominance;
- media or non-media companies already dominating the market in one national media sector should not be allowed to acquire a majority holding in media companies elsewhere in the Community;
- before a media company that is already active in one media sector is allowed to operate in another media sector, all its holdings and cross-ownership arrangements must be disclosed in full.

On this basis, it called for the introduction of legal provisions to harmonise national restrictions on media holdings by means of a directive.

In January 1994, the European Parliament adopted Resolution A3-0435/93 on the European Commission Green Paper "Pluralism and media concentration in the internal market" in which it, too, called on the European Commission to "submit a proposal for a directive firstly harmonizing national restrictions on media concentration and secondly enabling the Community in the event of concentration which endangers pluralism on a European scale". In the European Parliament's view, such a directive:

- should cover the entire media sector, including the print media;
- must not be based on the issue of formal ownership alone, but also make possible investigation of a "dominant influence";
- should exclude certain groups/companies (for example, advertising agencies) from participation in particular media sectors;
- should provide for strict application of the law on competition to cross-ownership involving programme suppliers and broadcasters;
- enforce the principle of absolute transparency of ownership.

In October 1994, the European Commission published a communication following up to the consultation process relating to the Green Paper "Pluralism and media concentration in the internal market – an assessment of the need for community action" (COM(94)353 final). The European Commission acknowledges the need for adopting Community rules on media ownership, ending disparities between national rules concerning the media and ending legal uncertainty caused thereby which restricts the exercise of the freedom of establishment and the free movement of media services, as well as distortions of competition created by differences in the levels of restriction applied in particular countries. However, it decided to launch a second round of consultations on the subject before taking a final decision on the matter.

On 27 October 1994, the European Parliament adopted a resolution on concentration of the media and pluralism in which it expressed its "disappointment at the fact that in its abovementioned Communication to Parliament and the Council the Commission still fails to acknowledge the need for a Community directive on media concentration". In its resolution, the European Parliament "calls on the Commission to respect the undertakings it has made to Parliament to draw up, as soon as possible, a proposal for a directive on pluralism and media concentration in the internal market", expresses its view that "the Commission's proposal should seek to put an end to the distortion of the media caused by excessive concentration" and reaffirms the conviction expressed in earlier documents that such action is needed to "harmonize national legislation on the media at a high level with the objective of creating and maintaining a diverse and pluralistic forum of opinion in the media which is in the interest of Europe's citizens".

Democracy is on the march in Europe. After the collapse of communism, there is not a single European country which does not proclaim its desire to apply the true standards of democracy. Where such proclamations ring hollow and are not translated into real policies and real change, the rulers of those countries are sooner or later called to account by the citizens. In country after country of central and eastern Europe, when progress towards creating democracy proved slow or unsatisfactory, people took to the streets to signal their impatience. Truth in the media and an end to political manipulation of the media are always high on the agenda. Central and eastern Europeans will hardly be satisfied that democracy has come to their countries before both objectives have been achieved.

### ***The audience and its needs***

Before we do anything else, let us consider that often forgotten element of mass communication, namely the audience. Yes, theoreticians of mass communication, and even media professionals themselves, sometimes tend to forget that there is an audience out there and that its needs should be pre-eminent.

One of the most deeply felt needs addressed to the media is that for self-recognition in media content. People want to recognise themselves, their ideas, their way of life in images of reality offered by the media. Additionally, as Blumler (1985) points out, there is a "social identity" motivation for media use: people want to maintain and strengthen their social identities through what they see, hear and read in the media, and reinforce group affiliation, values and identity as a consequence.

In some societies, where (because of fast change, social dislocation or mobility of the population) group identities are not clearly defined, media are needed to help create and reinforce the particular group's chosen identity and therefore to help fulfil a deeply felt need, serving practically as an extension of the reference group.

Groups seek to promote their interests and to project their identity. This is why they regard inadequate or tendentiously negative presentation in media content as a gravely prejudicial form of injustice. And this is also why, when they cannot gain access to the media to remedy that situation, they seek in many cases to establish their own community, alternative, "parallel" and "free" media,

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144. Originally published in *Media and democracy*, Council of Europe Publishing, Strasbourg, 1998.

-serving both “intra-group” purposes (to generate group identity solidarity and organisation, raise awareness of group’s traditions, culture, situation, interests) and “extra- or “inter-group” ones (to represent its interests, inform population at large about group’s demands, aspirations, needs, project its identity, establish communication with other groups, etc.).

In all these cases, psycho-social needs and expectations addressed to the media add special urgency and poignancy to the role of the media in a democracy. It is hard to overestimate their importance. Consistent failure to satisfy them generates an overwhelming feeling of frustration and alienation in members of the audience. This is what is likely to happen primarily in an undemocratic context, where the media may be used for political propaganda purposes and to paint a rosy picture of the situation in the country, potentially considerably different from the reality people experience every day.

A serious discrepancy between the portrayal of reality in the media and reality itself as perceived and experienced by the audience gives rise to an impaired sense of personal dignity, because continuous reception of information known to be false is an insult to one’s intelligence. Tension is intensified further when people are obliged to act on the basis of this false information: they feel their actions to be senseless, their sense of frustration rises and their self-esteem is diminished further.

This was exactly the situation in Poland and other central and eastern European countries under the communist system. The need for self-recognition, for affirmation of identity, for reinforcement of a sense of self addressed to the media was very strong, but fulfilment of this need was specifically and deliberately denied to Polish media audiences, for example, because the media were expected to inculcate new values, ideas and beliefs, rather than to reflect existing ones. The goals of dominance and cultural and ideological homogenisation of the Polish population, of educating the “new socialist man”, of performing persuasive and propaganda functions – all militated against satisfying this deep-seated need and providing this crucial gratification. Accordingly, much of media content was perceived as an imposition and rejected as such. The destructive psychological effects of media operation were powerfully felt, giving rise to extreme tension and a sense of alienation and frustration among the people.

Precisely such a feeling of alienation contributed to the state of anomie and deprivation experienced by Polish workers, which is recognised as having been a factor in provoking unrest and dissension, leading to the birth of Solidarity in 1980. In these circumstances, it is not surprising that Solidarity regarded truth as one of the values and ideals of paramount importance. And so, Thesis 31 of Solidarity’s 1981 policy document said: “The Union will fight against hypocrisy and falsehood in all fields of life because society wants, and has a right, to live in truth. Telling the truth, in speech and in writing, is imperative for the development of social consciousness and for retaining our national identity. To build a better future, we must know the truth about contemporary times.”

It is important to add that Solidarity went further than that. Just like the groups seeking to establish their own media mentioned above, it believed that since social, political and cultural pluralism and a plurality of world outlooks are as a foundation of democracy, society must be in a position to communicate freely and to give expression to the full diversity of views. This was to be achieved by means of the "socialization of the media", as defined by Thesis 32 of the 1981 policy document: "The media of social communication are the property of society and must serve the entire society and operate under its control". Another major concept was access to the media, understood broadly enough to be almost equivalent to "the right to communicate". and "communication as empowerment". This was part of a much broader movement to reform the social system so as to make sure that individuals, groups and society as a whole would be in a position to perform their role as subjects, that is, exercise their right to their own identity, in the broadest meaning of the term, as well as to mastery of their own fate, to enjoy self-determination and indeed self-government.

Thus, in the final analysis, all these concerns amount to the question of human rights, which in turn, of course, provide the foundation stone for democracy in general.

### ***The edifice of democracy***

There is no question that freedom of expression and freedom of the press are indispensable elements of democracy which can generally be defined as "a system of government that assigns the ultimate responsibility to the public to decide how it wishes to live, but presupposes that the public is fully informed when it makes that judgment" (Fiss, 1996: 92).

The European Commission and Court of Human Rights have said as much by pointing out in the case law concerning Article 10 of the European Convention on Human Rights which enshrines the right to freedom of expression (c.f. Gomien, Harris, Zwaak, 1996; Voorhoof, 1995) that:

- "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment";
- "freedom of expression affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds";
- "freedom of the press affords the public one of the means of discovering and forming an opinion of the ideas and attitudes of political leaders".

To go deeper into the issue of media and democracy, let us give some thought to what we really mean by democracy.

At the foundation there is certainly the notion and practice of citizenship. As Jean-Jacques Rousseau once said, "Create citizens and you will have everything

you need; without them, you will have nothing but debased slaves". Edward Shils (1995) points out that:

Citizenship leads to an attachment to society as a whole, reflected in decisions and actions serving the protection and enhancement of the common good ... Citizenship amounts to acceptance of the duty to act (at least to some extent) for the common good when one is faced with decisions touching on conflicting interests or ideals. It enjoins the individual to take into account the consequences of individual actions for the common good and for society as a whole. Widespread dissemination of civic attitudes make it possible to preserve an equilibrium between different competing and opposed elements of society. (Shils, 1995: 11-12)

T.H. Marshall's classic analysis of citizenship from the 1940s points to three of its basic dimensions: exercise of civil, political and social rights. It is not possible to enjoy all those rights fully unless one lives in a democratic system. One could say that the long and hard struggle for these rights is what has created democracy as we understand it today. So, citizenship and democracy are two sides of the same coin.

Ralf Dahrendorf (1994) makes the same point when he says that citizenship must be introduced by a dual effort: that of the authorities and that of the people. As he puts it, the authorities play an indispensable part in introducing and respecting civil, political and at least elementary social rights and in the creation of institutions which safeguard exercise of these rights (an independent judiciary, political parties and a free press, as well as a liberal economic system). Obviously, it is also necessary for the citizens to both espouse those values and to be actively committed to their preservation and exercise.

So, we have the state (that is, the authorities, the administration, law enforcement and the army) on the one side and the citizens on the other. Both have a role to play in a democratic system, and yet both are sometimes perceived as a threat to democracy. The state has a tendency to extend its reach to all spheres of society; if that tendency is not checked, the bureaucratic machinery of the state would, according to some views, gradually take over people's lives and take all the decisions for them. On the other hand, there are those who mistrust what they perceive as the "authoritarian personalities" of the masses who, if given a direct say in the running of a democracy, might well destabilise it.

If the state is to be prevented from dominating society and the citizens, it must come face to face with civil society which could be defined in very general terms as all forms of self-organisation of society (that is, economic organisations, voluntary organisations and all the activities of everyday life) outside the control of the state. One of the goals of civil society is to resist the state's expansionist claims, as well as to bring pressure to bear on state power to achieve effective democracy. Crucially, this assumes that if civil society is to be able to hold its own in constant confrontation with a potentially expansionist state, the two

should be relatively evenly matched. Here, too, there is a both interdependence and built-in tension between these two elements of democracy.

Ralph Dahrendorf sees civil society first of all as a set of civic rights, including primarily everyone's right to participation in, among other things, public life. These rights, he says, "provide the compass which helps us steer the right course between the Scylla of the state with all its competence of power, and the Charybdis of the corporate cartel of organisations and institutions which in some circumstances can be equally dangerous to freedom" (Dahrendorf, 1994: 236). Dahrendorf believes that in addition to the requisite legal and political framework of the democratic state, civil society must also have a foundation in a mature democracy and a mature political culture. It can be built only if there is widespread determination on the part of society to demand respect for, and observance of, individual civic rights, and popular will to hold to account anyone, or any institution, which violates them. This can hardly be done without some degree of acceptance of the institutions of the state.

Peter Dahlgren, a Swedish media scholar, agrees:

Each side ... is a precondition for the democratization of the other ... If the State is too weak, it cannot foster democratization of civil society. If it is too strong, it becomes too interventionist; without a viable civil society, the state becomes too all-encompassing. The democratization of civil society has to do with the development of a democratic culture or mentality within the context of everyday life. (Dahlgren, 1995: 6)

So, we now have citizenship as the foundation of the edifice of democracy, and the democratic state and civil society as the "walls", keeping each other in its place and preventing the edifice from collapsing. Let us now add the "roof", that is, the public sphere. According to classical liberal theory, the public sphere is the space between government and society in which private individuals exercise formal and informal control over the state: formal control through the election of government and informal control through the pressure of public opinion. In other words, the public sphere is a forum of public debate where citizens can debate issues of common concern, voice and act on their views and seek to arrive at a consensus on matters of general interest. As with civil society in general, the public sphere should be based on the principle of inclusion, of equality of access to the public sphere for everyone.

The classical model of the public sphere, developed by Jürgen Habermas, posits the public sphere's autonomy from both the state and the market. Public sphere institutions can neither be controlled by the state, nor can they operate according to strict principles of profit maximisation. These institutions mediate between these two realms of social life, constituting a third social space in which citizens can come together to critically debate issues ranging from public policy to group needs and identities. In a truly democratic society, the public sphere would by definition be separate from the state and form part of the civil society,



constituting a “space for rational and universalistic politics distinct from both the economy and the state” (Garnham, 1986: 41), or a situation in which “all voices hav[e] equal access to a neutral public sphere, where their unfettered rational discourse ... culminate[s] in the articulation of popular will” (Dahlgren, 1987: 25).

One aspect of the public sphere which is particularly important in terms of the operation of the political system is political communication, defined by Wolton (1990: 12) as “the space in which contradictory discourse is exchanged between three actors with the legitimate right to express themselves in public on politics, namely politicians, journalists and public opinion”. The trick in a democratic society is to prevent any of the three actors from dominating political communication, and especially to create conditions for public opinion to be heard.

It is the public sphere which helps keep all other elements of the edifice of democracy in their place. It is through the institutions of the public sphere, if they operate properly, that all their possible transgressions against democracy will come to public attention. It is also through some of those those institutions (for example, public opinion and the media) that citizens and civil society will, in the first instance, seek to oppose such transgressions, before using others (for example, by taking to the streets, if that becomes necessary) to express their views more forcefully.

There are many fora of public debate. Still, on a day-to-day basis in our life today, media institutions and their portrayal of reality and society constitute a particularly important element of the public sphere. Their role is to distribute the information necessary for citizens to make an informed choice at election time; to facilitate the formation of public opinion by providing an independent forum of debate; and to enable the people to shape the conduct of government by articulating their views. In performing that role, they can potentially become very powerful and seek to dominate public life. After all, it is the media which assign significance to issues, confer status and legitimacy (or disrepute) on the people they bring to public attention, select what events are likely to be communicated to the public, and provide a context which gives meaning to what is said and done. They can, of course, be a channel for persuasion and mobilisation.

Beyond these media impacts, we may identify at least three sources of their power:

- structural (stemming from their ability to deliver an audience unavailable by any other means and generally from their characteristics as means of communication);
- psychological (based on the relation of credibility and trust they have developed with their audience, enabling them to intervene in political processes in their own right, as it were);
- and normative (deriving from the respect in a democratic system for the principle of free speech and media independence, which legitimates the media’s own role in the political process) (see Gurevitch and Blumler, 1983).

By virtue of their contents, the media can affect the relationships:

- between the individual and the political system (by affecting the individual's knowledge and view of that system);
- between the individual and the constituent institutions of the political system (by supporting particular institutions or gaining support for some politicians);
- between the constituent institutions of the political system (by affecting their relative strength);
- and between the political system and its constituent institutions (for example, by giving prominence to some institutions and not to others).

For these reasons, the media as part of public sphere are more than just the “roof” of the edifice of democracy: they are the public arena where the processes of democracy unfold and are perceived, and scrutinised, by everyone.

Like civil society, the media, too, are closely intertwined with other elements of democracy and dependent on a democratic environment to be able to serve it. They must always resist the desire of the state to control or influence them, while at the same time helping the citizens keep track of what state authorities are doing so as to keep those authorities accountable to the electorate. Their functions in a democracy are many and varied. A general, though not necessarily exhaustive list of the tasks that the media ought to fulfil in a democratic system has been adopted by Jürgen Habermas, the German sociologist (quoted in Cohen, 1996: 47):

1. Surveillance of the socio-political environment, reporting developments likely to impinge, positively or negatively, on the welfare of citizens;
2. Meaningful agenda-setting;
3. Providing a platform for illuminating advocacy by politicians and spokesperson for other causes and interest groups;
4. Facilitating a dialogue across a diverse range of views, as well as between power-holders and mass publics;
5. Creating a mechanism for holding officials accountable for how they exercised power;
6. Providing incentives for citizens to learn, choose, and become involved in public life;
7. Putting up a principled resistance to the efforts of forces outside the media to subvert their independence.

To sum up what has been said so far, it is clear that all the basic elements of democracy are both interdependent and potentially at odds with each other at the same time. All are indispensable and yet all may, by becoming too powerful

and reducing the role played by others, subvert the democratic process. Hence the need for a carefully balanced relationship between them and for a system of checks and balances to maintain equilibrium in the system.

### ***Different types of democracy***

So far, we have been looking at the main building blocks of democracy. However, just as buildings come in all shapes and sizes, so democracy assumes different forms:

- Direct democracy, a term which refers to a procedure of majority rule, based on direct involvement by citizens in the running of the system;
- Representative or parliamentary democracy, where citizens exercise their right to make decisions through their chosen representatives.
- Constitutional or liberal democracy, a term which refers to the powers of the majority being bound by a framework of constitutional restraints designed to guarantee certain individual and collective rights, such as freedom of speech, religion, opinion and association.

Yet another meaning of “democracy” refers to any political or social system which attempts to minimise social or economic differences, especially those that result from the unequal distribution of wealth, resources or private property. Of course, it would be hard to regard as a real democracy any system which eliminates these differences without at the same time granting full exercise of human rights and civil and political rights. However, social democratic systems have long tried to do both. There, democracy is more than a system of government; it is also a kind of society, seeking to guarantee not only political but also social and economic equality.

Another way of identifying different forms of democracy is to distinguish:

- Competitive or elite democracy: a system of indirect, representative democracy where the citizens elect into power one or more of competing political parties and then seek to exercise whatever control they can over their leaders; members of the public elect the decision makers and remain relatively passive afterwards. This system is based in part on the above-mentioned theory that the public in general (because the masses are uneducated and so unfit to exercise power, and may have “authoritarian personalities” to boot) cannot be trusted to run the country and participate directly in the process of governance;
- Participatory democracy: a system of direct democracy in which citizens not only choose their leaders but also participate themselves in decision-making processes at all levels;
- Dialogue democracy (or discourse democracy): a system in which decision-making processes are based on interactive and rational persuasion between the members of the public.

Representative democracy has been described by Joseph Schumpeter as an arrangement whereby elites “acquire the power to decide by means of a competitive struggle for the people’s vote” (quoted in Abramson, Aterton and Orren, 1988: 19). This is hardly rule by the people. Dissatisfaction with this “arrangement” has led in the United States to the development of alternative or complementary concepts of democracy, serving to rectify that basic weakness of elite democracy. They are:

- Plebiscitary democracy: seeking to empower the people to set government policy directly through the holding of plebiscites, referenda and initiatives, and thus to enable the people to function as their own legislature. Also public opinion polls can be seen as a form of plebiscitary democracy; while they do not facilitate direct involvement in decision making, they certainly allow the public to “speak” on every subject of current interest and thus to influence policy- and decision-making;
- Communitarian democracy: based on the view that what is required for true democracy is not some set of cold procedures for serving the private lives we live individually, but true participation in public space – in the meetings and assemblies, the deliberations and persuasions that distinguish the democratic process. Without losing autonomy, individuals must gain a capacity for common vision, must engage in a politics of fraternity and community. Here, democracy speaks to a conception of the common good which can be defined only if the people see themselves as a body of citizens embarked on a common way of life;
- Pluralist democracy: a concept based on the view that the modern democratic process is one of free competition among groups which individuals join on the basis of some perceived group interest, in order to fight for their particular interests. This is interest-group politics in which the conception of the common good plays no part: the process gives every group an incentive to engage in the bargains and coalitions which that alone produce majority support for a particular set of interests. In the media, it is important to ensure reflection of diverse groups’ interests and make possible access for the expression of those interests.

It is clear that the role of the media is seen differently in these different forms of democracy. We will concentrate on elite (representative) and participatory (direct) democracy, as offering the sharpest contrast in this regard. All others are intermediate forms, closer to either one or the other.

### ***Elite (representative) democracy***

In this, as in any other democratic system, the main prerequisite for the media to be able to perform their proper role is their freedom and independence. This, in part, is the purpose of Article 10 of the European Convention of Human Rights, which enshrines the right to freedom of speech and of the press. In legal terms, this is what is known as “an abstention right” (Voorhoof, 1995: 13).

Basically, it imposes on states a duty of abstention, that is, it prohibits state interference in the field of communication, unless this happens under conditions laid down in Article 10.

Of course, Article 10 and any versions of it in national constitutions are not enough, in and of themselves, to guarantee media independence. In seeking to develop a model regulatory regime which would serve this purpose, Dutch media scholar Cees Hamelink (1996) argues that it requires a fairly extensive body of law and regulation. In his view:

- the constitution should provide a guarantee for institutional freedom of expression; an explicit prohibition of all forms of prior restraint (censorship, etc.) by state and non-state bodies: only limited, specific and legitimate limitations of that freedom, a guarantee of maximum access to public information;
- the media statutes should provide: an explicit rejection of all forms of external or internal interference; only legitimate, limited and specific limitations on media contents and/or access to public information, the protection of professional journalistic secrecy; a guarantee of maximum access to public information in a special freedom of information act; a guarantee of public support for media pluralism in a special act;
- civil and criminal law limitations on freedom or expression on the basis of state interests, social values and individual rights should be limited and specific;
- media and journalistic self-regulation should provide for: the common use of editorial statutes in all media; the explicit rejection of external and internal interference in professional codes of conduct; clauses of conscience in professional codes of conduct and/or employment contracts; the explicit demand of maximum access to public information by the professional community; the explicit demand for professional secrecy by the professional community.

With all this in place, the media can – in the context of a democratic system – perform their proper functions. The inter-relationship between citizenship and the media in representative democracy is well explained by Blumler (1982: 633):

What we need as citizens most of all is ... a well-armed set of informational agents, able to act effectively *on our behalf*, as mediators who can (1) scan the information environment for us; (2) reduce and relate it to a coherent view of the main issues that society faces; (3) update that agenda of main issues as required; and (4) *organize* a coherent dialogue about how best to tackle them [emphasis added].

Citizens certainly need the media to perform such functions that allow the citizenry to be informed about current developments, form a view about them and follow the public debate about them. This approach clearly places all the

responsibility on the shoulders of the media and people working for them and assumes that the citizen will adopt a passive stance in social communication. This is in line with the traditional view that the democratic process should be mediated by professional and democratic gatekeepers – including both the media and, political parties, teachers, etc. – who guard the flow of information to the citizens, help organise civic discourse and opinion, and consequently the process of decision making.

English media scholar Paddy Scannell (1989: 139-140) makes this even clearer when he says that the media (he refers to public service broadcast media, but this can, to some degree, be extended to all media), perform a service resting on:

a right of access, asserted by broadcasters *on behalf of their audiences*, to a wide range of political, religious, social, cultural, sporting events and to entertainments that previously were available only to small, self-selecting and more or less privileged particular publics. [emphasis added]

There is no question about the democratising impact of media activity of this kind. They create public life properly so-called, because – thanks to them – all these events are placed in the public domain. Thus, the media, and especially public service media, act as a great leveller, equalising access to public life for their entire audience. National broadcast media in particular create a public world of public persons and routinely bring their audiences into contact with them. At the same time, they have brought private persons into the public domain and “resocialised” private life, by vicariously placing individuals in the midst of events in public life. In the process, they have enormously extended the range of what can be talked about: precisely because through them public life is accessible to all, it is there to be talked about by all. Everyone is entitled to have views and opinions about what they hear and see. However, it is clear that the media perform their functions on behalf of the public which has no active role to play. As Scannell puts it, this “creates participation without involvement”.

American political scientist Bernard C. Cohen has pointed out: “The press may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think about”. One thinks – and talks – about what one knows, and most of what one knows about current events comes from the media. In doing that, the media create an agenda for our thoughts and influence us in what seems important. So, by their choice of which current issues to cover and which not to cover (or give less prominence to), they set the agenda of public debate. This is the agenda-setting function of the media mentioned by Habermas above. And if the media engage in “pack journalism”, they can bring an issue or person to public attention virtually overnight. It is interesting, however, that the agenda-setting impact of television appears to be short-range, spotlighting key issues, while newspapers are the prime movers in setting the public agenda across a longer span of time.

Naturally, the media do not set the agenda all by themselves. Politicians and public opinion also play a role here. The media often follow the lead of public opinion in deciding which issues of the day deserve particular attention. For their part, politicians seek to impose their own agenda (by all the methods at their disposal, from speech-making through organising public events, and up to and including controlled leaks), but at the same time seek to gauge the importance attached to particular issues by the public and respond accordingly, as well as to respond to the agenda set by the media.

The media can also promote a process known as the “spiral of silence”. This phrase was coined by German public opinion scholar Elisabeth Noelle-Neumann. She found in the process of doing opinion surveys in Germany that people were reluctant to take a stand on issues on which they believed they were in a minority. People are usually wary of openly defying or opposing what they consider to be majority opinion, even though in fact that opinion may be shared only by a vocal minority and those who think otherwise may be in a majority, albeit a silent one. So, if the media give exposure to a point of view, people with different views may refrain from expressing it, which in turn accelerates the process of adopting that publicly voiced opinion and a decline in numbers of people opposing it, leading to a self-fulfilling spiral of silence.

In addition to these media functions, few are more important in a representative democracy than that which Habermas calls “creating a mechanism for holding officials accountable for how they exercised power”. This is what is usually called the “watchdog function”, since it is the media, and not the general public, which have access to information about what the authorities are doing,

A very special case of the media’s role in a democracy is illustrated by election coverage. The mass media play several distinctly different roles in elections:

1. as communication media whose properties and structural characteristics have by themselves helped remake the shape of election campaigns and have in general played an important role in shaping the political process;
2. as channels for communicating ideas and images existing or created independently of themselves, that is, a channel of communication (a) between the politicians and the public (hopefully this will be two-way communication and (b) among the politicians themselves:
  - a. the politicians seek to reach out the public with their images, their election platforms and their views on election issues; in turn the public in various ways voices in the media its views on the candidates and parties contesting the election;
  - b. the candidates respond to messages spread by other politicians and directly or indirectly engage in a debate with them;
3. as communicators originating messages and images and introducing them into social discourse, that is, as an initiator of political communication and a

communicator of its own messages (coverage and analysis of the campaign; staging of debates; interviews with candidates conducted at the media's own initiative, etc.).

On the first question, there is no doubt that the structural characteristics of the modern news media, and especially television, as sets of technical arrangements for delivering content to the audience with speed, reach and immediacy never possible before, have played an important role in shaping the political process. Party affiliations, arising out of class and social divisions, are much weaker today than in the past (some have already declared that "the party's over", meaning that political parties no longer play the same role as before). In any case, the party machine and local party structures may no longer matter so much if the leader can use the media appeal directly to the electorate and win an election on the strength of his/her personality. Hence a process of personalisation of politics and the tendency of voters to vote as individuals and not as members of larger groups. The media have also promoted:

- a decline of attention to face-to-face political campaigning and consequently a delocalisation of politics;
- a form of competition between parties which stresses performance rather than ideology;
- some depoliticisation of local government, etc.

In short, this has been part of what has been described as gradual transformation of public figures from statesmen to politicians to personalities.

All this is known as the "mediatisation" of politics, that is, the tendency of the political system to change and adapt to the circumstances of a society where the media are the main source of public information, and to take advantage for its own purposes of the norms and the working logic of the media system. At the risk of oversimplification, this could be described as one case in which the medium is indeed the message. Paradoxically, we may say that the media's major, long-term impact on the very shape and manner of functioning of the political system has been due to their properties as media of communication and not to the content or the messages they deliver.

The role of the media in election campaigns as channels of communication between the politicians and the public and among the politicians themselves is also largely passive, especially as far as direct access by candidates is concerned. Rules of such access are usually decided outside the media themselves. An element of editorial policy is of course involved in selecting which views expressed by members of the public to convey to the audience, but these are still views and ideas existing or created independently of the media themselves.

The influence of a medium as a communicator is another thing altogether, resulting from the medium's editorial policy and its choice of messages to introduce into social discourse:



In addition to performing a service to both sides of election-time communication (i.e. the candidates and the voters), the media also appear as *a separate communicator, a third force*, as it were, which exerts a significant influence on the course and effects of this process. Of course, they perform this role only if they are relatively independent of the two other participants, and particularly the candidates and the parties or political movements which support them. And they perform it to the extent to which *they actually bring influence to bear on societal attitudes and behaviour*. (Bralczyk, Mrozowski, 1993: 145; emphasis added)

Factors which ordinarily enhance the media's persuasive effectiveness include the following:

- their overall high credibility;
- the fact that the audience has no direct, personal knowledge of an issue and cannot verify media messages from first-hand experience;
- the fact that the audience does not hold firm views on the given subject.

While the first two factors are, of course, important, the third one would seem to be of primary significance in our case. We could formulate a hypothesis that the higher the degree of political partisanship among the electorate (resulting for example from existing social divisions and conflicts), the less of a chance the media have in affecting (that is, changing) the popular mood and thus significantly influencing election results.

By the very fact of transmitting, as a channel, messages attuned to the existing mood they may, of course:

- intensify already existing sentiments;
- mobilise the electorate around an issue on which it already feels very strongly;
- give exposure to an individual or a symbol, helping provide a previously unavailable focus for those sentiments;
- or even help counteract an existing spiral of silence, by making individuals and groups who felt isolated by virtue of their views aware of how many others share those views, and thus create or fuel a bandwagon effect.

However, their ability to affect the voters in other ways is limited: "mass media campaigns – not just political campaigns – convert very few people" (Katz, 1972: 362). Studies have found that though there may be exceptional situations, typically some 80% of the voters will have made up their mind (to vote for the same party as before) several months before the election, that is, before the actual campaign in the media had begun and only 10% previously undecided voters make up their mind during the campaign itself. We could say that the media's influence on election results is in inverse proportion to the gravity of issues facing the voters, the stakes involved for them personally in the election result, and the extent of their political commitment. Therefore, the more depends

on the outcome of the election for the voters personally, the more interested they will be in the issues, the more intense their political commitment will be, and the less they will need to rely on the media to make sense of the dilemmas involved or to make up their mind who to support. As a general rule, what this means is that the content delivered by the media, and especially television, in their role as channels and communicators, can be a relatively powerful force at election time in societies marked by a general social consensus on the shape of the country's political and economic system (this is usually a feature of stable, prosperous and democratic societies). In such circumstances, the general level of political awareness and commitment in society will be low, there will not be a fundamental difference between the election platforms of leading contenders or much at stake in the outcome of the election for most voters personally. Therefore, receptivity to media-delivered and media-originated information and persuasive messages may be relatively high. And conversely, where these conditions do not obtain, this receptivity may be low.

### ***Participatory (direct) democracy***

For all its importance, the right of freedom of expression and of the press is a nominal right, and the freedom a negative one (that is, freedom without restrictions other than those provided for in Article 10, but also without any guarantees that it can be exercised).

In a representative system, whether this concerns the government or the media, "power accrues to the representatives, not to those they represent" (Scannell, 1989:163). In the media, the power to grant "communicative entitlements", that is, the ability to speak publicly through the media, is concentrated in a few hands: of media editors and journalists who select the individuals or groups who will, temporarily, receive such an entitlement. Usually, they choose the so-called "accredited spokespersons" (politicians, businessmen, authorities, experts), while ordinary persons usually become newsworthy only when they are victims of accidents.

Moreover, any discussion of the media's role in society should take into account the fact that the impetus which decides what role the media will play comes largely from outside the media system. As the English media scholar Denis McQuail has said, "the media are generally instruments, not instigators, of other social forces. They are not primary actors" (McQuail, 1992: 273). This distorts their role in a democracy even more and potentially makes it secondary and derivative in many cases.

English sociologist and media scholar, Raymond Williams (1968), has made the argument that in both systems of mass communication prevalent in western societies, actual freedom of communication is limited, because:

- the paternal system (as in Britain until the 1980s) is based on control of what ought be said;

- and in the commercial system access to the media sector is made difficult by the market mechanism, resulting in a situation in which anything can be said, provided you can afford to say it and do so profitably.

Therefore, there has long been a debate on how to turn freedom of speech and the press into a positive freedom, and the right to this freedom a substantive right, that is, one which everyone can truly exercise. All this has led to calls for the development of a democratic, participatory model of mass communication, as part of a system of direct, participatory democracy. Though efforts to define democratic communication have not been spectacularly successful, there is broad agreement that it should remove the distinction, built into many communication patterns, between the sender and the receiver.

This is the problem social thinkers and have wrestled with for generations. Already in 1932, German writer Bertolt Brecht argued in his *Theory of radio* that the medium should be changed from a means of distribution to one of communication, “allowing the listener not only to hear, but to speak.” In the 1950s, the communication democratisation movement began to gain momentum. British author Brian Groombridge (1972: 31) traces its beginnings to “a surge of impatience” when the new, educated and socially conscious generation discovered that “the old oligarchy seemed to sit as securely as ever at the apex of our democracy” and, of course, the media. And it was the May 1968 generation which really put the issue of communication democratisation on the public agenda. Social movements dedicated to reforming and “opening up” existing media institutions came into being. In later formulations, Brecht’s view found an echo in “the right to receive” and “the right to transmit” as “the basis of any democratic culture” (Williams, 1968: 120); in “each receiver a potential transmitter” (Enzensberger, 1972); and in “the right to communicate is ... a fundamental human right” (Fisher, Harms, 1983: 19), later supplemented by the view that “a right to communicate includes a right to telecommunicate” (Harms, 1985: 160).

One of the underlying premises of this approach has been the evolution of the concept of citizenship, as the concept of civil rights have been progressively extended. English media scholar Graham Murdock (1996) has pointed out that this new, “complex” notion of full and equal citizenship, encompasses, in addition to civil, political and social rights, also cultural ones. These cultural rights are:

- rights to information;
- rights to experience: rights of access to the greatest possible diversity of representations of personal and social experience in fictional media genres (especially television ones), aiding efforts to answer fundamental questions which invariably spring up in people’s lives;
- rights to knowledge: rights to explanations of patterns, processes and forces shaping the present and of its links with the past, helping translate information and experience into knowledge and develop personal and social strategies;

- rights to participation: in this context, this means the right of people “to participate fully in social life with dignity and without fear and to help formulate the form it might take in the future” and “to speak freely about their own lives and aspirations in their own voices and to picture the things that matter to them in ways they have chosen” (Murdock, 1996: *passim*).

For these and other rights to be safeguarded, and for full citizenship to be made possible, public communicative activity must, argues Murdock, meet the following conditions:

- it must provide a relatively open arena of representation, including barriers against co-optation by the two major centres of discursive power – state and government on the one hand, and the corporate world on the other;
- it must demolish the accepted divisions and develop forms of representation and participation and scheduling that promote encounters and debates between the widest possible range of identities and positions;
- it must balance the promotion of diversity of information and experience against citizens’ rights of access to frameworks of knowledge and to the principles that allow them to be evaluated and challenged;
- it must ensure that the full range of its services remains equally available to all.

In line with this approach, the communication democratisation drive usually takes the form of a struggle to extend the range of “subjects of communication” (Olêdzki, 1984), that is, for groups shut out of active participation in the mass communication process, to break through to the ranks of active senders. Hence the emergence in the 1960s of “alternative,” “free,” “community” media, using either “big” or “small” or indeed new media operating on the fringes of establishment media systems.

Coupled with this was an interest in how to reform existing broadcasting systems (Branscomb, Savage, 1978) and in the kind of broadcasting policy and media structures needed to ensure feedback, access (Berrigan, 1977) or “participatory programming” (Groombridge, 1972).

A special dimension of this strand of the debate has been the study of local and community broadcasting in terms of its democratisation potential (Beaud, 1980; Downing, 1984; Jankowski, 1988). Another has concerned the impact of the new technologies on prospects for communication democratisation.

Underlying this entire debate was the distinction between democratisation of the media and democratisation through the media. The first concept refers to democratisation of the manner of operation and the content of the media. The second concept refers to something more: to using the media to promote social change and democratisation of society.

One of the most consistent advocates of communication democratisation in both senses of the term has been the English sociologist John Keane. If the right to participation is at the core of civil society, then in the media field it must be understood as the right to communicate – and this is precisely what Keane insists on as a fundamental tenet of the new system of public service media serving civil society. He has made the argument that:

There is need of ... a new constitutional settlement which ensures that political power is held permanently accountable to its citizens... It is also the reason why the undermining of both state power and market power from below requires the development of a dense network or "heterarchy" of communication media which are controlled neither by the State nor by commercial markets. Publicly funded, non-profit and legally guaranteed institutions of civil society, some of them run voluntarily and held directly accountable to their audiences through democratic procedures, are an essential ingredient of a revised public service model. (Keane, 1993: 10; see also Keane, 1991)

Keane believes that the media, including the new technologies, should serve primarily as mechanisms for keeping the state accountable and keeping open channels between state and social institutions. Neither the traditional public service media nor commercial media can truly serve civil society. He sees a need for a plurality of non-state (and indeed non-market) media of communication which serve as the primary means of communication for citizens situated within a pluralistic civil society and safeguard both freedom and equality of communication. This necessitates the regulation and maximum feasible reduction of private corporate power over the means of communication, the maximum feasible de-commodification and "re-embedding" of communication media in the social life of civil society is a vital condition of freedom from state and market censorship. He proposes a system of widespread public interventionism in the media market place which should always attempt to "level-up" rather than "level-down" citizens' non-market powers of communication. It should, in his view, seek the creation of a genuine variety of media, which enable little people in big societies to send and receive a variety of opinions in a variety of ways. It should aim to break down monopolies, lift restrictions upon particular audience choices and to popularise the view that the media of communication are a public good, not a privately appropriable commodity whose primary function is to produce and circulate corporate speech for profit. It presupposes the establishment of media enterprise boards to fund alternative ownership of divested media, and to support and subsidise public access to the media, and media access to the market, by use of public funds.

This approach, while highly popular at one time, now finds little support. Dahlgren (1995) calls it romantic radicalism, or a utopian concept of direct participatory democracy in communication. Rather, he says, we should have a blend of direct and representational mechanisms. Also in Poland (as well as in other central and eastern European countries; see Jakubowicz, 1994), the original approach of the dissidents was rejected after 1989.

The experience of the 1960s, when many efforts were made to satisfy what was assumed to be a universal need actively to participate in mass communication, shows that it is indeed unrealistic to want to accustom a community to continuous self-expression. Participation and self-expression

quickly run out of steam and become artificial ... It is naive to believe that a system can be made to work immediately in the hands of the majority, and in particular of the underprivileged for whom it was originally intended. [The middle classes] appear to show a greater propensity towards participation. It is in fact from these very middle classes that young "intellectuals" have emerged who are prepared to conduct a certain type of social and cultural activity and have found a favourable vehicle in video, as in CTV (*European Experiments in Cable Television* 1977: 17).

A great many schemes of alternative communication were originally based on Enzensberger's concept of emancipatory media and were designed to serve the principle that content should be made by the user (c.f. Cavalli-Sforza, 1978) – only to give that up sooner or later, and opt for the principle of content being made for the user and under his/her control. Deprofessionalisation of the media, one of the rallying cries of supporters of democratisation, later largely gave way to concepts like "controlled professionalization" (Jankowski et al., 1988).

### ***Media and democracy in the information society***

The coming of the information society is accompanied by wildly differing forecasts as to its consequences for mass communication (among other areas of social life). On the one hand there is what has been a "euphoric description of the information revolution", typified by the belief that the information society will be one in which the creativity of individuals will flourish, there will be freedom of decision and equality of opportunity, free of overruling power, and based on participation. According to this school of thought, each new technology or medium offers a prospect of increased choice, diversity and democracy in communication. New information and communication technologies make possible the creation of individual symbolic universes – by and for each person separately. This can take the form of the "electronic newspaper", such as *The Daily Me*: "an electronic device that searches the world's information sources and databases and pulls together a digest or collection that reflects your own individual set of preferences and interests, as defined by you and specified in your search software – in short, your own user profile" (Winsbury, 1994: 30). With the profusion of content offered by cable and satellite television and control made possible by the VCR, they, too, can be turned into "personal media".

With the digitisation and convergence of mass communication, telecommunications and computers, the emergence of new information and communication technologies has introduced a qualitatively new situation by making

it possible ultimately to invest practically every act of such communication by means of those technologies (mainly various online services) with the following three features:

- interactivity: communication participants can interact, engage in conversation, are in a feedback situation;
- individualisation: communication can be addressed to an individual or group, not necessarily to a mass audience;
- potentially asynchronous character: the message need not be received as it is sent; it can potentially be stored and retrieved later.

Thus, the development of new information and communication technologies, with their great profusion of highly diversified content and infinitely more opportunities for individuals and groups to communicate, is seen by some as creating conditions for:

- much greater interchangeability of sender and receiver roles in mass communication, and the deinstitutionalisation and deprofessionalisation of media organisations;
- partial elimination of divisions between point-to-point and broadcast media, as well as functional divisions among media as sources of entertainment, sources of information and knowledge, and means of interactive communication;
- emergence of a much greater number of senders and media organisations at society-wide and intra- and intergroup levels, ensuring a multiplicity of multidirectional communication flows of diversified content and various reach.

New technologies can immeasurably boost the active communication capacity of virtually all members of society. In fact, already 1970 is supposed to have marked the beginning of a new electronic “conversation order of communication”:

The re-definition of communication as “fundamentally interactive and participatory” at the start of the new order re-establishes the importance of conversation and re-organizes our technology to facilitate information-intensive, conversational interaction. Such conversation can be supported today by various online search capabilities, news services, electronic libraries, conference services, and so on. (Harms, 1985: 169)

Hope is expressed that the new technologies will foster “increased democracy through rapid citizen’s access to proposals and policies for change at local, national and regional level ... as well as [empower] citizens to influence the exercise of political power at all levels” (International Federation of Journalists, 1995, *passim*).

John Downing (1989) describes two grassroots computer projects: Peacenet, serving to promote peace issues, and Public Data Access, designed to make US government information more widely available. Based on this, he sees “several potentials for grassroots teledemocracy”:

First, computer communication projects allow the direct gathering and analysis of data on key issues that affect communities and subgroups of the population that might be otherwise overlooked or ignored. Second, by mobilizing a constituency otherwise separated in time and space, computer communication projects can help generate enough people and publicity to pressure powerful political interests. Third, computer communication projects can serve not only as information nerve centers but also as forums for developing the requisite language and agendas for political action. Finally, by linking people across national borders, computer communication projects can begin to address the common problems of humanity, such as human rights, toxic waste, and peace, by strengthening the resources and reserves of democratic culture. (Downing, 1989: 162)

A couple of years ago, the National Public Telecomputing Network in the United States provided free access to so-called “Free-Nets” in 50 US cities (with 40 more expected to go online soon afterwards). These services provided, in part, remote education services and direct interaction with local, city and national government agencies.

Interestingly, however, such schemes represent not so much direct “teledemocracy”, but successful watchdog and lobbying functions, performed by already existing organisations, but enhanced and made more effective by the use of new information and communication technologies. The story of traditional “alternative” media is repeated.

Theoretically, it is no doubt possible that such projects can indeed serve as the beginnings of a new, powerful public sphere, performing all the functions typical of a genuinely democratic society. No doubt, also, that the new technologies, including all the permutations of the Internet, do begin to constitute a public sphere of a special kind. However, it seems more likely that, for a long time to come, they will remain where Downing says they are today: in the “alternative public realm” of the information society (see Roszak, 1986 on the computer and the counterculture). With time, their importance will go beyond that achieved by the “traditional” alternative public spheres and media (cf., for example, Downing, 1984, 1988), but it is difficult, as yet, to predict their future position and importance.

On the other hand, there are dark warnings and pessimistic scenarios that the information revolution will only exacerbate the existing social stratification and deepen rather than eliminate differences in access to information, to the public sphere, and thus to power. For a long time to come, unequal distribution and use of the mass media and the new technologies will be a hallmark of the information society. Whichever frame of reference we adopt, whether that of



the social group, or of regional differences within developed countries, or finally of differences among countries in the same geographical regions, or among regions and continents, it is clear that the new technologies extend and deepen existing social and regional inequalities, adding information haves and have-nots to those in other areas of social life.

The same goes for other forms of stratification, with inequalities with respect to information resources existing along class, gender, ethnic, regional and national lines. To give but one example, that of electronic bulletin board users, a study has found:

The first three hypotheses, suggesting bulletin board users are higher educated, wealthier and work in more prestigious occupations than the population of Americans ... were supported by data. That bulletin board users would be younger was not supported. This provides further evidence that technologies providing enhanced information services are less used by the disenfranchised – the poorer, lower-educated, working class (or unemployed) persons. Additionally, because many board users are from occupations that typically use computers, those without this job-required equipment may be less likely to purchase it, even if empowered economically. (James et al., 1995: 41)

Among those who will be unable actively to use the new technologies, the effects of the new situation may be quite mixed. The mass media, by promoting an explosion of information, increasing the amount of available information and the speed with which it is distributed, are said to contribute to some of these dangers. As Israeli media scholar Elihu Katz has put it: "Getting closer seems to mean seeing less. The combination of information management, instant news, empty analysis and the best of intentions threatens the future of critical journalism, and our own". Katz singles CNN out for special consideration in this respect:

News is like hot potatoes for CNN. Like other American networks, it collects its news as quickly as possible via satellite connections to reporters and other sources throughout the world. Unlike the other networks, however, it also uses satellites to distribute the news as quickly as possible. At first glance, this sounds like the ideal deployment of the new media technology. The only trouble is that it eliminates the editor. Rather than collecting information and trying to make sense of it in time for the evening news broadcast, the CNN ideal is to do simultaneous, almost-live editing, or better yet, no editing at all. (Katz, 1992, quoted in Bardoel, 1996: 284)

Thus, CNN may be a forerunner of disintermediation, a process which will, it is said, remove the intermediary between the public and information, that is, the media. With direct online access to databases, news services and a profusion of other information sources, it is claimed, the public will no longer need the media and editors to mediate between them and reality and will derive their information in "raw" form, rather than as processed and edited by the media.

While putting the information receivers in control, this situation will also have considerable drawbacks from their point of view. Information society is said to create a state of tension, alienation and anomie caused by the meaning crisis brought on by man's limited capacity for understanding and adjustment to ever-increasing amounts of information and rates of change (Klapp, 1982). Jean-Pierre Dupuy (1980) puts it succinctly: "More and more information, less and less meaning".

Faced with a mass of information which there is no time to digest or analyse, often relating to developments, countries or individuals they have little or no knowledge of, people often treat such news in a state of "suspended belief" for lack of a frame of reference within which to place it, and thus of an ability to really understand it. This situation may be so stressful and the surfeit of information so excessive that people may choose to be "absently present", that is, to withdraw from real communication. Faced, in the context of disintermediation, with the constant need to choose which of a great mass of news to receive, people may "lose their way on the information highway", and either opt out altogether, or turn back to the media in search of the help of editors and journalists in finding their way through the information maze. This turning away from serious content and intensified interest in entertainment may mean that, as Sepstrup (1987) has pointed out, the passive majority will be content to take advantage of the "video dimension of information society:" the profusion of television channels, cable, video games, etc., and only a relatively small active group will be able to gain mastery of new information technologies ("the data dimension") of the information society. Also English media scholar Michael Tracey asks whether the prevailing model of future society will be a "civics" or a "circus" model. Will we have, he asks:

a new sophisticated citizenry or a new ignorance drowning in trivialized pleasures and an obsessive tele-consumerism; accessing the post-industrial Alexandrian library or Mortal Kombat 50; feeding democracy by massively amplifying access to news and analysis or, through a plenitude of distraction, producing a culture parched and ignorant; or a mix of all of the above. (Tracey, 1994: 42)

Considerable anxiety also accompanies the perception that the information society may be commercially driven and subject to all the same mechanisms as the commercial media:

If the information superhighway is to be commercially driven by market forces and private enterprise ... then there need to be systems for charging the consumer for what he or she wants to see or do, and systems for shutting out those who have not paid or have not subscribed. Thus subscriber management systems, conditional access systems, encryption systems, scrambling algorithms ... become ... the hallmark of the free market in action. (Winsbury, 1995: 8)

The “free market in action”, it is claimed by some authors, creates less than a free marketplace of ideas, and therefore can hardly create promise of a more open debate:

The political economy of the U.S. mass media is dominated by communication gatekeepers who are not media professionals as much as large profit-making organisations which close ties to government and business. This network of the powerful provides news and entertainment filtered to meet elite demands and to avoid offending materials ... it is ... extremely rare for ... dissonant news to graduate to act as a framework that questions generally accepted principles, or to be part of “big news”. This presentation of dissident themes only episodically, within official frameworks, and implemented by free-market forces without state censorship enhances the credibility of the dominant ideology and perspectives. (Herman, 1990: 86-87)

What, then, is the impact of the information society on democracy likely to be? Some authors and politicians (like Ross Perot, to mention but one example) believe that with the new media “teledemocracy” or a new version of the Athenian kind of direct democracy are just round the corner, absolutely certain to come sooner or later.

On the other hand, there are those who believe that “democracy works by public debate and not by pushing buttons”, as Commissioner Martin Bangemann, the EU’s chief promoter of the information society, has put it in a public lecture.

Also Abramson, Arterton and Orren (1988:21) warn that “it is in the nature of a plebiscite or poll to collapse democracy into a crudely majoritarian system”:

plebiscitary forms of participation – especially in the quickened form contemplated by advocates of electronic voting – contain a characteristic danger. In their concern for speed and numbers, so-called feedback schemes can be rigged to communicate public opinion to government without pause for public meetings and assemblies, the talk and deliberations that focus an individual’s attention on questions of the common good and public interest. This is to reduce political participation to the passive and private act of registering one’s own preconceived opinion on an issue. When public opinion in this crude and unreflective sense becomes the law of the land, then democracy is divorced from any politics of the common good ... Without benefit of discussion, we record our own interests on the question at hand, and the public interest is simply the aggregate or sum total of these individual interests.

Another aspect of the same situation is that through electronic networks citizens are approached separately, without there being a common identity or a shared debate. This direct democracy lacks the mechanisms of common consideration and working out compromises acceptable to the majority that are inherent in representative democracy. This centrifugal force may inaugurate an era of direct civic discourse, but may also usher in disorientation of individuals, who are already having difficulty adjusting to rapid change in society. This

could destabilise communities and, in an era already distrustful of political and other leaders, further fragment societies and weaken a sense of responsibility to others.

The new technologies may make common consideration of the issues, inherent in the democratic process, very difficult. Because, as has been said, they can serve as “personal media”, potentially creating as many individual symbolic universes as there are receivers of media content:

The shared public world could diminish. Multiple, unique and potentially unshared private worlds based on various interests or idiosyncrasies could emerge and dominate ... If readers and viewers delete certain kinds of political news from their personal profiles during non-election periods, how will they remain acquainted with ongoing public political issues? And what will alert them to the need to re-acquaint themselves and re-select domestic political news at election times or at times of crisis? ... These emerging systems raise important questions about how shared social and political frameworks can be established in complex pluralistic societies. How will it be possible to conduct social and political debate in this new environment? (Firestone, 1994/5: 22)

In other words, as Les Brown (1994) points out, the paradox of democratising media in such a manner (creating possibilities of individuals and groups living in worlds of their own, weakening both geographic and national communities) is that it leads to a lesser form of democracy, with people and communities detached from the dialogue that is vital to democracy.

Civil society has traditionally been mediated by professional and democratic gatekeepers – whether they were journalists and editors, political parties, teachers, etc. – who guarded the flow of information to the citizens, helped organise civic discourse and opinion, and so the process of decision making. They were a force of cohesion in society, in part by creating a common political vocabulary, a common political agenda and by assisting the formation of public opinion.

Hence, it is pointed out, the need for new intermediaries and gatekeepers, capable of performing the functions of agenda-setting, of making sense of events and focusing attention on issues of importance. Several authors point to the role of broadcasters in this respect. Saito (1995: 33) makes the argument that as the multimedia era approaches, the broadcast media, which have long played a fundamental role in society, will likely take on increasingly important functions: “they will be needed to shine the light of journalism over society”. Others point specifically to public broadcasters: “if the public sphere cannot be maintained by the commercial media, its preservation could devolve to public service broadcasters” (White, 1994: 22).

Accordingly, unless the information society develops other mechanisms for creating this sense of cohesion and serving as a forum of public debate, the media are not likely to lose their importance in democracy in the foreseeable future.

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As recently as 1960, Asa Briggs, the British historian of broadcasting, wrote:

The provision of entertainment has never been a subject of great interest either to economists or to economic historians – at least in their working hours. Yet in 20th century conditions it is proper to talk of a highly organized entertainment industry, to distinguish within it production and distribution, to examine forces making for competition, integration, concentration and control and to relate such study to the statistics of national income and output, the development of advertising, international economics relations and – not least – to the central economic concept of the market. (quoted in Garnham, 1990: 44)

Today, the idea that the economic aspect of media operation deserves close study and attention, and that it affects the functioning of the media, is, of course, taken for granted. However, it is only possible fully to appreciate its fundamental importance when one considers the case of media trying to operate in circumstances which defy normal market conditions.

At a seminar on Media and Elections – Lessons for Political Journalism (Kiev, 10-15 May 1994), a journalist working for a newspaper published in the Crimea asked for advice on how to make his publication profitable, explaining at the same time that since the newspaper wanted to be truly independent, it did not “take money from either the government, or any party, any business or, indeed, the mafia”. And that “with the high rate of inflation, money coming in from subscriptions<sup>146</sup> soon loses its value”, leaving little case for operating expenses. He then showed me a copy of his newspaper. I looked to see what the price was, but all it said on the cover was “Price: Negotiable” – meaning that the editors could never be sure how much money they would obtain for sales. On seeing this, I replied: “I have no answer to your question”.

Another case in point was that of Ukrainian independent producers. At the time, Ukrainian Television, itself starved of cash, made time available on one of its channels to independent producers. It did not commission any programming, nor did it pay for it, but just turned chunks of time over to these producers. Let us say someone got two hours to fill with his own production. His first order of business (if that is what it can be called) was to run around to sell some advertising time to collect enough money to produce or buy programming to fill two hours. He

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145. Originally published in *Media and democracy*, Council of Europe Publishing, Strasbourg, 1998.

146. In the Soviet Union, the annual subscription, paid for the whole year in advance, was the common method of paying for newspapers.

was able to do that because Ukrainian businesses did not think in terms of advertising campaigns; rather, they advertised what they had to sell at a given moment and decisions to advertise were taken on an ad hoc basis. Based on what the producer could get this way, he proceeded to package the two hours of programming, or, if the money was not enough, would “sublet” an hour to someone else to fill in the same way. On this basis, the two hours of programming were put together and delivered to Ukrainian Television. The producer, having spent all his/her money (with maybe just a little left over), was ready to begin the process all over again. As we will see below, in Belarus, the independent producer, rather than expecting to be paid by the government broadcasting organisation, must himself pay for airtime during which to show his programming. This stands normal broadcaster–producer relations on their head.

At the same Kiev conference, knowing what types of currency restrictions may be in force in a transition economy, I asked a representative of a successful private news agency how it collected money from its foreign clients. She hesitated and then replied “I’d rather not say”. Clearly, some bending of the rules was involved.

The conference found the following economic reasons for the underdevelopment of private media in Ukraine, which was seen as a reflection of the general situation in which Ukraine lagged behind in the transition to a market economy (see Steilmann, 1994):

- relations between media undertakings are often based on barter, exchange and so on, making it impossible to operate properly;
- cash transactions are made difficult by existing financial and currency regulations;
- credit is difficult to obtain;
- many media establishments lack proper organizational, managerial and financial structures;
- high inflation undercuts press subscriptions system, making many newspapers unviable and unable to compete with those sponsored by political or economic interests;
- there are no broadcasting ratings or objective data on newspaper circulation, so that it is impossible to calculate advertising rates properly;
- reliance and dependence on sponsors forces managers and journalists to produce and disseminate politically-biased material or straight propaganda. (European Institute for the Media, 1994: 257)

All that blights prospects for media development. The situation in Belarus is the same or worse from an economic point view, with consequences for the media well described by Bazylar and Pomar (n.d.):

If there is to be any alternative to government-owned or wholly subsidized media, there must be other sources of financing. While in many countries, the private market can support media through the purchase price and through

advertising, this is not feasible in Belarus due to poor economic conditions. Commercial television and radio must rely exclusively on advertising, and cable television on the cost of subscription. Due to high inflation, low salaries and rising living costs there is little purchasing power among consumers. If media organs which rely on sales charged enough for a profit margin, they would find almost no-one able to afford their products. For the same reason, it is hard to solicit advertisements, as businesses also do not see the consumers as being able to absorb the cost in the prices charged. Furthermore, few businesses have sufficient income to seriously invest in advertising. As a result, many private media organs operate at a deficit and others without a substantial profit ... Credit is extended at very unfavourable terms due to exorbitant inflation rates and there is very little capital being circulated for investment. The difficulty in acquiring capital in turn makes it very hard to purchase needed equipment and technology. This problem especially affects the electronic media, but even newspapers incur problems due to, for example, the cost of paper or the price for publication ... Additional burdens are imposed by government through control of organisational structure and financial relations. The government also collects taxes which subsume a large portion of any profit margin. Producers seeking to obtain broadcast time on government-owned electronic media pay significant costs, such as 50% of the advertisement income, to air their programs.

As is clear from both the Ukrainian and Belarus examples, the ability of the media to be financially successful by operating on the market is crucial to their independence, to say nothing of the quality of their contents (Schröder, 1992).

### **Media on the market: paradoxes and contradictions**

After this brief excursion to an area where the market economy is only beginning to develop, let us note that in advanced countries with highly developed market economies the importance of the economic aspect of media operation is underscored by the "industrialisation of culture", meaning, as Briggs himself has put it, that massive market interests have come to dominate culture, including the media. These market interests (including newspapers, book publishing, record companies, music publishers, film studios, radio and television) are known as "cultural industries", due to the fact that they employ the characteristic modes of production and organisation of industrial corporations to produce and disseminate symbols in the form of cultural goods and services, generally, although not exclusively, as commodities to be sold on the market. In all these industries we find at some point the use of capital-intensive, technological means of mass production and distribution, highly developed divisions of labour and hierarchical modes of managerial organisation (see Garnham, 1994: 154-168). Since they operate on the market and in most cases seek maximisation of profit, they also compete for:

- a limited pool of disposable consumer income;
- a limited pool of advertising revenue;
- a limited amount of consumption time;
- and for skilled labour.

Accordingly, a whole discipline of media economics (cf. Gomery, 1989; Picard, Winter, McCombs, Lacy, 1988) has emerged to study the media, alongside other cultural industries, as economic entities subject to the rules of the market. Another reason for this is that the media are perceived more and more as parts of the economy itself; indeed, as a driving force of economic growth as such, due to a process of convergence with telecommunications and informatics. The European Commission has made that very clear in its 1993 White Paper on "Growth, competitiveness and employment" and its subsequent report "Europe and the global information society". One could say that the media have become part of the productive forces of the economy and the foundations of economic development. This is all the more reason to approach them from an economic point of view and study their operation in the same way as that of other economic entities.

At the same time, from an economic point of view, media and media messages have many paradoxical and contradictory features. Media messages may be private goods (meaning that their consumption reduces their potential value, or denies their availability to other people), but more often they are public goods which are not destroyed in the process of consumption and may be available to others: if one person reads a book or watches a film, that does not make them any less available to others. This means, among other things, that to put a value on them and turn them into goods which can be sold for a price, access to them sometimes has to be artificially limited in order to create scarcity and boost demand.

Media, like newspapers, for example, are undoubtedly physical commodities, but they are also symbolic commodities. The two aspects of the media are produced by different groups of workers who may not have much to do with each other and whose work is governed by quite different logics.

Media messages are all, in a sense, prototypes. Most are used only once, or just a few times. Like other cultural commodities, they resist the homogenisation process, which occurs when many copies of the same product are made as a commodity for sale. This drive for novelty means that in general the cost of reproduction is marginal in relation to the cost of production (the cost of each record pressing is negligible compared to the cost of recording; the same goes for prints of films, for example). Accordingly, the marginal returns from each extra sale tend to grow, leading in turn to a powerful thrust towards audience maximisation as the preferred profit-maximisation strategy. As a result, it is distribution and not production which is the source of profit: the primary goal is to create an audience for media messages.

However, audience maximisation is not always the ultimate goal. American news magazines, for example, are as much concerned with upgrading the "quality" of the readership – its income and purchasing power – as they are with increasing readership size. So, they compete feverishly to prove to advertisers that each attracts a younger, more affluent and better-educated reader: more "upscale" in

business jargon. In any case, they prefer better-educated readers who are easier to write for. On the other hand, increasing circulation raises the ever higher costs of mailing issues to subscribers, many of whom may be the less affluent ones, whom neither advertisers nor journalists want. So, news magazines periodically try to discourage “downscale” readers, for example by omitting detailed explanations in stories which these readers are thought to need, “and they hope that risqué stories and ‘sex covers’, which graphically report on erotica or the liberalization of sexual attitudes and behaviors, will anger them sufficiently to cancel their subscriptions” (Gans, 1980: 219).

It has been said that media practitioners “must attend to some commercial and audience considerations ... commercial considerations are intended to reduce the costs of [message production], or to increase revenue from the audience and/or advertisers. Audience considerations, on the other hand, exist to hold the present audience” (Gans, 1980: 214). This is an indication of the fact that media operate in what are known as “dual product markets”, since on the one hand the media offer a product (that is, their contents), and on the other – a service (that is, access to their audience for advertisers).

These contradictory features of the media and media messages account for the difficulty in subjecting them to economic analysis.

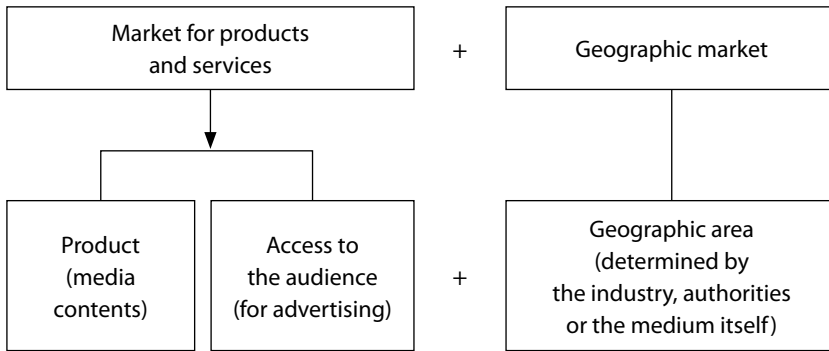
Media economics is a subset of economic investigation in general which seeks to analyse the allocation of resources and distribution of products and services in an economy. Media markets<sup>147</sup> have two components, which together suggest how sellers (media) and buyers (their audience) are inter-related: the product market and the geographic market. A common product market consists of sellers (media) providing the same product (content) or close substitute products, to a common group of buyers. The geographical dimension is an important consideration when a product market is essentially local or regional in nature. These elements are shown in Figure 1.

A framework for approaching media establishments as market players is provided by the industrial organisation model (see Busterna, 1988). This model is shown in Figure 2.

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147. Media markets are defined in a variety of ways. As far as the geographic market (see below) for newspapers is concerned, the term “retail trading zone” is often used to describe the area in which the particular newspaper obtains most of its retail trade advertising and the majority of its circulation. Sometimes newspapers concentrate on the “primary market area” within a larger geographic market. “The designated market area” is also a fragment of a larger geographic market which a medium has chosen as its “market niche”. An “area of dominant influence” refers to that part of the geographic market where a particular medium outlet (usually a radio or television station) is a leader.

**Figure 1. Defining the media market**



**Figure 2. The industrial organisation model**

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<b>Market structure :</b>	Concentration of sellers and buyers Product differentiation Barriers to entry Cost structures Vertical integration
<b>Market conduct:</b>	Pricing behaviour Product strategy Research and innovation Advertising
<b>Market performance:</b>	Technical and allocative efficiency Progress Full employment Equity

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In this model, market structure refers to how a given market is organised, to the number and relative size of sellers (that is, media) and buyers (media audience). Product differentiation may result from the policy of media owners and managements to offer different contents (or package it differently) than in other media, so as to reduce the level of competition between them. Condition of entry to a market describes the ease or difficulty that exists for potential new media outlets wishing to enter the market. High barriers to entry restrict the number of voices which may speak in a given area, reducing the range of content available to the audience. Cost structure refers to the relationship between fixed production costs and total production costs in a market. When fixed costs are high, there is a substantial reward for large producers of media content due to economies of scale, prompting especially capital-intensive media (such as television, for example) to expand and seek ways to enlarge their market and scale

of operation. Vertical integration refers to the integration of various stages of the production and distribution of media content within the same companies.

Market conduct refers to the methods media use to win or hold a large market share, including pricing behaviour; product strategy relating to the design and quality of media output and practices with regard to product distribution; research and innovation serving to improve the product or differentiate it from that offered by other media; and advertising and promotion serving to maintain the audience and expand it.

Finally, market performance encompasses technical efficiency (producing a given level of output with the least amount of productive input); allocative efficiency referring to whether a particular market earns normal or excessive profit (excessive profit means that there ought to be more competitors which would drive profits down); progress (firms increase output per unit of input over time); full employment of available resources, and equity (meaning that producers do not get excessive rewards for their efforts and there is relative price stability).

This general model helps analyse and explain many aspects of the operation of the media as economic entities and makes it possible to understand the logic of media behaviour and market processes in the sector.

The “Media support continuum” in Figure 3 illustrates the place of particular media, depending on whether they are financed by “direct support” (subscriptions by, or sales to, consumers) or “indirect support” (sponsorship, advertising).

**Figure 3. Media support continuum**



Source: Jeffres, 1986.

Magazines get half of their support from subscriptions/retail sales and half from advertising, while newspapers get about two thirds of their revenue from advertising. Commercial radio and television get the great majority of it from sponsorship and advertising. The new technologies (for example, VCRs, cable television with pay-tv, premium and pay-per-view channels, etc.) are changing the continuum by adding new forms of direct support.

The table in Figure 4 shows the proportion of revenue that the UK press derived from advertising in 1979. This may have changed since then, but the data are still indicative of the differences between different print media.



**Figure 4. Proportion of UK press revenue derived from advertising in 1979**

<b>National dailies</b>	<b>National Sundays</b>	<b>Regional daily and Sunday papers</b>	<b>Local weeklies</b>	<b>Total newspapers</b>	<b>Trade, technical and professional journals</b>	<b>Other periodicals</b>	<b>Total periodicals</b>
44%	44%	66%	85%	59%	64%	47%	54%

Source: Curran, 1986.

These figures show which media truly operate in a dual product market. Public service media financed solely by licence fees operate in one market alone: they concentrate on delivering media contents to the audience. The same could be said of books and films which depend almost entirely on direct sales to film-goers and readers. However, in most European countries, audiences of public service broadcasters have little choice but to pay their licence fees, which gives the public media themselves an assured source of financing (in most cases supplemented by advertising revenue) regardless of the contents and quality of their programming. On the other hand, book readers and film-goers can vote with their money: if they do not buy the books or pay for the tickets, the investment into producing the books or films will bring no return. This makes these media much more dependent on the market.

Other media which partly or wholly depend on advertisers are in a different situation: they face a set of different, and sometimes conflicting, goals and must always reconcile their preoccupation with delivering the contents to the audience with the need to deliver a service to advertisers which they will want to pay for, thus covering a large part of the costs of the particular newspaper or radio or television station, and ensuring its profitability. The manner of resolving the often conflicting nature of these goals and the frequent need to give priority to the second one in order to ensure the survival of the medium establishment largely determine what happens in a particular newspaper, radio or television station.

Advertising revenue is, of course, indispensable for the media. As we will see below, it may also have positive effects in the form of a promoting some forms of media pluralism.

Most media separate editorial and business departments (see Gans, 1980) to make sure that content or programme production is not determined by the commercial logic. In English commercial television it is claimed that “the programme controllers are more Reithian than the BBC. Advertising pressure is simply not transferred through” (cited in Curran, 1986: 309). Also in American television networks and national news magazines journalists are relatively free from direct advertiser pressure – because of their size and relative immunity from direct pressure of this nature (it might be a different matter in local news media). What is important, however, is not whether advertisers may successfully

demand that content which hurts their interest be withdrawn or altered, or withdraw their advertising in the hope of getting more co-operation in the future, but that in American commercial television (as well as in many other commercial media) "what immediately and largely determines content ... is the invisible hand of economics ... the decisions are made by what reaps a profit" (Comstock, 1980: 13). In this situation, the advertising function may gain equal importance with, or indeed priority over, the editorial one.

This may be reflected in a great number of ways. A frequent concern, for example, is the compatibility of stories and advertisements or commercials which accompany them. This is manifested in the following way:

If a top [television] producer chooses a story on smoking and lung cancer, he checks whether a cigarette company is listed as one of the day's sponsors ... [if so] he informs the business department of the story, which in turn allows the sponsor (or the advertising agency) to postpone the commercial for another day. If the agency decides to run the commercial nevertheless, it will be placed as far away as possible from the cancer story. The procedure is much the same at the news magazines, although top editors, having more makeup alternatives than top producers, can always move advertisements elsewhere, and do not need to request postponements ... Weekend news programs often have single sponsors. An NBC news executive pointed out that Exxon, which sponsors the network's weekend programs, has never complained or interfered; but he also suggested that if a major oil spill occurred on a Sunday, he would have to cancel the day's commercials, "and that might be very difficult". (Gans, 1980: 254)

At the micro-structural level, the "invisible hand" helps determine (or may in some cases be the decisive factor in determining) what content is published or aired. In extreme cases, it actually becomes quite visible. It has been noted, for example, that in American television news:

advertisers are beginning to decide what kind of news segments they want created as vehicles for their messages ... more and more, news segments and informational broadcasts are produced primarily for the advertiser, not the viewer ... Sales-originated information segments first appeared in network TV, on ABC's *Good Morning, America* ... [it] had no health segment until the ABC sales department found that it could be sold to Bristol Myers and American Home Products. A fashion segment sponsored by Revlon and J.C. Penney was next. Then Independent Network News *USA Tonight* followed suit with a sponsored, billboarded health segment ... Serious, issue-oriented documentaries are practically museum pieces these days. But special programming suggested by and sponsored by advertisers can and does make air. And if financial news is sponsored by Merrill-Lynch, for instance, can the viewer be sure that coverage of Merrill-Lynch's involvement in an insider trading scandal is on the square? (Cummings, 1987, *passim*)

This last issue looms even larger when we have to do with media companies forming part of larger economic entities. How can the audience be sure that the stand they take on certain issues is not subordinated to their owners'

other economic or political interests? After all, Rupert Murdoch's *The Times* has promoted British Sky Broadcasting (another Murdoch company) and took the side of its owners in the debate whether this form of concentration should occur. Since Murdoch is involved in commercial television, more often than not public service television can expect nothing but rough treatment from his newspapers.

Another case in point is the fact that during the Gulf War, National Broadcasting Company in the US often mentioned superior American weapons systems used by the US Army: Patriot and Tomahawk Cruise missiles, Stealth bombers, B-52 bombers, AWACS plane, Apache and Cobra helicopters, NAVSTAR spy satellite system – all designed and built by General Electric, which owns the National Broadcasting Corporation. NBC reporters probably mentioned these weapons systems for valid journalistic reasons, but the station's connection to their producers raises quite a few questions about the nature of what they were doing: serving as reporters, or as publicists for their employers?

Decisions on what high-cost programming to produce are usually taken by American commercial television stations only when advertisers have expressed an interest in a particular show or series and have made a commitment to sponsor it or to run their commercials in the advertising breaks surrounding it. And since advertisers want to make sure that the audience of the show or series is really composed of potential consumers of the goods and services they advertise the concern to make programming attractive for just those socio-demographic groups enters the very creative process of writing the script, choosing the setting for the story, selecting characters and storylines. The well-known phenomenon of writing breaks into the plot of a film or series in such a way that the scene before the commercial break creates suspense in the hope of holding the audience until after the commercials is also a way of subordinating the very fabric of programming to the commercial logic.

This goes for all types of programming. Some time ago, Walter Cronkite had this to say about the advice of television news consultants about how to win better ratings for news shows:

There is no newsman worth his salt who does not know that advisers who dictate that no item should run more than forty-five seconds of the newscast and that it must have acting in it (a barn burning or a jackknifed tractor trailer truck will do), that calls a ninety-second film piece a "mini-documentary", that advises against covering city hall because it is dull, that say the anchorman or woman must do all voice overs for "identity" – any real newsman or woman knows that sort of stuff is balderdash. It's cosmetic, pretty packaging – not substance. (quoted in Fang, 1980, 280)

Even more important is the impact of advertising on the media at the macro-structural level, where it may be said to shape the media system itself. This is because, as James Curran puts it:

Advertisers rarely think of the media exclusively as a distribution system for advertisements; they also generally make judgements about the effectiveness of different media as agencies of persuasion. They are not “neutral” in their desire to reach all members of the public; they usually wish to reach – and will pay more to reach – particular segments of the market rather than others. They are not “passive” and unchanging in the criteria they adopt for media buying; on the contrary, changes in marketing perspectives, research procedures and data inputs have produced changes in how advertisers have spend this money, with important long-term consequences for the development of the media. (Curran, 1986: 310)

What this means is that where advertisers go, there the media follow, with the result that because of the “market determination of the British press ... its structure is shaped by considerations other than the needs and requirements of democracy” (Curran, 1995: 43). One example quoted by Curran is the fact that though independent journals of political opinion have a strategic role in introducing and developing new ideas in the political discourse of democracy, they are in a “near-terminal decline” in Britain (with the exception of *The Economist*), in part because they fail to deliver specialised audiences that advertisers want to reach. In more general terms, a study of the British media found that the introduction of commercial television set in train a realignment of the media as vehicles for advertising. It put a premium on specialised media, capable of delivering particular audience groups, while at the same time downgrading the importance of mass and general audience media, better reached by means of television:

Firstly, recent changes in advertising allocation *between* media sectors have tended to undermine traditional mass media, promote the growth of specialised media and favour the development of the regional press. Secondly, advertising appropriations *within* each media sector have profoundly influenced the character and development of each medium. In particular, they have reinforced the conservative domination of the national press, caused the women’s magazine business to be heavily oriented towards the young middle class, and contributed to a growing financial imbalance between the public and private sectors of broadcasting. Third, the media have adapted to the requirements of advertisers in the ways they have sought to maximize revenue. This has resulted in a growing polarization between popular and quality newspaper journalism, the adoption of limiting programme strategies for producing large and predictable audiences on television, and the increasing subordination of the consumer magazine press in creating a conducive editorial environment for advertisements. (Curran, 1986: 332-3)

### ***Media concentration and democracy***

Developments on the media market may lead to media concentration or diversification. Figure 5 shows that companies can concentrate or diversify their business by way of mergers, acquisitions, launching of other media and dealings with other media companies.

**Figure 5. Processes of media concentration and diversification**

<b>System of media concentration or diversification</b>	<b>General conditions required</b>	<b>Effects (companies and markets)</b>
Mergers	Crisis in the industry	⇒ – decreases in level of competition on the market ⇒ – more favourable conditions for the companies concerned
Acquisitions	⇒ Financial, industrial and commercial superiority (buyer) ⇒ Need to improve competitive ability (seller)	⇒ quick growth of the companies that invest large sums of money ⇒ fewer “voices” in the market
Launching of media	Markets changing, growing or offering new possibilities (i.e. new media outlets)	⇒ slow growth of the company ⇒ more diversity in the market
Deals between companies	Maturity of the industry and considerable entry barriers	⇒ dangerous competition avoided ⇒ power sharing

Source: Sanchez-Taberner et al., 1993.

Traditionally, until the advent of the new technologies, the process of media concentration was more widespread than that of media diversification. Expansion of media establishments is a natural result of their commercial and market success. As Gustafsson (1995) puts it “Media integration is a self-propelled process, driven ‘by the normal operation of the firms’”. The model in Figure 6 is sometimes used to explain the reasons for media concentrations, a process defined in the EEC Council Regulation of 21 December 1989 on the control of concentrations between undertakings as a situation when “a) two or more previously independent undertakings merge, or b) when one or more persons already controlling at least one undertaking, or one more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings”.

**Figure 6. Market power model**

Advertising	Product differentiation	Greater brand loyalty	Low price elasticity	Higher prices
Advertising cost is barrier to entry	High concentration		High profits	

Source: Jeffres, 1986.

According to this model, advertising leads producers to make their goods or services appear distinct or different from others, so as to demonstrate their "superiority" and thus to exercise market power. This means that brand loyalty is established (for example, through advertising) and as a result demand curves become less elastic (so consumers want the products and are not put off by price changes, meaning that the producer can raise prices without losing customers). This also creates barriers to entry for new competitors because they would have to bear very heavy costs of advertising to gain a share of the market in competition with established companies. As a consequence, concentration of market power is achieved through advertising and those who dominate it can achieve high profits.

The market power model is one of many explanations of the process of concentration. Media undertakings seek advantages by co-operating and concluding co-operation agreements which cover combined buying and selling, exclusivity, joint ventures, non-competition agreements, specialisation, etc. While this does not involve loss of legal control by particular undertakings, it can give them a strong influence on the market, which amounts to a concentration of market power.

Concentration as such is characterised by a decrease of power of autonomy or legal control over a company. That results mainly from concentration of the industry. Another concept is the concentration of the media market, defined as a situation which happens when, as a result of various possible processes: acquisitions, mergers, deals with other companies or even the disappearance of competitors, only one or a handful of media companies operate in any market.

The difference between the two types of concentration is illustrated by the following example. It is theoretically better that there should be 40 rather than 20 newspapers in a country. However, if each of the 40 papers has a distribution area where it has a quasi-monopolistic status, pluralism is better served if there are 20 papers whose distribution area extends over a large part of the country, forcing the papers to compete in the same markets. Industry concentration is higher, but market concentration is lower. This is why the concept of concentration is closely related to that of competition. Low concentration indicates a state of (full) competition and high concentration – a situation of (near) monopoly, including duopoly or a dominant market leader.

The reality of media markets in Europe (see Mounier, 1997) shows that concentration does exist, sometimes where it is least expected. In terms of circulation, for example, *Bild Zeitung* breaks all distribution records in Europe (11.3 million copies), but it is the *Luxemburger Wort* which tops the list in terms of market share (60% in Luxembourg), followed by the *Irish Independent* in Ireland. In the magazine market, disregarding TV publications, *ADAC Motorwelt* has almost 18 million readers, but the *Kampioen* (the magazine of the Dutch automobile association) has more than 35% of the Dutch market. In private television,

while TF1 reaches 60 million people in France, it is MTV Oy which takes more than 43% of the market in Finland, followed by TV2 Denmark and SIC Portugal. In terms of radio, no private radio holds more than 25% of the national audience share, and only P4 National in Norway and RTL in France have a notable influence on their markets.

As for advertising revenues, Austria and Norway reach records of concentration in the daily press, with respectively 63% and 58% of the accumulated revenue accruing to the two leading titles. Canale 5 in Italy and TF1 in France come close to having 50% of the television advertising market. While RTL France is the only radio station to achieve revenue in excess of 200 million ECUs, the advertising revenue shares are very concentrated in Greece (Sky Radio with 43%).

Concentration of the industry takes a number of forms which are listed below:

1. merger – a process in which either an undertaking is absorbed by another undertaking, or two or more undertakings unite to form a single undertaking;
2. integration – all forms of more or less far-reaching combination of power and control over the activities of an undertaking or a group of undertakings. Integration may occur in two different forms:
  - horizontal integration: a situation in which an undertaking or a group of undertakings, controls, at executive level, several production units of one and the same activity (for example, an undertaking controlling several printing businesses, or several titles, or several advertising agencies, etc. In a press group, for example, horizontal integration makes it possible to realise economies of scale resulting from different operations (for example, operations to control advertising, to combine editorial segments that are common to many titles, joint printing, distribution or promotion, etc.);
  - vertical integration: a situation in which an undertaking or a group of undertakings control the different phases of a production process (for example, a press undertaking controlling newsprint, the actual publishing, the printing and the distribution). This can be a case of upstream integration, when an undertaking merges with others constituting a source of the product, or downstream concentration, when the merger is with undertakings involved in the sale or distribution of the product. Almost all the major players are highly integrated along the production, distribution and commercialisation chain. They go further and further “upstream”, that is, towards the sources of media content (television companies investing into book publishers, newspapers and periodicals, film studios, etc.) and “downstream”, that is, into different forms of distribution (cable, video, syndication, etc.), to realise profits from various forms of exploitation of already available product. This is a way of taking advantage of economies of scope offered by what

is known as the “cascade strategy” or sequential distribution of the different forms the same work can take;<sup>148</sup>

3. multimedia integration: a situation in which an undertaking or a group of undertakings controls different media (for example, participation of press undertakings in the capital of radio or television broadcasters) – also known as cross-media ownership;
4. multisectoral integration: a situation in which an undertaking or a group of undertakings control one, or several different media and is active at the same time in one or more other economic sectors (for example, an undertaking active at the same time in the building industry, the distribution domain and the media domain);
5. international integration: a situation in which the activities of an undertaking or a group of undertakings extends over two or over several countries.

Horizontal and vertical integration are the two most common processes which are involved in the process of media concentrations (Prestinari, 1993). As for the horizontal variety, major operators who have developed their own television business tend to remain faithful to their own success formulae. A typical example is CLT, which has multiplied its own networks by participating in several national markets, such as RTL Hei Elei in Luxemburg, RTL TV in both Luxemburg and France, M6 in France, RTL (former RTL Plus) in German, RTL TVi in Belgium, RTL 4 in the Netherlands and RTL 7 in Poland. The successful French service Canal Plus has followed very much the same formula. Even some of the public broadcasters have added niche channels to the main service, including the German ARD with 3 SAT; ZDF with Eins Plus, RAI with RAI-Sat, France-Television with Bravo, Sport 2-3 and TV5, Nos with D2TV. The main aim is to introduce new technologies such as satellite transmission, or to give more space to cultural or educational programmes. The BBC is now engaged on a major programme of expansion, with plans to establish thematic satellite television channels all over the world. As for vertical concentration, one case in point is the Fininvest group which is present at every key point along the television chain of value – from television and film production (Videotime and Silvio Berlusconi Communications/Pentra) to management of operating rights (SBC), broadcasting (three channels: Canale 5, Italia 1 and Retequattro), management and commercialisation of soundtracks (RTI Music), sale of advertising airtime (Publitalia 80) and finally signal transmission (Elettronica Industriale).

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148. Sequential distribution means that the same symbolic commodity can successively take the form of different works whose distribution is organised sequentially, to derive the maximum profit from it. These works and stages of distribution may be as follows: hard-cover book and/or theatrical production; soft-cover book; first-run movie theatre; second-run movie theatre; video cassette (first sell-through, then the rental market); pay-per-view cable TV; premium cable channels; regular pay-TV; “free” network TV; foreign television; “second-run” pay TV; TV syndication.



In general, there are three major types of transnational media mergers, each driven by a different motivation:

- cross-media empire building: the merger of companies that own different types of media – book publishing, television, radio, newspapers, magazines, record companies. Such mergers create potential synergies through expanding the markets an advertiser can reach through a single advertising package purchase, and/or expanding the potential distribution possibilities for a single creative product;
- hardware–software marriages (for example, Sony’s buy-out of Columbia Pictures and CBS Records to provide software produced in the standard of the hardware);
- concentrated, industry-specific deals: purchase by a media company of similar media outlets in another country.

All this is very important in terms of the preservation of democracy. The Declaration on the Freedom of Expression and Information adopted by the Committee of Ministers of the Council of Europe on 29 April 1982, affirms the importance of the “existence of a wide range of independent and autonomous media, permitting the reflection of diversity of ideas and opinions”. Media diversity is one of the main aspects of the pluralistic expression of ideas, tastes and opinions at both the political and the cultural levels which are regarded as a prerequisite for effective freedom of expression and information as secured by Article 10 of the European Convention on Human Rights, and to effective citizen participation in the life of a democratic society through the information they receive and disseminate via the media. The question therefore becomes whether the trends noted above do or do not serve the pursuit of democracy.

In the media field and elsewhere, four standard models of market organisation are distinguished. Each of these models represents a different and distinct combination of assumptions concerning the nature of demand, cost efficiencies, conditions of entry, and, perhaps most importantly, the distribution of power among the firms and their relation to the marketplace through which the products are transacted. Accordingly, these models should offer a framework of analysis in terms of our focus, that is, the economic aspects of media operation in a democratic society.

The main features of these models are summed up in Figure 7.

**Figure 7. Models of market organisation**

	<b>Perfect competition</b>	<b>Monopolistic competition</b>	<b>Oligopoly</b>	<b>Monopoly</b>
<b>Number of media</b>	large	large	small	one
<b>Their scale of operation</b>	small	small	large	very large
<b>Their share of market</b>	insignificant	small	large	100%
<b>Their product</b>	undifferentiated	differentiated	homogeneous or highly differentiated	homogeneous or highly differentiated
<b>Their subservience to market forces</b>	total	some ability to act independently	mutual interdependence of rivals	very low
<b>Their profits</b>	normal (just above average costs)	normal, but excessive at times	excess profits in the long run	excess profits
<b>Market entry for new media</b>	easy	easy	difficult	high barriers to entry
<b>Market conditions</b>	long-term equilibrium	short-term equilibrium	short term equilibrium	long-term equilibrium

Adapted from Litman, 1988.

According to a widespread view, democracy is best served by a situation in which many media outlets operate on the market, vying for the interest of the public. That would seemingly argue in favour of striving to maintain a situation of perfect competition in the media sector. It combines the existence of many separate (media) companies on the market with ease of entry into the market for new (media) outlets. However, this is difficult for two reasons. The model is a theoretical one and can hardly be found in practice. Moreover, it assumes that all firms operating on the market offer the same undifferentiated product. It is hard to imagine exactly similar newspapers, or radio stations offering exactly the same contents, operating on the same market. Democracy is best served by pluralistic media offering a wide range of ideas, information and types of culture.

Therefore, the answer would seem to lie in the model of monopolistic competition. Here, a company tailors content to particular market niches and must create an image of itself as providing a unique product or attribute to be successful.

Since most media establishments rely largely on advertising for their financing, they may thus contribute to diversity by applying the strategy of product differentiation and, for example, matching their content with the composition, needs and interests of the given consumer market. This may result in market segmentation, with different media seeking to appeal to various groups because advertising messages must be tailored as accurately as possible to the given audience and match its "demographics" in terms of age, sex, income, locality, etc. Large media groups may thus potentially promote diversity simply as a business strategy, that is, by diversifying their media outlets and establishing new newspapers, radio and television channels etc. to reach various groups of the audience (for example, by creating newspapers representing quite different orientations within one conglomerate in order to achieve greater profits by serving diverse audiences).

What we are seeing in Europe, however, is a trend towards oligopolistic markets. One example of this is the British press. In 1994 it was pointed out that:

Today, just four companies control more than 85 per cent of all daily and Sunday newspaper circulation. Rupert Murdoch's News Corporation owns *The Times*, the *Sunday Times*, *The Sun*, the *News of the World*, and *Today* and controls 34.4 per cent of daily circulation and 37.6 per cent of Sunday circulation. The other major players are Mirror Group newspapers (23.3 per cent of daily and 28.9 per cent of Sunday circulation), United Newspapers (15.4 per cent and 10.4 per cent) and Associated Newspapers (12.3 per cent and 12.2 per cent. (Liberty, *Human Rights Convention Report*, cited in Sparks, 1995)

The British national press has been dominated by four companies at least since the mid-1950s. For the last 35 years, newspapers published outside these large groups have never had more than 15% of the market. The only new long-term entry into the group of dominant companies in the last half century took place 25 years ago. It was by Murdoch's News International, which hardly counts as a fresh entry into newspaper publishing: "The normal pattern of entry is therefore either for an existing large-scale publisher from outside [the] market to buy an existing title, or for genuinely new entrants to fail and be taken over by existing large companies" (Sparks, 1995: 189).

The process of media concentrations at the national and international (or indeed global) levels has acquired great momentum. This process is the subject of a prolonged, and still unresolved, controversy.

Some argue in favour of allowing the process of concentration to continue. On the one hand, they believe that large media establishments are potentially more capable of protecting their independence and autonomy from political and administrative authorities and, for that matter, from individual advertisers. Also, they have the capital as well as management and research and development capabilities allowing them to overcome high barriers to market entry and establish new media outlets and to finance them until they reach break-even point.

They are more capable of cross-subsidising particular media outlets within their organisations, and may thus potentially keep alive low-profit or loss-making media, which would otherwise find it difficult to survive in the marketplace.

Opponents of this “market model of media pluralism” raise two main objections. Firstly, the market model does not really produce representative socio-political-cultural diversity including critical and oppositional voices; rather, the predominant trend will be in favour of the superficial variety of the same politically safe content (“corporate speech”, Keane, 1991) differently packaged for different groups of consumers. Keane (1991) expresses the frequently heard view that advertising reduces the supply of “minority interest” programmes, aesthetically and intellectually challenging themes, and politically controversial material, which fails to achieve top audiences.

Secondly, opponents of the market model point out that while the big corporations can better protect their own autonomy and independence, they can – by encompassing within their organisations a great many individual media – potentially constrain the editorial freedom of those media. Even where ownership does not translate into direct control and those individual units remain editorially independent (as far as content decisions are concerned), rationalisation of business and organisation often leads to sharing of certain services and reduces the difference between them. In order to make a profit to survive, corporate headquarters often take decisions which directly influence content (such as promoting solutions which make possible economies of scale, cutting costs, closing down, shedding staff, investing or not, and merging operations). In some cases, the motive behind media concentrations is said to be that of gaining the ability to make renewed or repeated use of accumulated media content, or to create synergies by having the same media product appearing in differing markets and in a variety of packages. This would serve standardisation and not diversification of media content.

Accordingly, it is claimed by proponents of this general approach that while media concentration may excel in producing numerical pluralism, that is, a great number of newspapers, radio and television stations, satellite and cable channels, etc. (provided of course that the market can sustain them), it may also effectively result in reduced autonomy and independence of particular media units, and a reduction in the number of different information sources and greater uniformity of content. And in any case, when they reach an excessive level, media concentration may distort competition and give existing media establishments the ability to deny market access to new independent entrants or weaker competitors, and ultimately lead to monopoly or oligopoly, which is undesirable both on social and economic grounds. The process may also potentially give individuals or groups in control of large media conglomerates extensive power to influence public opinion, including withholding information which is not in the interests of the owners. Media forming part of larger groups are not independent and autonomous in their editorial policy, but are controlled by the mother company which in this situation could be described as the real

“sender”, with the other media serving to a large extent as distribution channels for content produced or determined elsewhere. Moreover, owners’ policies may be different at times of social peace and stability and at times of social strife, when the political and economic order in which they have a vested interest may be destabilised or jeopardised. This gives them a potential power to use the media to influence public opinion and prevent views they find inimical to their interests from reaching the general public.

It is also pointed out that any potential strategy of promoting or encouraging media concentrations in a liberalised regulatory framework in order to ensure the financial health of the sector and its ability to compete in the marketplace is suited only to larger and richer markets where the balance between available resources generally needed for production and distribution of media content, and resources needed for pluralistic media output, favours pluralism. Smaller markets (“small” countries, regions, cultural or linguistic entities), as well as new and emerging markets, may not be capable of sustaining large media groups, or a full range of media, including many specialised ones, or ones oriented to smaller market niches.

In television, for example, all relevant studies have found that there must be at least five or six competing channels before alternative minority programming will be offered as a marketing and business strategy. In a smaller country, however, where the programme production capacity lags far behind the development of distribution channels, such proliferation of channels usually means an increased reliance on imports of stock foreign programming and intense competition in a rather narrow spectrum of content. In this sense, promotion of market access by new media outlets and reduction of concentration may – in countries where resources are insufficient – actually reduce pluralism of content. In any case, such countries may become dependent for specialised channels and minority programming on the strength of foreign media groups, should this prove sufficiently attractive for them from a market and advertising point of view.

These arguments are persuasive enough for quite a few countries to practise public interventionism into the press system (and in some cases also broadcasting system) with a view to restricting media concentration and promoting press pluralism. This is illustrated in Figure 8.

**Figure 8. Supportive and restrictive measures in west European countries**

<b>Country</b>	<b>Direct press aids</b>	<b>Merger control regulations</b>
Austria	yes	no
Belgium	yes	no
Denmark	no	no
Finland	yes	no
France	yes	yes
Germany	no	yes
Greece	no	no
Ireland	no	yes
Luxembourg	yes	no
Netherlands	yes	no
Norway	yes	no
Portugal	yes	yes
Spain	no	yes
Sweden	yes	no
Switzerland	no	yes

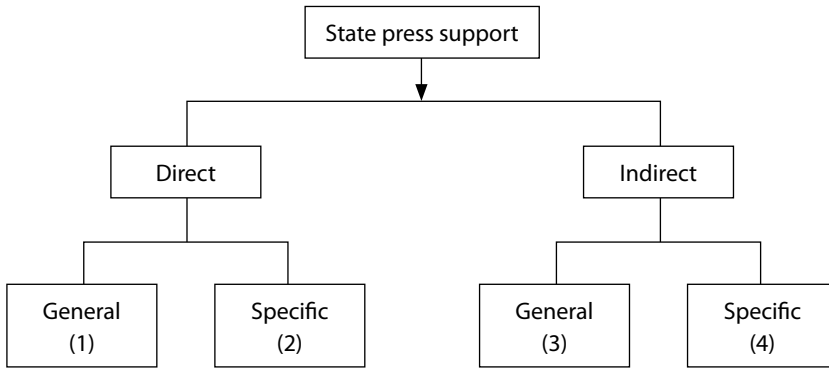
Source: Holtz-Bacha, 1994.

In general, three general mechanisms of state intervention in newspaper economics can be distinguished (Picard, 1995):

- advantages: assistance programmes that provide reduced fees for services or other preferred treatment by government agencies or government-controlled entities (reduced VAT, free or reduced fares for journalists on state railways or airlines),
- subsidies;
- regulation, including, for example, controls on newspaper ownership and anti-trust laws.

Figure 9 provides a typology of press aids available in countries where public policy in favour of supporting press pluralism is followed (see also appendix).

**Figure 9. Types of press aids.**



- direct subsidies (1+2)
- low-interest credits (1+2)
- state advertising (1+2)
- limitations for broadcast advertising (3)
- reduced customs duty for paper imports (3)
- support for paper industry (3)
- support for journalism education (3)
- support for news agencies
- tax exemptions/exonerations (3)
- absence (reduction) of advertising tax (3)
- preferential rates for public transport of journalists (3)
- preferential rates for postal services (3+4)
- preferential rates for train transport (3+4).

Source: Holtz-Bacha, 1994.

General aid is that which is given to assist a newspaper, but not for a single type of use (for example, operational subsidies). Specific assistance includes aid that can be used only for a specific purpose, such as grants received to retrain printing personnel. Indirect aid is given to the industry as a whole, rather than a specific newspaper. Direct aid is given directly to a specific newspaper. Selective intervention refers to advantages, subsidies or regulation in which an administrative body has the ability to make a decision as to whether it should be provided and to which newspaper. Mandated intervention is that for which no discretion to provide or withhold the assistance rests in an administrative body or official, because the intervention has been mandated by law.

As can be seen, most cases of state press support are of an indirect and general kind, so as to avoid arbitrary administrative decisions concerning which newspaper should receive assistance. However, in a number of countries (see appendix), selective subsidies for economically weak newspapers are also available in the belief, as in the Norwegian situation, that:

economic support to those parts of the press that were particularly vulnerable to competition [is] a necessary mitigation of the market mechanism. In order to maintain a press structure consisting of newspapers that “represented” different political parties that competed on the local level, the political

majority in effect defined the maintenance of the diverse press structure as a public good for which the responsibility could not be left totally to the market. (Skogerbo, 1997: 102)

Accordingly, the following types of subsidies are available in Norway:

- production subsidies, awarded with the use of complicated criteria by a committee decision to “No. 2” newspapers in local newspaper markets and to small local newspapers;
- subsidies for Saami newspapers;
- subsidies for “specific publications”, representing social or political interest groups or serving a specific target group;
- subsidies for press offices;
- subsidies for the distribution of newspapers in Finnmark
- subsidies for applied media research.

Figure 10 provides a ranking of nations for total intervention in newspaper economics.

**Figure 10. Ranking of nations by weighted score for total intervention in newspaper economics.**

Rank	Country	Score
1	Sweden	19.2
2	Italy	17.8
3	Netherlands	17.8
4	France	17.6
5	Norway	16.6
6	Finland	14.8
7	Belgium	13.4
8	Germany	11.4
9	Canada	11.0
10	Austria	10.8
11	Iceland	10.2
12	United Kingdom	9.6
13	Denmark	8.8
14	USA	8.6
15	Ireland	7.4
16	Switzerland	7.0

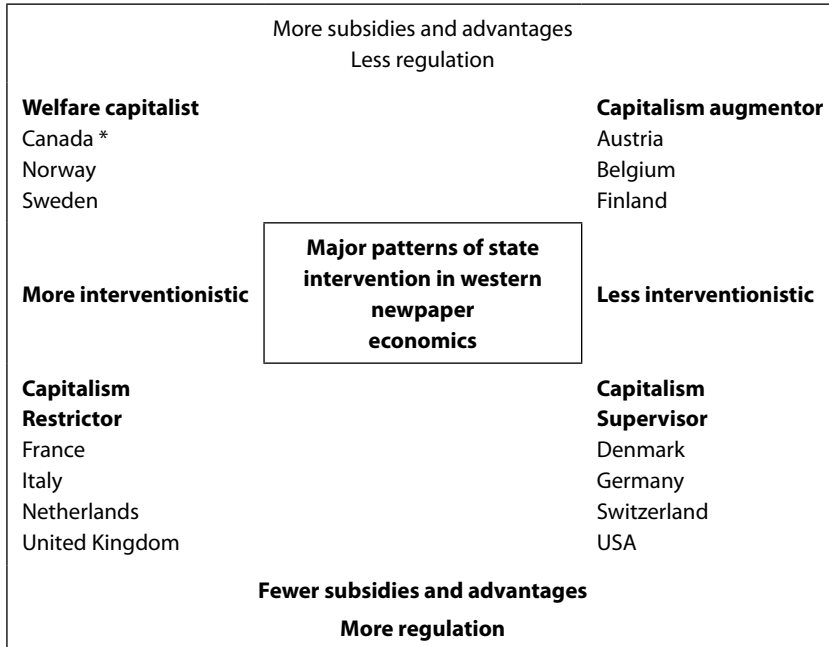
Source: Picard, 1995.



Scores were created by summing the weighted scores for different types of intervention (both in terms of support and restriction of concentration) available in each nation. The weights for each type of intervention ranged from one to three based on the extent to which they limited or alter competitive situations or the existing structure of industry.

Figure 11 provides a general overview of patterns of economic interventionism into the press market in various countries.

**Figure 11. Patterns of economic interventionism**



\* Least like the group. Also factored towards the augmentor and supervisor groups.

Source: Picard, 1995.

**Media economics and the new technologies<sup>149</sup>**

The convergence of telecommunications, broadcasting and information services means that instead of each constituting a distinct market, they will all form one integrated communications market. The new technologies can be defined as “digital communication channels through which text, graphics, moving pictures

149. This section draws heavily on Prosser T., Goldberg D. and Verhulst S. (1996) The impact of new communications technologies on media concentrations and pluralism, a study prepared at the request of the Committee of Experts on Media Concentrations and Pluralism, Council of Europe. University of Glasgow, Glasgow and on Report on media concentrations and pluralism prepared by the Committee of Experts on Media Concentrations and Pluralism, Council of Europe, Strasbourg, 20 January 1997.

and sound are presented in a single package and which have multiple modes of production, transmission, reception and storage". This means that the development of the new information and communication technologies will introduce a fundamentally new stage of media economics, by leading to the creation of what Vincent Mosco calls "the pay-per society":

We see evidence of the pay-per society all around us. There is pay per call in telephone, pay per view in television, pay per bit or screenful of material in the information business. Advertisers refer to pay per reader, per viewer, or per body when they place an advertisement. In the workplace, word processors know about pay per keystroke, And so on. The essence of what is happening is this: new technology makes it possible to *measure* and *monitor* more and more of our electronic communication and information activities. Business and government see this potential as a major instrument to increase profit and control. The result is a pay-per society. (Mosco, 1988: 4-5)

Businesses, Mosco continues, have a lot to gain in the pay-per society. They stand to gain simply by making information a commodity for sale. The new technology deepens and extends opportunities for selling information by transcending the boundaries that space and time impose on the packaging and repackaging of information in a marketable form. A newspaper story can be repackaged in a number of saleable forms, including radio, television, cable, teletext, magazines, computer databases, educational "courseware", and so on – each package brings its own return for essentially the same content. So, it is no wonder that companies like Time Inc., or ABC, would like to be involved in most of these businesses. It is an opportunity to be paid several times over for the same story. Similarly, information about people's credit purchases, vacation choices, opinions about society and politics, can be packaged and sold several times over. Again, it is no wonder that companies like Sears and American Express would like to be involved in this range of businesses. On the other hand, if more and more information is for sale word by word, or bit by bit, and will be available only in this form, more and more information and media content will have to be bought and paid for, putting a growing financial strain on the information consumers and media audiences.

Business opportunities created by these new technologies, as well as the need to be positioned so as to take advantage of synergies offered by being involved in all relevant fields and by any new developments in the future, prompt many companies today to gain a foothold in the new communication services. Alliances are created for the purpose of cross-sectoral service provision or cross-sectoral infrastructure provision, cross-ownership of different service providers in the broadcasting and telecommunications sector, or strategic alliances between leaders in different sectors. These alliances take place between communications equipment and computer hardware companies; between consumer electronics companies and content creators; between telecommunications companies and cable television companies. Also media conglomerates, resulting from the convergence of multimedia industries, play a constantly growing role.

This, of course, is true first of all of the television sector, where all the largest European operators have announced the launch of digital broadcasting services or clusters of programmes (as is the case, for instance, of Canal+ and the different operators grouped with the company TPS in France, of the Kirch and Bertelsmann Groups in Germany, of Telepiu and the Cecchi Gori Group in Italy, of the CLT Group in Luxembourg, of the Nethold Group in the Netherlands, and of BSkyB and the BBC in the United Kingdom). Against this background, it is worthwhile underlining the importance these operators attach to gaining control of the technical systems for accessing the new television services, and the power struggle which has developed between them in order to impose their system on the market, illustrated in Germany by the set-up of the Multimedia Betriebsgesellschaft consortium (MMBG) in the field of digital decoders, and the clash between the Kirch and Bertelsmann groups in the sector.

This is equally true of the press sector, however, where several publishing groups have resolutely launched themselves either alone or under co-operation agreements with other partners into new areas such as online information services. Examples include the alliance between Bertelsmann and America Online, the partnership concluded between the Burda Group and AT&T to launch Europe Online, or the development of an Internet access platform by the French group Lagardère). Other fields include software and CD-ROM publishing (areas into which the Dutch publishing groups VNU and Wolters Kluwer have moved their business activities, for instance).

Similar interest can be seen amongst a certain number of cable operators. Examples include the agreement in the United Kingdom between Nynex, TeleWest and Bell Cablemedia to develop interactive and multimedia services, or the launch of online services by the Lyonnaise Communications company in France.

The coalitions mentioned above transcend the conventional divisions that existed between the different professions in the world of communication (broadcasting, cable, telecommunications, data processing), notably as a result of the convergence between transmission systems. Alliances between partners from sectors which hitherto were distinct, a trend already perceptible before 1994, have only multiplied since, both inside and outside Europe. Reference may be made, for example, as far as the United States are concerned, to the alliance between the American telecommunications operator MCI and the News Corp. Group, to the partnership developed between NBC and Microsoft or to the agreement concluded between the Disney Group and the regional telephone operators BellSouth, SBC Communications and Ameritech Corp. In the European theatre, examples of the same trend include the participation by the German telecommunications operator Deutsche Telekom AG in projects currently underway in the country to develop digital television and online services, or the alliance set up by France Télécom and US West in the multimedia field. Other developments in this field are shown in Figures 12 and 13.

**Figure 12. Main companies active in Europe in the development of new communications services**

Country	Operator
Belgium	Belgacom (T), France Telecom (T)
Finland	Telekom Finland (T), Nokia Oy, Yleisradio Oy, Sanoma Corporation, Aamulehti Group
France	France Telecom (T), Havas, Canal Plus Hachette
Germany	Deutsche Telekom AG (T), Bertelsmann, Deutsche Bahn AG, Mannesmann, Thyssen AG, Veba, RWE, Viag
Italy	Stet (T), Telepiu
Netherlands	Philips, Nethold, VNU
Norway	Telenor (T), NetCom GSM A/S
Spain	Telefonica (T), Retevision, Airtel, Hispasat
Sweden	Telia (T), Sveriges Television/Sveriges Radio Kinnevik, Bonnier
Switzerland	Telecom PTT (T), SSR, Rediffusion Pay TV SA
United Kingdom	British Telecom (T), News International Pearson, Reed Elsevier, BBC, Reuters

(T) = Telecommunications operator

**Figure 13. Partnerships established in 1995 in the area of new communications services**

Multimedia / Interactive services	NBC / Microsoft (United States): interactive television, multimedia services
	Microsoft / DreamWorks (United States): interactive programmes
	Hitachi (Japan) / Oracle (United States): interactive television
	Intel / Oracle / Sequent Computer Systems (United States): material and software for interactive multimedia
	NTT / Sony / Sega / Yamaha / Victor (Japan): interactive services
	Nynex / TeleWest / Bell Cablemedia (United States): interactive television
	France Telecom (France) / US West (United States): multimedia servers
	Sega / CSK (Japan): interactive software
NTT (Japan) / Sony (Japan) / AT&T (United States): multimedia services	

Video-on-demand	Sony (Japan) / Microsoft (United States): receiving terminal Disney / Bell South / SBC Comms / Ameritech / GTE (United States): video-on-demand Sun Microsystems (United States) / Toshiba (Japan): video on-demand and news on-demand services
Online services	Burda (Germany) / AT&T (United States) Bertelsmann (Germany) / Deutsche Telekom (Germany) / Vebacom (Germany) / America Online (United States) Sega / Fujitsu (Japan) MCI (United States) / News Corp (Australia) NBC / Microsoft (United States)
Data bases	Sony (Japan) / Oracle (United States): products for databases

Three consumer markets can be distinguished within this new communications market:

- residential services: pay television, video on-demand and interactive television, video games, electronic shopping, home banking or personal finance, home alarm, virtual reality, etc.;
- business services: electronic data exchange and electronic messaging, video and desktop conferencing, corporate training, multimedia databases, networking, intranet, electronic commerce, etc.;
- public services: government on-line, tele-education, the digital librarian, transmission and computerising of medical records, tele-medicine, virtual museum, etc.

Then, there will also be cross-market services: online services (electronic diaries, newspapers, directories, news and weather, event and travel timetables, electronic mail etc.). cable telephone, photo-CD, CD-ROM, video-mail, World Wide Web.

The applications will be mainly personal and the unit of consumption will be the individual, rather than the household unit, the school or the workplace.

As can be seen from the above, five categories of services will be offered by the online services: communications; transactions; information retrieving; entertainment; education.

The infrastructure of services will form a three layer model: applications, generic services and bearer services. The generic services will ideally support the convergence applications through transparent interoperability over the bearer networks. These include email facilities, information access, navigation systems,

conditional access systems and billing. These services will dominate access to information on a paid basis. If they are controlled by a small group of providers, they could constitute “gateway monopolies” with a major impact on the potential range of choices available to the consumer and the price of those choices.

In order for advanced information and entertainment services to be developed, a suitable multimedia delivery structure has to be in place. There will be at least five markets according to the new value chain:

- content providers who will develop and own multimedia information and media content, covering individual artists as well as whole companies (television producers, music companies, news services etc.);
- content and service producers/packagers (database compilers, publishers, broadcasters, record companies, etc.);
- network builders who develop the integrated broadband communications infrastructure;
- network operators or service providers who manage the networks and provide new communication services by transporting information and entertainment content and/or communications. These will be divided into national and local distributors (the latter being networks operated by local exchange carriers, cable television systems, wireless systems, local radio and television broadcasters. Some may control their own gateways and control systems. Some may collect bills and run navigation systems.
- access applications or site equipment providers, delivering consumer electronic devices (PCs, PC-TVs, set-top boxes etc.), application software (information-entertainment navigation, selection, retrieval, viewing, browsing, billing, etc.).

The impact of these developments will be very extensive. It will include:

- the destruction of whole sections of the value chain. For example, electronic delivery of publications will remove the need for retail outlets and the fleets of lorries which currently form the distribution process for magazines and newspapers. When taken further, this process will promote disintermediation (removal of intermediaries between information and content providers and receivers, and of middle-sized companies from the market) and thereby an evolution towards a dichotomous media sector comprising largely big (in many cases international) companies and small organisations. This may eventually create a situation in which it will be more and more difficult to preserve the existence of a large number of autonomous media outlets of comparable size and influence, traditionally regarded as a prerequisite of media pluralism. Disintermediation, by reducing the role of editors and journalists in mediating the flow of information in society, in performing a gatekeeping function and providing analysis, background and comment on events, will shift many of these activities onto the individual, putting a premium on his/her ability to undertake such activities

and potentially sidelining some of those without the necessary education and training;

- the convergence of previously separate markets, for example, print publishing and broadcasting;
- the creation of new business opportunities.

In traditional media, increased vertical integration of different parts of the media sector involve strong ties between, on the one hand, broadcasters and content creators and producers (upstream acquisition agreement) and between producers and broadcasters and distributors (downstream agreements) on the other. In online services, this form of integration involves agreements between content and service providers and network builders. Together with more traditional forms of media cross-ownership, all these forms of multimedia concentration may have different consequences. On the one hand, they may create economies of scope and provide a basis for minimising costs. However, when combined with a degree of market dominance this process can give an operator scope for using an unfair competitive advantage (preventing others from entering the market; allowing cross-subsidy or enforcing contractual ties, for example, by forcing customers to take services they do not want).

Moreover, media concentrations may favour the recycling of already available material rather than promote new and original creativity. For example, the new media have been developed partly to exploit huge quantities of software available in film and television libraries:

Cable and satellite especially can find a home for some programming which has the enormous advantage of being extraordinarily cheap ... The money-making life of these programs is thus extended and this appeals to the film and TV companies, while new channels discover instant time-fillers ... Therefore, movie channels are commonplace in cable operations ...; sports channels, covering some live performances and drawing extensively on archive material, are also popular; re-runs of the hit TV serials of the 1950s and 1960s occupy much time on the new channels. (Webster, Robbins, 1986: 285)

### ***Globalisation and media economics***

Media concentration is, naturally, not only a national but also an international phenomenon. Europe is seeing many developments in this area.

In the written press sector, the national daily press market in most countries remains dominated by companies held by shareholders of the same nationality. The more or less wide-scale presence of foreign capital is noteworthy in two types of country:

- countries in central and eastern Europe: examples include stakes in the capital of Polish publishers of national daily newspapers held by the Swedish group Bonniers, by the German company JMG Ost Presse Holding

and by a subsidiary of the American group Cox Enterprise; or the presence of German and Austrian shareholders in the capital of the publisher of the *Novy cas* paper, the largest national daily in Slovakia;

- the “small” countries of western Europe with the same language as a “large” European country. An example is the French-speaking Community of Belgium, in which the capital of two out of the three largest publishers of daily newspapers, Rossel & Co. and IPM, is partially held by French interests.

There is a significant share of foreign capital on the magazine press market in certain countries, notably those of central and eastern Europe (such as Poland, and Slovakia to a lesser degree), but also in other European countries (see, for instance, the domination by the “VNU” group of the French-speaking Community in Belgium, the Danish groups Allers and Egmont on the family magazines market in Sweden, or the interests owned by the Swiss group Edipresse in the Portuguese market via the company Publicações Projornal). This phenomenon is also valid sometimes in “larger” countries (such as the predominant presence of the German company Gruner & Jahr and the British group EMAP in the specialised magazine market in France).

Although the radio sector remains dominated by national operators in many countries (Estonia, Greece, Iceland, Norway, Spain, Turkey), foreign operators have a more or less significant share in certain other countries at the national and/or local level. Examples include the presence of the French radio group NRJ in the French Community of Belgium, in Finland, in Germany, and in Sweden via the RBS Broadcasting AB company; the presence of the CLT group in the French Community in Belgium, in France, in Germany and in the United Kingdom; the presence of the Swedish group Kinnevik in Finland and Norway, and of the American company SBS in Denmark and Finland.

Different operations showing an increasing internationalisation of the operation of cable operators have taken place since the beginning of 1994. This is attested to by the interest of American companies (cable operators as well as telecommunications operators) in the cable market in Europe. In this respect, special mention should be made of the numerous initiatives taken in 1995 by US West (in addition to the operations cited above, that of the shareholding acquired by US West in Kabel Plus, the leading cable company in central and eastern Europe). In the same vein, reference can be made to the increasing internationalisation of the business activities of certain European operators (witness the development of KPN Kabel in the United Kingdom but also in France).

These processes of European media concentration are an element of a larger process of globalisation, that is:

the globalization of the communications industry, led by the American and Japanese conglomerates and facilitated by the deregulation of the world's money markets. Europe is already a major purchaser of American software and Japanese hardware, but it also has important production and manufacturing



potential of its own in both these domains. Much of the turbulence in the European communications market is attributable therefore to the strategic manoeuvring of European and other conglomerates aimed at both consolidating and improving their position in the world market. The phenomenon of globalization has created an irreversible increase in the size and importance of the communications industry. (Weymouth, Lamizet, 1996: 17)

As a consequence, Europe has been able to develop a number of large media conglomerates. Figure 14 lists the top 10 conglomerates.

**Figure 14. Europe's top ten media firms (ranked by media turnover)**

Company	Country	Media turnover (\$ billion)
Bertelsmann	Germany	7.9
Havas	France	7.3
ARD	Germany	5.4
Reed-Elsevier	UK-Netherlands	4.2
BBC	UK	3.6
Fininvest	Italy	3.5
Matra Hachette	France	3.5
RAI	Italy	2.9
CLT	Luxembourg	2.6
Axel Springer	Germany	2.4

Source: Mounier, 1997.

In addition to other reasons for international expansion mentioned above, a preference for dispersion rather than concentration in conducting international business seems to be behind this process. Concentration involves locating all the production activities at home and exporting the ready product abroad. Dispersion means locating production and distribution activities among a variety of nations to take advantage of the different competitive features (such as lower labour costs) or characteristics (cultural differences) that affect the potential success of the company's products. Media production naturally favours a dispersion strategy, as it helps overcome host country language, cultural and institutional barriers by tailoring media product to suit local needs (see Carveth, 1992). Another fundamental principle which determines much of what media conglomerates are doing, both nationally and internationally, is the quest for synergy, that is, "the co-ordination of parts of a company so that the whole actually turns out to be worth more than the sum of its parts acting alone, without helping each other" (Turow, 1992: 683). In the words of a *Time* Magazines Inc.

executive, the company decided to merge with Warner Communications to form Time Warner for the following reasons:

A media company that intended to compete successfully in [the international] environment ... would have to propose products and synergies that only a large, versatile organisation could offer. It would have to be able to move its products throughout the emerging global marketplace and amortize its costs over as many distribution networks as possible. Advertisers would be demanding more speed, responsiveness, flexibility and teamwork ... Long-term, we saw the world accommodating perhaps a half-dozen global companies. And we intended to be one of them. Bigness for bigness sake didn't interest us very much ... What we wanted was solid vertical integration, so we could offer synergies that would bring together magazines, publishing ventures, studios, cable channels, and other activities into a coherent operation. (quoted after Turow, 1992: 688-89)

This type of reasoning is behind the growth of companies operating across the globe. Figure 15 lists just a few of them.

**Figure 15. Selected international media conglomerates**

<b>Company</b>	<b>Countries</b>
News International (Murdoch)	Australia, Great Britain, Germany, France, Spain, the Netherlands, Hungary, Russia, USA, Hong Kong, Fiji, Papua New Guinea
Bertelsmann	Germany, France, Spain, Belgium, the Netherlands, Great Britain, Sweden, Norway, Denmark, Italy, Switzerland, Austria, Portugal, Greece, USA, Canada, Columbia, Argentina, Brazil, Mexico, Venezuela, Ecuador, Chile, Japan, Australia, New Zealand
Hachette	France, Monaco, Spain, Italy, Belgium, the Netherlands, Portugal, Great Britain, Germany, Sweden, Japan, Hong Kong, China, Brazil, Canada, USA
Havas	France, Great Britain, Italy, Spain, Belgium, Germany, Czechoslovakia, Russia, Luxembourg, Monaco, USA
Robert Hersant	France, Belgium, Spain, USA
Silvio Berlusconi	Italy, Spain, France, Germany

Source: Hamelink, 1994. In view of the fast-changing situation on world markets, the above list should be taken as merely indicative.

As with media concentration at the national level, so with the same process at the continental and global level, fears have been expressed as to the possibility of a handful of companies controlling most of the media contents available to the world's population. Comparing the concentrated media power of

such conglomerates to “private ministries of information”, Ben Bagdikian of the US has pointed out:

The sad reality is that once permitted to grow almost more powerful than government and overwhelmingly on one side of the political spectrum, large media corporations represent a social and economic problem in every country that has reached that state. ... Private ministries of information are no less troublesome than propagandistic governmental ones. This makes more urgent than ever, the exploration and dissemination of experimental and actual models in various democratic countries that offer the possibility of avoiding the two extremes of, on one hand, total political exploitation of the media by governments, and on the other hand, similar domination of public information by uninhibited powerful corporations that in their own way represent the same social disabilities. (Bagdikian, 1995: 121-122)

Also in Europe, there have been calls for action at the European level to control international media concentrations on the continent:

Without any adequate and countervailing powers European broadcasting will make the big jump from a system based on public monopoly to one where private monopoly is king, destroying in the process all that has made Europe’s broadcasting tradition so distinguished and exceptional. European-level regulation is significant as much for its momentum as for its content. Facilitating the free flow of programmes across European borders and the co-production of audiovisual works cannot of itself create a thriving and competitive industry ... The very visible internationalization of broadcasting, combined with increasing private ownership of television channels in all European countries, seem to be fertile soil for a continued drive towards a shift in regulatory power over broadcasting away from the national towards the international arena. (Hirsch, Petersen, 1992: 55)

This issue has long been a matter of controversy within the European Union. The Green Paper of the Commission of the European Communities, “Pluralism and media concentration in the internal market” (COM(92) 480 final, December 1992 – the study was undertaken at the prompting of the European Parliament motivated by conviction that monopolisation of the media must be prevented), presented the following options regarding possible action by the Union:

1. Take no action at all;
2. Enhance transparency by passing an instrument to achieve greater disclosure of information on media ownership and control in the Community, so as to improve knowledge of the level of media concentration;
3. Adopt a Council of Europe directive or regulation to harmonise laws on media ownership in the Community.

Since, there have been successive rounds of consultations, debates about the possible contents and thrust of a directive, etc., but the upshot is that in March

1997 the European Commission again postponed any decision on a draft directive to limit the ability of major players to dominate the market.

Apart from the protests from companies operating in the field, two considerations seem to have influenced the European Commission's thinking:

- Since most of the giant media groups have so far emerged outside Europe, it is a matter of some importance for similar European groups to be able to withstand international competition and protect the European media market by strictly business methods, seeing that in a liberalised market and with globalisation less and less can be done in this respect by legal and administrative means. In the age of globalisation and the progressive emergence of a global market largely dominated by a few multinational conglomerates, it is unwise to prevent national media from expanding and being able to compete. A policy of stifling the growth of national or European media groups only makes it easier for them to come under the domination of multinational giants. The unspoken assumption here is that it is better to sacrifice a degree of pluralism at the national level in order to ensure the survival of European media groups able to operate on a continental scale and to fight off the expansionary drive of media conglomerates from other parts of the world.
- The new technologies offer such virtually unlimited opportunities for new voices to join the public debate and for individuals, groups and companies to enter the media market that there is no danger of even the largest global media conglomerates stifling freedom of speech and pluralistic communication.

These considerations also seem to predominate at the national level, as western European countries ease or eliminate restrictions on media concentrations. It remains to be seen what the consequences of this tendency will be. In any case, the economic aspect of the media is certainly coming to the fore in the process.

**Appendix**

***International comparison of press aids***

<b>Country</b>	<b>Main type of indirect aid</b>	<b>Direct aid</b>	<b>Main type of direct aid</b>
CH	Purchase tax preferential postal rate advertising market	no	
S	VAT preferential postal rate advertising market	no	
GB	VAT preferential postal rate advertising market	no	
IRL	VAT	no	
S	VAT advertising market	yes	selective: economically weak newspapers distribution
SF	VAT preferential postal rate advertising market	yes	selective: economically weak newspapers distribution
N	VAT preferential postal rate advertising market	yes	selective: economically weak newspapers*
NL	VAT advertising market	yes	selective: economically weak newspapers
F	several taxes preferential postal rate pref. telecomm. rates train transport advertising market	yes	selective: economically weak newspapers French press abroad
I	VAT preferential postal rate advertising market	yes *	selective: party newspapers newspapers of journalistic co-operatives Italian press abroad
A	VAT preferential postal rate advertising market journalism education	yes	general selective: economically weak newspapers

\* very limited

Source: Holtz-Bacha, 1994.

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**Introduction**

In this paper, I propose to:

1. Provide an overview of the issues identified by the Advisory Committee in its opinions under the relevant provisions of the Framework Convention for the Protection of National Minorities (FCNM) on media and by the Committee of Ministers in its resolutions and analyse how these were addressed by the monitoring bodies, including the recommendations made;
2. Provide a critical evaluation of the interpretation made by the monitoring bodies of the FCNM, highlighting the added value/shortcomings of the Framework Convention. This critical evaluation may refer, where relevant, to existing domestic legislation and practices as well as to other relevant international standards in the field of media, including their interpretation by the treaty bodies;
3. Outline some points for further analysis and discussion in those areas which have or have not been reviewed by the monitoring bodies in the field of media.

In order to do this, it could be useful to begin by developing a basic general model of different forms of action designed to promote the goals of the convention.

As one reviews the great multitude of international instruments and documents devoted to the issue of the rights of national minorities in the media field, it is possible to develop a typology of those rights and the ways in which they should be safeguarded and guaranteed.

The overarching principles here are, of course, those of respect for human rights and fundamental freedoms, equality and equal dignity of all individuals, the enjoyment of rights and freedoms without discrimination, and equal protection of the law. These rights are enshrined in, among other documents, the Universal Declaration of Human Rights (Articles 1, 2, 7, 10, 26), the International Covenant on Civil and Political Rights (Articles 2, 14, 20, 26, 27), the European Convention on Human Rights and Articles 20 and 21 of the EU's Charter of Fundamental

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Rights, adopted in 2000. Protocol 12 to the European Convention on Human Rights lays down in Article 1 a general prohibition of discrimination on any grounds, including that of association with a national minority.

To this must be added respect for cultural diversity and cultural rights, as defined in the Declaration on Cultural Diversity of the Council of Europe Committee of Ministers, adopted in 2000, as well as in Article 22 of the Charter of Fundamental Rights, and the Universal Declaration on Cultural Diversity, adopted by the 31<sup>st</sup> Session of UNESCO's General Conference in 2001.

Also very important – as is made clear by Recommendation No. R (97) 21 of the Council of Europe Committee of Ministers on the Media and the Promotion of a Culture of Tolerance – is the existence of a culture of tolerance and understanding between different ethnic, cultural and religious groups in society,

### ***1. Minority media rights: an overview***

Below, we will seek to put together – from declarations of general principles, political texts and treaty provisions as such – as full a list as possible of minority media rights and ways of safeguarding their observance.

The first obvious distinction is between negative and positive goals of such efforts. Negative goals relate to efforts to eliminate social phenomena, which prevent observance and promotion of these principles and exercise of rights. By contrast, positive goals relate to action designed to ensure exercise of minority rights.

#### ***1. Negative goals of promoting minority media rights***

As far as negative goals are concerned, one example is the political declaration adopted by Ministers of Council of Europe member states at the concluding session of the European Conference against Racism (Strasbourg, 11- 13 October 2000) which speaks of the “fight against marginalization and social exclusion”, about “combating racism and racial discrimination”, “elimination of racism, racial discrimination, xenophobia, antisemitism and related intolerance”.

With regard to the media, some elements of negative goals are listed in the Recommendation No. R (97) 21 of the Council of Europe Committee of Ministers on the Media and the Promotion of a Culture of Tolerance, where media enterprises are called upon to:

- avoid derogatory stereotypical depiction of members of cultural, ethnic or religious communities in publications and programme services;
- treat individual behaviour without linking it to a person's membership of such communities where this is irrelevant;
- challenge the assumptions underlying intolerant remarks made by speakers in the course of interviews, reports, discussion programmes, etc;

Another example of this is the commitment undertaken by Commission on Security and Cooperation in Europe (CSCE) countries at the 1991 meeting of

Experts on National Minorities “not to discriminate against anyone based on ... linguistic ... grounds”. In turn, Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers on “Hate speech” states in Principle 1 that

the governments of the member States, public authorities and public institutions at the national, regional and local levels, as well as officials, have a special responsibility to *refrain* from statements, in particular to the media, which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-semitism or other forms of discrimination or hatred based on intolerance. Such statements should be *prohibited and publicly disavowed* whenever they occur. (emphasis added)

Mention could be made in this respect also of the General policy recommendation No. 6 on combating the dissemination of racist, xenophobic and antisemitic material via the Internet (2001).

## **2. Positive goals of promoting minority media rights**

When we turn to efforts serving positive goals, it soon becomes very clear that they can be further subdivided into two groups:

1. those that seek to assist minorities in the enjoyment of their media rights;
2. and those that seek to empower minorities actively to exercise their media rights in a variety of ways.

Assistance in the enjoyment of minority media rights involves action to enable minorities to be served by media in their own languages. This is the main objective of Article 11 of the European Charter for Regional and Minority Languages. In the same article the parties also undertake to guarantee freedom of direct reception, and not to oppose the retransmission, of programme services from neighbouring countries in a language used in identical or similar form to a regional or minority language.

Also very important is the right to proper portrayal in the media, as noted in the Council of Europe Parliamentary Assembly's Recommendation 1277(1995)<sup>1</sup> on migrants, ethnic minorities and the media: “Migrants and ethnic minorities are entitled to be portrayed comprehensively and impartially in the media. This is a pre-condition if all citizens are to take a more rational view of immigration and multi-culturalism and accept persons of immigrant origin or members of ethnic minorities as their equals.”

An important aspect of efforts to assist in the enjoyment of minority media rights is the area of training. For example, Recommendation No. R (97) 21 of the Council of Europe Committee of Ministers on the media and the promotion of a culture of tolerance encourages both schools of journalism and media training institutes, and the media themselves, to introduce specialist courses in their core curricula on such issues as the involvement of the media in multi-ethnic and

multicultural societies; the contribution which the media can make to a better understanding between different ethnic, cultural and religious communities; and on professional standards on tolerance and intolerance. A similar point is made in Recommendation 1277 (1995) of the Council of Europe Parliamentary Assembly on migrants, ethnic minorities and media. According to the recommendation, these and other measures should encourage broadcasters, for example, to:

- make adequate provision for programme services which help promote the integration of all individuals, groups and communities as well as proportionate amounts of airtime for the various ethnic, religious and other communities;
- develop a multicultural approach to programme content;
- promote a multicultural approach in programmes which are specifically geared to children and young people.

Empowerment relates to a variety of forms of access (see below, Part VIII, on the ambiguous use of this term in the Convention) to, and participation in, the work of the media and media-related institutions.

Here, state obligations may, as can be seen in Article 9.3 of the Framework Convention for the Protection of National Minorities (FCNM), be of a dual nature:

- negative, that is, not to hinder or obstruct action by persons belonging to national minorities (in this case: creation and use of the printed media) or;
- positive, that is, a requirement to take affirmative action to enable persons belonging to national minorities to exercise active rights, either where this is within the purview of state authorities (for example, awarding of licences to broadcast, or allocation of frequencies), or where state authorities may assist national minorities (by providing financial assistance,<sup>151</sup> to create printed media, for example, which is something national minorities can otherwise do on their own, without the need to obtain any permits or authorisations).

In general terms, this relates to the requirement, expressed in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities that states “shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs”; as well as to the principle, expressed in the same declaration, and more fully in the OSCE Lund recommendations on the effective participation of national minorities in public life, that persons belonging to minorities have the right to participate in cultural, religious, social, economic and public life (see also Frowein and Blank, 2000).

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151. As explained in the explanatory report, paragraph 61, no express reference has been made to the right of persons belonging to a national minority to seek funds for the establishment of media, “as this right was considered self-evident”.

We may distinguish a number of levels and forms of access and participation: at the level of (i) programming, (ii) workforce, (iii) editorial control and management, (iv) ownership of media, (v) regulation and oversight of the media, (vi) legislation.

Many of these issues are dealt with extensively in the *Guidelines on the use of minority language in the broadcast media*, recently issued by the OSCE High Commissioner on National Minorities. As for other international instruments:

- (i) As regards access at the level of programming, Article 19 of the Central European Initiative Instrument for the Protection of Minority Rights puts states under an obligation to assure that “in case of TV and radio in public ownership ... persons belonging to national minorities have the right of free access to such media including the production of such programmes in their own language”. In the 1991 CSCE Meeting of Experts on National Minorities in Geneva, participating states “confirm the importance of refraining from hindering the production of cultural materials concerning national minorities, including by persons belonging to them.
- (ii) On the question of access by minorities to the media at the level of the workforce, Recommendation 1277 (1995) on migrants, ethnic minorities and media of the Council of Europe Parliamentary Assembly calls for establishing of “teaching and training programmes designed for persons of immigrant origin or belonging to ethnic minorities so as to give them a genuine chance of a career in the various media sectors”.
- (iii) As far as minority access to the media at the editorial and management level is concerned, the 1998 OSCE Oslo recommendations regarding the linguistic rights of national minorities call for “public media editorial boards overseeing the content and orientation of programming should be independent and should include persons belonging to national minorities serving in their independent capacity”.
- (iv) As regards access to media ownership, or structural minority access to the media system, the 1998 OSCE Oslo recommendations regarding the linguistic rights of national minorities state clearly that “Persons belonging to national minorities have the right to establish and maintain their own minority language media”. Accordingly, the recommendations call for state regulation of the broadcast media to be based on non-discriminatory criteria and not to be used to restrict enjoyment of minority rights in this respect.
- (v) With regard to media regulation and oversight, Article 11.3 of the European Charter for Regional and Minority Languages calls on parties to “ensure that the interests of the users of regional and minority languages are represented or taken into account within such bodies ... with responsibility for guaranteeing the freedom and pluralism of the media”.
- (vi) On the question of participation in the legislative process, the general principle is well expressed by the Document of the 1990 Copenhagen Meeting of

the CSCE Conference on the Human Dimension of the CSCE: “(35) The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities”. This point is also raised in a position paper of the European Commission against Racism and Intolerance “All different, all equal: from principle to practice” of March 2000 which argues the need for mechanisms whereby civil society can react to the development of legislation which might have discriminatory effects for groups that are vulnerable to racism or xenophobia, and for the legislator to take into account any conclusions this may lead to. A similar point is to be found in paragraph 33 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

In view of the fact that “States Parties are under the legally binding obligation to ensure the compatibility of their domestic legislation and ... its practical application with the principles enshrined in the FCNM” and on the other hand that “States Parties are under no legally binding obligation to ensure the direct applicability of the substantive provisions of the FCNM” (Hofmann, 2001: 239-240) – what we should be concerned with here is the policies and actions undertaken by the states party to the convention themselves to pursue its objectives and apply them internally.

Thus, if we were to develop a full matrix of the rights of national minorities in the media field, and of the ways in which they should be safeguarded and guaranteed, we might arrive at the position in Figure 1.

**Figure 1. Minority media rights: general overview of state obligations**

Negative goals	Positive goals	
I. “Ban, combat”	II. “Assist”	III. “Empower”
State action to prohibit, disavow, marginalise, counteract all forms of discrimination and inequality	State action to develop public policy and regulation and provide assistance and funds to guarantee the right of minorities to media in their own languages, to access to media from kin and/or neighbouring countries and to a proper representation of their identity, culture, history and interests in media content, as well as action to promote inter-cultural and inter-ethnic dialogue and understanding	State not to hinder, or to take action to ensure minority access to, and participation in, the media at the level of:
		1. Programming
		2. Workforce
		3. Editorial control and management
		4. Ownership of media
		5. Regulation and oversight
		6. Legislation, public policy

## ***II. Minority media rights and the European Convention on Human Rights***

The above composite list of media minority rights goes beyond the provisions of any existing legally binding instrument. Its value, however, should lie precisely in the fact that by bringing all the elements of minority media rights together, it could set a standard – both in interpreting existing documents, and for future use in the development of new documents or provisions.

For example, the European Convention on Human Rights contains no minority rights provision similar to Article 27 of the International Covenant on Civil and Political Rights. At present, the only specific reference to minorities is to be found in Article 14 and in Protocol 12.

Even so, the Convention does protect minority rights. If one brings together Convention rights and the Strasbourg Court's case-law relating to minorities on the one hand, and to freedom of expression and media law issues on the other (though for reasons of space it is only possible here to suggest lines of possible analysis of this kind), it is possible to group and interpret them in line with the classification used in Figure 1.

Nevertheless, it is clear that while a considerable number of minority media rights are covered directly by, or can be inferred from, the European Convention on Human Rights, they are not dealt with fully or systematically in the Convention itself. Hence the need for such instruments as the Framework Convention and for further consideration by the monitoring bodies, primarily the Advisory Committee, on how it can be interpreted and applied to safeguard minority media rights fully and effectively.

### ***I. "Ban, combat"***

Although "national minority" is undefined in ECHR, it is contrary to the Convention to treat "any person, non-governmental organisation or group of individuals" in a discriminatory fashion without reasonable and objective justification (Article 14). This ties in with Article 17, which relates to media law in that it restricts such activities subverting Convention rights, like hate speech, for example.

Discrimination is not limited only to those cases in which a person or group is treated worse than another similar group. It may also be discrimination to treat different groups alike: to treat a minority and a majority alike may amount to discrimination against the minority.

### ***II. "Assist"***

A great number of cases under the ECHR have dealt with linguistic rights. In the context of judicial proceedings, for example, everyone has the right to be informed promptly, in a language he/she understands, of the reasons for arrest

(Article 5.2) and the nature of any criminal charges (Article 6.3.a). There is also a right to a free interpreter if a defendant cannot speak or understand the language used in court (Article 6.3.e).

This can also be inferred from the right of minority children to education in their language (Article 2, Protocol 1). Refusing to approve schoolbooks written in the minority's kin-state might be a breach of the right to freedom of expression. Even when the books might give the kin-state's view of history and culture, the government must show, according to the European Court of Human Rights that the censorship or blocking of the books was done in accordance with law and pursued a legitimate aim, such as the prevention of disorder. It would then be for the government concerned to show that the censorship measures were necessary in a democratic society.

Given that Article 10 includes the right to receive, as well as to impart information, this could, by extension, be interpreted to mean the right of minorities to media in their own language, and since this right is to be enjoyed "regardless of frontiers" – this extends also to trans-frontier communication, for example, to access to media content coming from kin or neighbouring state.

### ***III. "Empower"***

The use of a minority language in private or among members of a minority group is protected by the right to freedom of expression guaranteed under Article 10 – which recognises everyone's right in this area. Given that the Court has found that Article 10 applies to a great variety of content (including opinions and ideas and generally speech whose primary purpose is political) and forms of expression, this enshrines extensive minority rights in this field. Thus, among other things, minorities have a right to publish their own newspapers or use other media, without interference by the state or others. The state must allow the minority group free expression. Moreover, it has a positive obligation to facilitate exercise of freedom of expression. This covers also media policy generally, including such matters as licensing of broadcasting establishments (see below, Part IV).

Another area of (minority) rights concerns the individual right to freedom of religion (Article 9) including the right to manifest that religion, which allows a minority the necessary degree of control over community religious matters. The Court has held that the state must not interfere in the internal affairs of the church. Freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

The Court has also held that where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified state interference. Seen

from this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary state intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection, which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.

Minority groups need to be able to participate effectively in cultural, religious, social, economic and public life (Article 11 and Protocol 1, Article 3). Formal or de facto exclusion from participation in the political processes of the state is contrary to the democratic principles that the Council of Europe espouses. It is the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a state is organised, provided that they do not undermine democracy or human rights. In relation to the media, this implies a right to involvement in the process of media legislation, policy making, regulation and oversight.

Let us note in this context that the European Court of Human Rights has held that if a state takes positive measures to enhance the status of a minority group (for example, with respect to their participation in the democratic process), the majority cannot claim discrimination based on such measures. In general, a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

### ***III. Treatment of minority media rights in the Framework Convention***

The European Commission against Racism and Intolerance states in its position paper "All different, all equal: from principle to practice" that the Framework Convention for the Protection of National Minorities is, along with the European Charter for Regional or Minority Languages, the Convention on the Participation of Foreigners in Public Life at Local Level and the European Convention on Nationality, an instrument which "offers significant safeguards for combating certain forms of racism, racial discrimination, xenophobia and related intolerance".

An OSCE report on "The linguistic rights of persons belonging to national minorities in the OSCE area" recognises the Framework Convention as the main European agreement (apart from the ECHR) on minority linguistic rights, "the first modern pan-European convention aimed specifically at the protection of persons belonging to national minorities".

The report also states that "International standards dealing specifically with access to the media for minorities are somewhat limited in nature. The only





**Figure 3. The Framework Convention on positive goals in promoting minority media rights (1)**

II. "Assist"	Provisions of the Convention
<p>State action to develop public policy and regulation and provide assistance and funds to guarantee right of minorities to media in their own languages, to access to media from kin and/or neighbouring countries and to a proper representation of their identity, culture, history and interests in media content, as well as action to promote inter-cultural and inter-ethnic dialogue and understanding.</p>	<p><b>Article 3.2</b> Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the ... present framework Convention individually as well as in community with others.</p> <p><b>Article 4.2</b> ... adopt, where necessary, adequate measures in order to promote ... full and effective equality between persons belonging to a national minority and those belonging to the majority ...</p> <p><b>Article 5.1</b> ... promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.</p> <p><b>Article 6.1</b> ... encourage a spirit of tolerance and intercultural dialogue and ... promote mutual respect and understanding and co-operation among all persons living on their territory ... in particular in the fields of education, culture and the media.</p> <p><b>Article 9.4</b> In the framework of their legal systems ... adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.</p>

**Figure 4. The Framework Convention on positive goals in promoting minority media rights (2)**

III. "Empower"	General provisions	Specific provisions
<p>State not to hinder or to take action to ensure access and participation in the media at the level of:</p> <ul style="list-style-type: none"> <li>– Programming</li> <li>– Workforce</li> <li>– Editorial control and management</li> <li>– Ownership of media</li> </ul>	<p><b>Article 7</b> ensure respect ... to ... freedom of expression, and freedom of thought, conscience and religion.</p> <p><b>Article 9.1</b> recognise that the right to freedom of expression ... includes freedom to hold opinions and to receive and impart information and ideas in the minority language ...</p> <p><b>Article 9.4</b> In the framework of their legal systems ... facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.</p>	<p><b>Article 9.1</b> ... recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language.</p> <p><b>Article 9.3</b> ... not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure ... that persons belonging to national minorities are granted the possibility of creating and using their own media.</p>
<ul style="list-style-type: none"> <li>– Regulation and oversight</li> <li>– Legislation, public policy</li> </ul>		

**IV. Minority media rights and media autonomy and editorial independence**

In the context of the foregoing, a set of issues concerning media autonomy and editorial independence requires some consideration. Figures 2-4 suggest the need for active and possibly quite interventionist media policy measures to promote enjoyment and exercise of media minority rights. Should this be taken to mean an infringement of media freedom and autonomy, or restrictions on freedom of expression?

One approach is represented by Mendel (1998). In his opinion, international instruments on human rights put states and governments under an obligation to prohibit discrimination in the media and not to apply discrimination in its own policies vis-à-vis the media. Governments may also, Mendel adds, wish

to undertake affirmative action to enhance minority access to the media, for example by providing funding for minorities programme production.

However, Mendel clearly differentiates between public and private media as regards obligations with respect to minorities.

Public media, "because of their link to the state, ... are directly bound by international guarantees of human rights, including obviously those relating to freedom of expression and minorities". Another reason for their special obligations in this respect is that they play a particularly important role in ensuring pluralism, which is key to minorities' access to the media.

As a result, Mendel believes, public broadcasters are under a general obligation to assist minorities in a number of ways, including through the promotion of a culture of tolerance, ensuring appropriate minorities representation in staffing, broadcasting programmes by and about minority communities and providing appropriate visibility to minorities. It is important, in his view, for these obligations to be provided for only at a general level in order not to infringe on the editorial independence of public broadcasters, as defined, for example, by Recommendation No. R(96)10 of the Council of Europe Committee of Ministers on the guarantee of the independence of public service broadcasting.

As for commercial broadcasters, Mendel believes that "it is reasonably clear that states may not use licensing procedures to require private broadcasters to promote a culture of tolerance or otherwise impose content controls of this sort on them". In his view, self-regulation and professional ethics are a far better way of encouraging private broadcasters to promote tolerance and generally ensure that the media are a positive force for minority rights.

Mendel is also of the opinion that there is no need for interference in the print media sector for the purpose of promoting minority media rights.

It is clear from Advisory Committee opinions (see below) that it is of a different view, for example as regards the use of licensing to impose what Mendel, perhaps unjustifiably, calls "content controls" on broadcasters, requiring them to "promote a culture of tolerance".

In view of this difference of views, we need to consider the legitimacy of state measures to promote media minority rights.

As noted by Voorhooff (1998), the freedom of the media is not an absolute one. Article 10 of the European Convention of Human Rights contains a restrictive list of the interests which it is necessary to safeguard in a democratic society, also by interfering with freedom of speech when it is used to endanger those interests. Any limitation of, or interference with, such freedom must satisfy each of the following conditions:

- it must be provided for by law (which must be narrowly interpreted);

- it must have a legitimate purpose;
- it must be necessary in a democratic society, that is, it must respond to a pressing social need and be proportionate to the legitimate purpose it pursues.

Voorhoof (1998: 42) explains that Article 10 implies a duty, an obligation for public authorities to take measures to stimulate freedom of expression and information. This “positive action” approach, says Voorhoof, was clearly reflected in the final report of the Sevilla Colloquium of 1985 on the European Convention on Human Rights, in which it was stated:

Given the socio-economic conditions of our society, which do not favour equality and in which organized groups hold important portions of power, it is the State’s responsibility to ensure the effectiveness of the implementation of freedom of expression and information in practice.

The notion “necessary in a democratic society”, as such, is not only fundamental in the supervision of the duty of public authorities not to damage or interfere in the exercise of the right to freedom of expression and information, but also implies the obligation of State Parties *to ensure plurality and to correct inequalities*. (emphasis added)

A similar approach is adopted in a report “Media diversity in Europe” (2002), where it is argued that Article 10 of the European Convention on Human Rights “is of crucial importance on the question of media diversity”.

The underlying idea behind the understanding of freedom of expression is that a free system of this kind is an essential prerequisite for a functioning democracy. It follows that this concept of freedom of the media also guarantees media diversity. The state is moreover obliged to take positive regulatory measures ensuring the widest possible range of balanced private media, if for practical reasons such variety is not in fact achieved. The concept of the purpose-serving function of the media as a means of promoting freedom of information has been taken up and applied by the Court in connection with 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, it stressed in the judgment concerning the Austrian broadcasting monopoly that the preservation of a plural, culturally diverse broadcasting offer was undoubtedly an aim that could justify restrictions to broadcasters’ freedoms. Furthermore, such pluralism can be achieved by other means than a public service broadcasting monopoly, for example, through a dual broadcasting system.

The need to guarantee media pluralism in the context of Article 10 of the Convention has been underlined by the European Court of Human Rights in other judgments. For example, in the Jersild case, it emphasised the importance of the audiovisual media for a democratic society. In the Piermont judgment of 27.4.19957, the Court likewise referred to the media’s important role in a democratic society and the related need for pluralism, tolerance and openness.

The report concludes:

It can therefore be seen that the European Court of Human Rights has recently been giving increasing weight to the social, cultural, political and democratic role of the media, although this is done in the context of the restrictions under Article 10.2. It is also worth noting that the European Union follows this case law. The European Court of Justice considers that, in the light of Article 10.2 of the Convention, there is a compelling public interest in the maintenance of a pluralistic radio and television system, which justifies restrictions on fundamental freedoms.

Article 10 of the Convention accordingly not only enshrines an individual right to media freedom, but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy.

In short, then, we may agree with Voorhoof (see also Hamelink, 1999) that while Article 10 is a guarantee against interference by public authorities in the field of freedom of expression and information, the article also supports and even requires a positive action approach to achieve pluralism in the media field, or to limit the effects of market pressure or monopolistic tendencies. State actions and regulations in order to achieve these goals should, however, stay within the framework of Article 10.2.

With regard directly to the use of licensing of private broadcasting stations to promote diversity, the Court has held that “the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments” (*Informationsverein Lentia and Others v. Austria*). In another case, it stated that “a licensing system not respecting the requirements of pluralism, tolerance and broadmindedness without which there is no democratic society would thereby infringe Article 10, paragraph 1 of the Convention” (*Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*). This can clearly apply to minority broadcasting, as well as to any other.

As for the print media, there would be no justification for extending the positive obligation of the state to promote minority media rights to the area of their content, but states certainly may assist minorities, for example, by providing financial assistance, in establishing their own publications.

#### ***V. Opinions of the Advisory Committee***

Out of the 22 Advisory Committee opinions available for analysis (see *Compilation of Advisory Committee Public Opinions Article by Article*, 2003), three (from Liechtenstein, Malta and San Marino) raise no concerns regarding the

media. The remaining ones (from Albania, Armenia, Austria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Moldova, Norway, Romania, Russian Federation, Slovakia, United Kingdom, Ukraine) do raise a variety of issues concerning minority media rights.

These opinions have been analysed in order to establish the frequency with which the three avenues of efforts to safeguard minority media rights identified in Figure 1 appear in them. In the analysis, references to media issues were coded for identification with one of the categories or sub-categories. Due to the imprecision of some terms and other difficulties of coding, the result should be treated only as a very rough indication of the order of magnitude of the appearance of different issues and areas of minority media rights in the Advisory Committee opinions.

The results are shown in Figure 5.

**Figure 5. Breakdown of issues concerning minority media rights in Advisory Committee opinions**

Category	No. of cases	%
I	44	16.2
II	170	62.5
III	58	21.3
<b>TOTAL</b>	<b>272</b>	<b>100</b>
<b>III includes:</b>		
III	19	7
<b>Sub-categories of III</b>		
III.1	8	20.5
III.2	1	2.5
III.3	8	20.5
III.4	11	28.2
III.5	1	2.5
III.6	10	25.6

While these results can only be treated as indicative, they are very interesting nonetheless. Advisory Committee opinions are largely reactive and not proactive or prescriptive (see below, Section VIII, for a comment on this), and so their content is shaped by the state report, information from a variety of other sources, and generally the situation prevailing in the particular country, ascertained during a visit to that country by members of the Advisory Committee. Still, it must be encouraging to find that category I issues (references to discrimination against minorities and to measures which should be taken to put an end to it) account for the smallest number and proportion of all issues raised in the opinions.

Well over half the issues represent category II – various forms of state action to develop public policy and regulation and provide assistance and funds to guarantee the right of minorities to media in their own languages, to access to media from kin and/or neighbouring countries and a proper representation of their identity, culture, history and interests in media content, as well as to promote inter-cultural and inter-ethnic dialogue and understanding (some concrete forms in which this is, or can be, done are examined in Section VII below).

Category III accounts for over 20% of references, with one third of the total devoted to general issues of minority active access to, and participation in, the media, and two thirds – to specific forms of access and participation. Among them, minority ownership of media (III.4) is mentioned most often, followed by minority involvement in legislation and development and execution of public policy to promote minority active access to, and participation in the media (III.6), minority involvement in programme production (in both public and private broadcast media) (III.1), and minority participation in editorial control and management bodies – primarily of state or public broadcast media (III.3).

It is hard to establish to what extent this order of preference is influenced by the framing and the relative weight attached to these various forms by the Convention itself. The fact that III.6 – which is not expressly covered by any paragraph of the Convention – is still given high prominence among sub-categories of III, could be seen to testify to the fact that the Advisory Committee is not confined in appraising the situation in particular countries to the pattern set by the provisions of the Convention itself. The same is true of the relatively high prominence of III.1 and III.3.

On the other hand, the fact that seven out of 10 mentions of III.6 relate to just one country (Armenia) and the remaining three to three different countries (Albania, Austria and Norway) must be seen as indicating that the Advisory Committee reacts to the situation in particular countries and is guided by it in its assessment. Otherwise, if its approach were prescriptive and if it sought to promote the full package of measures to promote media minority rights, there would be at least one mention of III.6 in each opinion (more on this in Section VIII).

## ***VI. Resolutions of the Committee of Ministers***

The Committee of Ministers has adopted 17 resolutions with regard to the 19 countries concerning which the Advisory Committee raised media-related issues in its Opinions.

Due to the fact that these resolutions are brief and deal with particular issues in a very general way, few of them make direct reference to the media as such. Where the media are mentioned, this is done with the use of general terms.

The result is that the resolutions provide little concrete guidance on how minority media rights are to be promoted in each country and usually the



matter is not directly addressed at all. A side effect is that, as shown in Figure 6, quantitative content analysis cannot be used to good effect with regard to resolutions adopted by the Committee of Ministers.

**Figure 6. Direct references to media-related issues in resolutions of the Committee of Ministers**

Country	General	I	II	III	III.1	III.2	III.3	III.4	III.5	III.6
Armenia			2		1			1		
Croatia										
Cyprus										
Czech Rep.										
Denmark										
Estonia										
Finland	2									
Germany			2							
Hungary										
Italy										
Moldova		1	1	1						
Norway		1								
Romania	1									
Russia										
Slovakia										
UK										
Ukraine										

There is thus a clear imbalance between the multitude of media-related issues raised in Advisory Committee opinions and the paucity of references to such issues in the resolutions of the Committee of Ministers. The media are not mentioned directly in 11 out of the 17 resolutions available for analysis with reference to countries where media-related issues have been found to exist.

**VII. Particular problem areas raised in Advisory Committee opinions and Committee of Ministers resolutions**

**1. Media representation of national minorities and the promotion of a spirit of tolerance and intercultural dialogue**

This matter appears in many Advisory Committee opinions, usually in one of two ways: either in the context of media content which offers negative portrayal of a

given minority,<sup>152</sup> or in calls for action to ensure presence of persons belonging to national minorities in the media.<sup>153</sup> The Advisory Committee rightly attaches high importance to this issue and in its opinions points to various ways of promoting this goal, including:

- training and sensitisation of journalists and media professionals as a way of increasing the level and quality of coverage of minority issues in the media (opinion on Albania);<sup>154</sup>
- need to avoid coverage of immigration and asylum issues which would contribute to feelings of hostility and rejection against immigrants, refugees and asylum seekers (opinion on Austria);
- broadening possibilities of access to and presence in the media by persons belonging to national minorities (opinion on Armenia);
- encouragement of a spirit of tolerance and intercultural dialogue, such as through the organisation of a cultural festival (opinion on Cyprus);
- need to avoid mention that a suspect in a criminal case belongs to a particular minority, unless this is reasonably necessary to the understanding of a case (opinion on Germany), or otherwise this may reinforce the prevalent clichés (opinion on Italy).

Thus, the frequency with which this issue appears in the AC Opinions and the highly specific and concrete way of dealing with it can offer states party to the Convention a good indication of deficiencies and shortcomings in this area, as well as of steps and measures necessary to remove them.

## ***2. Access of persons belonging to national minorities to the media***

This term is ambiguous and is used in Advisory Committee opinions and Committee of Ministers resolutions in a variety of ways.

In the opinion on Norway, paragraph 45 reads in part: “Finally, the Advisory Committee notes that the general public, as far as it does not access minority media, receives only very limited information through other media about cultural life of national minorities and events and problems affecting them”.

Here “access” clearly means “use”, in short – passive access: there can be no suggestion here of any active involvement, or participation in, the operation of those media.

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152. For example, the opinion on Albania says in paragraph 37: “The Advisory Committee has ... received information indicating that persons belonging to the Roma minority face a certain level of prejudice in their daily lives ... and that examples exist of prejudice and negative stereotyping in the media”.

153. For example, the opinion on Croatia says in paragraph 72: “The Advisory Committee also calls for further measures in the field of media, aimed at fair portrayal of persons belonging to national minorities and their improved access to various media”.

154. Particular states are mentioned here simply by way of example.

The matter is less clear in paragraph 55 of the opinion on Moldova, which reads: “The Advisory Committee appreciates the efforts made by the Moldovan authorities at the legislative level and in terms of implementing policies in order to guarantee freedom of expression and access to the media for persons belonging to national minorities. In this respect the Advisory Committee welcomes the recent initiative of the Moldovan public service television to produce and broadcast, in addition to the existing cultural programmes, a special programme aimed at cultivating an interethnic relations culture, based on tolerance, understanding and acceptance of differences and respect for diversity”.

Here “access” presumably means active access: production of that programme by representatives of minorities themselves.

Nevertheless, the notion of access is very prominent in both types of documents. As noted above, active access can take many forms, including also the presence of representatives of national minorities on the management bodies of public service broadcasters (as in Albania; see opinion on Albania, paragraph 50); or indeed establishment and operation of media outlets by persons belonging to national minorities (opinion on Albania, paragraph 48).

The Advisory Committee could reflect on the precise meaning of “access”, grade different forms of access in terms of the benefits they bring to minorities and seek more precision in its Opinions and advice to particular countries in this area (more on this in Section VIII).

### **3. The regulatory framework**

The question of the regulatory framework in states party to the Framework Convention is of crucial significance, given that the Convention contains mostly programme-type provisions setting out objectives that states must fulfil, that is, implies state obligations, not individual or collective rights, and leaves the states a measure of discretion in the implementation of the objectives (see Phillips, 2002).

There are frequent references to legislation and regulation in Advisory Committee opinions.

States may be called upon to:

- adopt new legislation (for example, in Estonia, where “there are no specific legislative provisions on public service broadcasting for persons belonging to national minorities”, so the opinion recommends that “the introduction of additional legislative guarantees in this sphere be considered”);
- draft legislation on which work is proceeding in such a way as to guarantee exercise of minority rights (see, for example, reports on Armenia or Albania);
- reconsider, amend or rescind existing legislation which is either harmful in terms of the goals of the Framework Convention (see, for example,

the opinion on Slovakia) or inadequate from this point of view (see, for example, the opinions on Estonia or Ukraine);

- ensure that existing legislation is not interpreted or implemented in a way that would result in limitations on the rights of persons belonging to national minorities (see, for example, the opinion on Moldova).

The Advisory Committee also on occasion expresses satisfaction with, or welcomes the adoption of, statutes which in its view are conducive to the exercise of minority media rights (see, for example, the opinion on Croatia).

In this area, then, the Advisory Committee's work is very detailed and specific and by the same token clearly helpful in providing states party to the Convention with extensive indications concerning their regulatory frameworks.

#### ***4. The positive obligations of the state in the field of sound radio and television broadcasting and the principle of independence and autonomy of the media***

In this regard, the Advisory Committee calls on governments to take appropriate steps to ensure that the schedule and time allotted to minorities in the programming of public stations will be commensurate with their objective requirements. It has also repeatedly called on governments to apply licensing procedures with a view to putting commercial broadcasters under an obligation to serve minorities in their programming.

Examples of this abound, as practically every opinion deals with questions of broadcasting and state obligations in this respect.

One typical case in point could be the opinion on Albania. The Advisory Committee notes that while there are a very limited number of programmes broadcast for national minorities, "there is virtually no broadcasting for Roma, Aromanian/Vlach and Montenegrin minorities. Furthermore, there are no radio stations or television stations catering only for national minorities" (paragraph 47). Based on this, the Advisory Committee suggests that:

- with regard to the public broadcaster – "the Steering Council of Albanian Radio Television, on which there is a representative of national minorities, should keep under review the ratio of programmes for persons belonging to national minorities, as well as the time and timing of these programmes, in order to guarantee appropriate coverage for the respective national minorities" (paragraph 49);
- with regard to commercial broadcasters – "further support for [programming in minority languages] should be provided by the relevant authorities, for example by requiring licensees to allocate a certain amount of time to broadcasting in minority languages" (paragraph 49).

The Advisory Committee also "welcomes the steps taken by local authorities, together with the relevant decisions of the Steering Council of Albanian Radio

Television, to allow the installation of TV amplifiers permitting the Greek national minority to watch Greek television, including in Tirana. The Advisory Committee also recognises that the Macedonian and Montenegrin national minorities can also receive certain radio and television programmes from neighbouring countries without special amplifiers". Nevertheless, it "considers that availability of such programmes from neighbouring states does not obviate the necessity for ensuring programming on domestic issues concerning national minorities and programming in minority languages" (paragraph 50).

The same approach is adopted in many other opinions. States are repeatedly called upon to take appropriate steps to increase broadcasting time made available in the public media for persons belonging to national minorities (cf. opinions on Armenia, Austria, the Czech Republic, Estonia, Finland, Germany, Hungary, Italy, etc.), or to "enhance access for persons belonging to national minorities" to public service media (opinion on Cyprus). Opinions do not usually describe the method by which this should happen, calling in many cases for the situation to be "reviewed", or the authorities should "take appropriate steps".

As for private broadcast media, licensing is often referred to as an instrument to achieve the desired effect as concerns broadcasting in minority languages in the appropriate volume. In the opinion on Germany, the Advisory Committee notes (paragraph 45) that it "is aware of the constitutional and legal limits that prevent the Federal authorities from directly financing programmes specially for national minorities". It notes, however, that the Sorbian People's Foundation can support Sorbian media, "which means that the Federal authorities and the Länder concerned also [can] contribute directly through their general subsidies to the Foundation. The Advisory Committee considers that similar solutions are worth examining for the other national minorities".

Thus, the Advisory Committee often encourages states and governments to adopt a very active approach with regard to the media.

### ***5. Minority programming and numerically small national minorities***

In its opinions the Advisory Council often points out that numerically small national minorities (often the Roma) are under-served – or not served at all – by broadcast media, even when they provide programming in the languages of larger minorities. The Advisory Committee is scrupulous in listing the numerically small minorities and the areas in which they may be concentrated, and in calling for action to redress the situation.

### ***6. Relations between minority and majority media and access of the general public to information on national minorities***

One example of the Advisory Committee's approach to this issue is provided by its opinion on Norway. It notes (in paragraph 45) "that the general public, as far as it does not access minority media, receives only very limited information

through other media about cultural life of national minorities and events and problems affecting them”.

This situation, which is repeated also in other countries, leads the Advisory Council to call in many of its opinions for more extensive coverage of minority issues in mainstream media, and for action to boost the minority media.

## **VIII. Conclusions**

### **1. Scope of the Convention**

As can be seen from Figures 2-4, the Framework Convention deals comprehensively with almost all media minority rights, except for some specific areas of positive goals.

As regards “assistance”, the Framework Convention involves recognition of the right “to receive and impart information and ideas ... regardless of frontiers” (Article 9.1), but does not otherwise directly address access by persons belonging to national minorities to broadcasts from other states in the minority language. Access to the usually more developed and fuller programming available from the kin state could be especially important for the maintenance and development of identity for such persons. In any event, consistent with the principle of non-discrimination, such access should not be denied based solely upon the language of the communication, a principle also reflected in the OSCE Oslo recommendations.

This right could, however, be inferred from Article 17.1 of the Framework Convention (see also Paragraph 32.4 of the OSCE Copenhagen document) which requires states to respect the rights of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers.

As far as “empowerment” is concerned, the right to “create and use their own media” covers sub-categories 1-4 in category III (Figure 1) – but primarily as far as media owned and operated by the minorities themselves are concerned. The concept, however, leaves out items 5 and 6, which are important in terms of minority participation in public life, and makes no reference at all to public or state media and active access by persons belonging to national minorities at levels specified under items 1-3.

Also the OSCE Oslo recommendations suggest that minorities should have access to broadcast time on publicly funded media and not merely the right to establish private stations. At the same time, the recommendations recognise that access must be commensurate with the size and concentration of the group. As noted above, other international documents also highlight other forms of minority access to, and participation in, other forms of public media editorial control and management, as well as more generally to media regulation and oversight, or legislation and public policy.

This is an area for improvement that the Advisory Committee might usefully give consideration to in its interpretation of the Framework Convention and monitoring of its observance. Advisory Committee reports do occasionally make reference to these aspects of minority media access and participation already today, but a more consistent and systematic approach could more successfully promote media empowerment of minorities.

## ***2. Standards set by the Convention***

As already noted above, the notion of “access to the media” (see, for example, Article 9.1) is ambiguous, both in the Convention itself, and in Advisory Committee opinions. It could well be understood as the ability of persons belonging to a minority to use the media because of availability of content in that minority’s language and dealing with the concerns of that minority. Here the obligation of the state is to make sure that such content is available, but this can be done practically without involving the minority itself. It could also be understood as minority empowerment – the ability of minorities to be actively involved in the work of the mainstream media in a variety of capacities, or to own and operate their own minority media. Finally, this could (but in reality should) also involve access to decision making and the work of bodies involved in legislation, regulation and oversight of the media. Here, the obligations of the state involved in ensuring exercise of active access rights are much more extensive.

The use of this concept should be careful and precise, so as to indicate clearly what form of access is meant in each case. There is no question that “active access” and other active rights are much more satisfying and preferable as a way of exercising minority media rights than “passive access”. Yet this distinction is not always clear in the Convention itself, or in Advisory Committee reports.

This is a matter of crucial importance in terms of the standards set by the Framework Convention. Promotion of minority media rights would be more effective and produce better results if the various types of category III measures providing for media empowerment of minorities were given more prominence and were more actively pursued by the Convention’s monitoring bodies.

## ***3. The Advisory Committee’s approach and methodology***

We have already noted that Advisory Committee opinions are largely reactive and not proactive or prescriptive, as their content is shaped by the state report, information from a variety of other sources, and generally the situation prevailing in the particular country, ascertained during a visit to that country by members of the Advisory Committee.

This springs in part from the nature and structure of state reports, as laid down in the outline for reports to be submitted pursuant to Article 25 paragraph 1 of the Framework Convention for the Protection of National Minorities (adopted by the Committee of Ministers on 30 September 1998 at the 642nd meeting of the

Ministers' deputies; ACFC/INF(1998)001). According to this, states are to go article by article and provide various categories of information (narrative, legal, state infrastructure, policy, factual, etc.) on measures taken in particular areas. Under Resolution (97) 10 of the Council of Europe Committee of Ministers, the Advisory Committee then "considers the state reports" and subsequently "transmits its opinions to the Committee of Ministers". The Committee of Ministers then adopts "conclusions concerning the adequacy of the measures taken by the Contracting Party concerned to give effect to the principles of the framework Convention" and "may also adopt recommendations in respect of the Party concerned, and set a time-limit for the submission of information on their implementation".

The results are as illustrated in Figure 5. Some goals and forms of promoting minority media rights are mentioned rarely, if at all. Since states are not asked directly whether they recognise those goals or engage in those forms of promoting minority media rights, they fail to provide information on what they may be doing, and – in any case – are not required to reflect on the usefulness and effects of pursuing certain goals or taking some kinds of measures.

The reasons for this state of affairs are to be found in Article 26.1 of the Framework Convention which defines the role of the Advisory Committee as assisting the Committee of Ministers in "evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention". This is a limited and passive role, which leads the Advisory Committee to focus on fact-finding and analysis of measures taken by parties.

This deprives the Framework Convention of active institutional support within the Council of Europe itself (Phillips, 2002, notes that NGOs have played a major role in publicising and promoting the Framework Convention) so far as promotion of its goals is concerned. This narrowly construed role of the Advisory Committee also restricts opportunities for a more active and creative role of developing guidelines and providing advice on practical ways of safeguarding minority media rights. For example, outline state reports could, with regard to Article 9, serve as a checklist of all the major forms of media minority rights and ways of putting them to practical effect, with states party to the convention requested to indicate which of these forms are pursued in the given country and by means of what measures.

In other words, the role of the Advisory Committee could be to advise not only the Committee of Ministers, but also potentially to advise states party to the convention on what they need to do fully to meet their commitments under the convention.

#### ***4. Resolutions of the Committee of Ministers***

As we have seen, there is a clear imbalance between the multitude of media-related issues raised in Advisory Committee opinions and the paucity of references to such issues in the resolutions of the Committee of Ministers. The media



are not mentioned directly in 11 out of the 17 resolutions available for analysis with reference to countries where media-related issues have been found to exist.

As a result, these resolutions provide little concrete guidance on how minority media rights are to be promoted in each country and usually the matter is not directly addressed at all.

This circumspect manner of dealing with media issues cannot be taken as an indication of the relative (un)importance of the media in the promotion of minority rights. Of course, the country concerned is usually invited to take appropriate account of the various comments in the opinion of the Advisory Committee and that, though in an indirect manner, does to some extent serve to restore balance.

However, this may be another indication that institutional support for the Framework Convention could be more active and determined.

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**Part V. Revision of  
the European Convention  
on Transfrontier Television**





# Modernising the European Convention on Transfrontier Television<sup>155</sup>

## **Foreword**

These remarks are written in a personal capacity, drawing as much as possible on the whole review of the European Convention on Transfrontier Television (ECTT) and of the Television Without Frontiers (TWF) directive. They are meant to assist the Standing Committee in its consideration of these issues. An effort has been made here both to report different points of view and to formulate clear recommendations – if only to stimulate debate.

This discussion document draws on the debate in the Standing Committee concerning its two earlier versions, as well as on additional analysis of the issues under consideration, assisted by contributions from other delegates and whatever documentation on the subject could be found.

## **Introduction**

To begin with, we need to make certain basic distinctions regarding the regulation of mass communications, especially when speaking about the scope of the Convention. Any attempt to create or change the legal and regulatory framework must begin with the question of the justification, rationale (need) for, and desirability of regulation – what purposes this will serve, what objectives is regulation to achieve, what are the arguments for and against introducing regulation. Naturally, the question concerning the legal basis of regulation also requires consideration. Once that is established, the decision must be taken whether only negative (guaranteeing “freedom from” restraint and intended to prevent harm), or also positive (providing “freedom for”, intended to promote some goal of public policy) regulation should be pursued.

Choice must also be made from a range of types and methods of regulation, that is, whether it should be minimal, market-opening, industry-based, market-correcting, market-shaping or market-overruling regulation.<sup>156</sup> Traditionally, regulation of broadcasting has represented the last category, but technological and market change is seen by some as militating in favour of a change of approach.

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155. Final version of the discussion document (T-TT(2005)003) prepared in 2005 for the Standing Committee On Transfrontier Television by Karol Jakubowicz as the delegate of Poland on questions concerning the scope of the convention, jurisdiction, freedom of reception and retransmission, the duties of the parties of the convention, advertising directed at a single party and the abuse of rights granted by the convention.

156. See A. Thomas, *Regulation of broadcasting in the digital age*, DCMS, London, 1999. [www.culture.gov.uk](http://www.culture.gov.uk).

An equally important issue is that of feasibility and practicability of regulation. It would appear that restraint with regard to the regulation of content distributed by some new technologies derives not so much from its undesirability (though this depends also on other issues, see below), but from its impracticability at the present stage.

Yet another question is that of the feasibility of fully effective regulation. Pursuit of this goal could, in some cases, result in provisions that are so complicated, and at the same time so intrusive, as to be unacceptable. They may also be so detailed as to be inflexible and potentially useless, when new circumstances arise. Accordingly, it is sometimes decided to forgo the quest for such regulation and to remain content with something less effective, or to rely on other methods, such as self- or co-regulation.

These remarks apply to all issues under discussion here, but are meant primarily to inform consideration of the scope of the Convention. We must be clear whether extension of the Convention to content distributed by the new technologies is undesirable, or merely impracticable at the present time. If the first is true, we should give up our search for appropriate regulatory tools in this field. If the second is true, we should press on.

The fact that the latter approach is gaining support is clearly indicated by the debate concerning the revision of the Television Without Frontiers directive within the European Union, and especially in the Contact Committee and focus groups.

As noted by Commissioner Viviane Reding in a recent speech ("Business without frontiers: Europe's new broadcasting landscape", European Media Leaders Summit 2004, London, 7 December 2004):

In the expert groups there appeared to be consensus on the fact that the present framework needs to evolve to respond to the massive changes that have taken place in terms of technological and market developments. The experts came to the conclusion that graduated regulation would be the only possible answer to differentiated regulatory needs. Regulation needs to be sufficiently flexible to be future-proof, but sufficiently clear not to create uncertainty as to which services are covered.

This shows a striking resemblance to ideas expressed during the review of the European Convention on Transfrontier Television, launched by the Standing Committee in April 2001 as a contribution to the European debate. Already in December 2001 we discussed the question whether in the future we should have two conventions (including a television and a "multimedia" convention), or one, technologically-neutral instrument.

Today, the review of both the European Convention on Transfrontier Television and the Television Without Frontiers directive is pointing more and more clearly to the need to develop a new model of content regulation in relation to all electronic media.

**Table 1: Old and new model of content regulation**

Old model	New model
Content regulation of broadcasting	Horizontal, technologically-neutral, graduated regulation of “regulatable” content, <sup>157</sup> involving – where needed – self- and co-regulation

Thus, there is gathering momentum in favour of extending the scope of the convention. This requires us to give serious consideration to how this should be achieved.

### **1. Scope/field of application (Articles 1, 2, 3)**

#### *1.1. Field of application today: mixed signals*

According to Article 1, “This Convention is concerned with *programme services embodied in transmissions*”.<sup>158</sup> This is then developed in Article 3:

This Convention shall apply to any programme service transmitted or retransmitted by entities or by technical means within the jurisdiction of a Party, whether by cable, terrestrial transmitter or satellite, and which can be received, directly or indirectly, in one or more other Parties.

The definitions of “transmission”, “broadcaster” and “programme service” in Article 2 reinforce the view that the scope of the convention is confined to “traditional” television, delivered in a “traditional” way (point-to-multipoint radio communications).

The definition of “transmission” explicitly excludes “communication services operating on individual demand”. The explanatory report points out in paragraph 83 that by so doing, “the authors of the Convention wished to exclude services which *cannot be regarded as being designed for reception by the general public*, such as video-on-demand, and interactive services like video conferencing, videotext, telefacsimile services, electronic data banks and similar communication services”. This is further clarified by paragraph 84:

this exclusion was not intended to apply to services such as subscription television services (that is, *a service intended for reception by the general public where the users pay a specific fee in return for the service offered*), pay-per-view or near video-on-demand services, or teletext services. On the other hand, closed user-group systems, such as encrypted programme services *designed specifically and exclusively for members of a given profession* (for example the medical

157. “Regulatable content” is a neologism, used here for want of a better term, by analogy to “licensable service” (see below).

158. Any emphases in quotations from the convention or the explanatory report are provided by the author.



profession) are not within the scope of the notion of “transmission” in so far as they are not intended for reception by the general public.

Thus, the impression is created of technology-bound regulation, pertaining solely to traditional television (that is, public and not private communication), delivered in a traditional way.

However, the following sentence from paragraph 82 should be noted in this context: “By opting for the term ‘transmission’, the authors thus wished to embrace *the whole range of technical means* employed to bring television programme services to the public”. The explanatory report seems to go beyond the letter of the convention itself, since Article 2 (a) defines “transmission” as “the initial emission [only – KJ] by terrestrial transmitter, by cable, or by satellite of whatever nature”. Thus, the technical means of transmission are exhaustively enumerated, leaving no room for “the whole range” of other means that could be applied. However, Article 3 does use the term “technical means within the jurisdiction of a Party”. This broader approach is supported also by paragraph 115 which says that “all forms of overspill, whether unavoidable or intentional and *whatever the technical means of transmission involved* (terrestrial transmitter, satellite, cable, etc.), are taken into account for the purpose of determining the applicability of the Convention”.

This, in turn, suggests a technology-neutral approach to the regulation of “traditional” television content which, it could be surmised, should be subject to regulation regardless of the technical means used to deliver it to the public.

Of course, the explanatory report does not have the binding force of the convention itself. However, one should also note the difference between the definitions of “transmission” and “retransmission”. In the first case, as noted above, the means of delivery are exhaustively enumerated. In the second case, the situation is different: “Retransmission signifies the fact of receiving and simultaneously transmitting, *irrespective of the technical means employed*”.

**Conclusion:** Together, paragraphs 83 and 115 of the explanatory report and the definition of “retransmission” suggest that least a conceptual effort has already been made to adopt a technology-neutral approach and extend the scope of the convention to technical means of delivery other than traditional broadcasting – if only with regard to “retransmission” and “overspill”. Still, that can at best be regarded as only a modest and imperfect beginning in this regard.

### 1.2. Distinguishing “Broadcasting” from “Non-Broadcasting”

The search for a model of “horizontal, technologically-neutral, graduated regulation of “regulatable” content” requires us, first of all, to consider the modes of distribution of such content (see sections 1.2.1, 1.2.2, 1.2.3) and then to decide what types of content, displaying what features, should be subject to regulation (see section 1.2.4).

*1.2.1. Distinction Between Broadcasting and Information Society Services:  
How Useful?*

In contributing papers from Portugal and Spain (see document T-TT (2004) 3 of 23 March 2004) mention is made of the need for a new definition of television. Also the Austrian delegate recalled in his contribution an excerpt from an EBU paper that “technological developments and convergence are progressively calling into question the distinction made between broadcasting and new interactive audiovisual services founded on a technical criterion”.

It is indeed becoming very clear that the traditional distinction between broadcasting and information society services fails to cover all possible in-between cases, so its usefulness as a guide to the type of regulation to be applied is diminishing.

This is illustrated by the concepts of “media services” and “teleservices” introduced in German legislation.

The German Interstate Agreement on Media Services (as amended by the 4th Interstate Agreement amending the Interstate Agreement on Broadcasting), defines “media services” in § 2 as:

- (1) distribution services in the form of direct offers made to the public with a view to the sale of products or the provision of services, including immovable property, rights and obligations, in return for payment (teleshopping);
- (2) distribution services disseminating measurement results and data determined, in the form of text or images, with or without ambient sound;
- (3) distribution services in the form of teletext, radio text, and comparable text services;
- (4) services available on demand in which text, audio, or video services are upon demand transferred for utilisation from electronic storage devices, with the exception of services focused on the exchange of individual services or the mere transfer of data, and with the exception of telegames.

In turn, the German Federal Act Establishing the General Conditions for Information and Communication Services of August 1 1997 defines “teleservices” in § 2 as:

- (1) services offered in the field of individual communication (e.g. telebanking, data exchange),
- (2) services offered for information or communication unless the emphasis is on editorial arrangement to form public opinion (data services providing e.g. traffic, weather, environmental and stock exchange data, the dissemination of information on goods and services),
- (3) services providing access to the Internet or other networks,
- (4) services offering access to telegames,
- (5) goods and services offered and listed in electronically accessible data bases with interactive access and the possibility for direct order.

The fact that the Directors' Conference of the German State Regulatory Authorities for Broadcasting (DLM) has by now published three papers on the distinction between broadcasting and these new types of services shows that the matter is by no means simple or conclusively decided.<sup>159</sup>

In the latest, third structural paper on "The distinction of broadcast services and media services" (2004) the Directors' Conference notes that broadcasting has been traditionally recognised as

- open access and free-of-charge distribution service;
- with moving images and sound or simply sound;
- with editorial content described as depicting real or fictional happenings or as a mixture of facts and opinions;
- relating to topics that affect people as individuals or as a part of society.

We might add that broadcasting is a case of public (point-to-multipoint) communication offered in a "push" mode (the recipient cannot choose or influence content, its sequence or composition), and that what justifies content regulation is its influence; spread effect (that is, significant reach, whether real or potential); suggestive power; and immediacy.<sup>160</sup>

By contrast, "information society services"<sup>161</sup> are seen as being:

- available in an interactive "pull" mode, leaving the recipient with full control over which content to access, and when, and whether to access it at all;
- delivered as point-to-point communication, with the characteristics of private, rather than public communication.

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159. It might be interesting to note in this connection that German regulatory authorities have also been trying to develop legal and regulatory approaches to different types of "business television", in terms of their placement between traditional television and new media. These are:

1. Original Business TV is an internal information transfer within a closed group of users.
2. The so-called Infomercials: clips in which companies, within the framework of a normal TV programme, present additional information on products or services to the general public.
3. If a company presents programmes with a similar content to its customers at the point of sale, this could be called Point-of-Sale TV.
4. Publisher TV. These are programmes which are broadcast by a licensed TV channel as part of its regular schedule, but produced by the publishing company in the style of their usual print products.
5. Corporate TV or Institution TV. TV broadcasts with information from and about a company or an institution, like for example a university.
6. Target-Group TV: a programme directed at certain interest groups with a specific, interest-related content. See Frank Scherer "Business TV – distinction between TV and new media", ERA-Seminar 10/11 April 2000, Budapest.

160. See also A. Grünwald, Final Report to the Standing Committee (T-TT (2003) 2).

161. Defined as in the Council of Europe Convention of 2001 on Information and Legal Co-operation Concerning "information society services", as "any service, normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

Accordingly, their spread effect, impact and influence are significantly reduced, which explains why they are exempt from content regulation.

The Directors' Conference points out, however: "Due to technical innovations it is questionable as to whether this view [of broadcasting] is still sufficient to create a boundary between the terms "broadcasting" and "media service" [as defined in the German Interstate Treaty on New Media Services – K.J.]

### *1.2.2. Other types of new services*

According to one classification of new services,<sup>162</sup> three types of such services are available:

#### 1. Services that interact with programmes

Two categories may be identified:

- virtual video/tape recorders: these services modify the chronology of the programme being watched, with pause, rewind and slow-motion functions, by recording it in a buffer of a set length. Such services require a special receiver, the PVR, which is discussed in another section of this document. Suffice it to say these services appear to be at the interface between television services and new media services, since they rely on a local action by the viewer over which the service provider has no control (essentially, it is like channel surfing);
- operations affecting programme content: these are operations that modify the editorial content of a programme or work in real time, either for each user or on the basis of votes from all those users having interacted. While the former option is very similar to call-TV opinion polls (voting for a person to stay on a show, for instance), the latter draws either on the concept of role-playing games or on that of audiovisual works that evolve in real time, which is a complicated, costly concept that is not yet at an advanced stage.

#### 2. Local interactive services

These are multimedia services (images, texts, audio and video) transmitted simultaneously alongside programmes and received by all users who have paid for them in their subscriptions; there is no return path between the user and the service provider.

Such services can generally:

- be consulted in real time (teletext, split screen [tiling]); or

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162. Draft report to the CDMM on convergence, prepared by the Advisory Panel on convergence (AP-CV), AP-CV(2004)001.

- be downloaded into resident memory in suitable terminals, regularly updated and thus consulted at will (certain EPGs, push Internet). In this case, downloading is automatic, that is, it does not depend on an action by the viewer or a command from the viewer to his or her set-top box; or
- a mixture of both options, where some information needs to be instantly available (customised weather services).

They may require a reception terminal equipped with an interactivity engine. This term refers to functions for interpreting software applications, which are transmitted via programme signals but are not compatible with the DVB standard, and consequently need operating system capabilities.

Multiple camera services may be considered to belong to this category, even though technically they involve as many television programmes as the number of cameras available, with an interactive split-screen (tiling) presentation.

### 3. "True" interactive services

These include services necessitating a return path between the user and the service provider; this path may be internal (that is, technically processed by the terminal) or external (a voice telephone call, for instance).

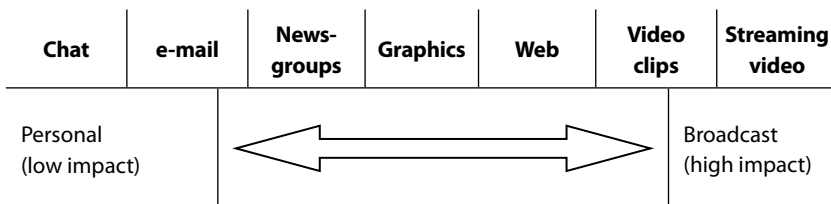
A distinction may be made between transactional interaction (one-off payment of a fee, as in the case of pay-per-view, teleshopping, home betting and downloads; the latter may be customised or operate on some kind of group basis) and genuine two-way dialogue (online games, Internet access).

What European law describes as "on-demand services" come into this second group, where the service is provided at the user's request. Genuine video on-demand belongs to the family of on-demand services.

This category also includes services that are currently available, such as visual display, webcam videos and the viewing of SMS or e-mail messages directly over programmes or using teletext.

The Internet can be another source of confusion. As illustrated in Figure 1 at one end of the spectrum of material available on the Internet are various forms of interpersonal (private) communication which are not subject to any content regulation. At the other end, there is the potential for anyone with enough money and bandwidth to run the equivalent of a television station via the Internet, via streaming video, that is, engage in public communication. In the middle between the two extremes, there is the current web, and future web-like services, which will increasingly be able to offer more broadcast-like services, as broadcasting is traditionally understood.

**Figure 1. Range of material available on the Internet**



Source: David Mitchell and Mark Armstrong "Broadcasting regulatory mechanisms and the internet", *Intermedia*, Dec. 2001, Vol. 29, No. 5/6.

### 1.2.3. Technological or technology-neutral approach?

In view of the foregoing, the comment made in the Spanish contributing paper must seriously be taken into consideration:

It has to be recognised that in particular the term "television broadcasting" has become quite obsolete, chiefly when considered in its connection with the 'individual demand' requisite foreseen in the definition of "transmission" set in Article 2(a): this is not only because broadcasting – transmission by radio waves, in a technical sense – is far from being the only way of transmitting TV programmes but also because its non-directional nature has probably ceased to be a fundamental characteristic to the definition owing to the recent emergence of interactive services.

Under this presupposition, it would therefore make sense to adapt these concepts to the current situation, by means of adopting a definition of "television", more in line with telecommunications law and the multiplication on means of transmission and which is able to encompass the potential digitalisation of transmissions and their bi-directional nature.

Also, the German authorities in their contributing paper seek to promote a technology-neutral approach, namely that the decision whether to classify a particular service as "broadcasting" and submit it to content regulation applied to broadcasting should be taken on a functional basis rather than exclusively on the basis of technical criteria. Thus, they comment: this approach to regulation "can take into account new developments and thus cover also future, new forms of offers". The German authorities point out further that "audiovisual services *should be regulated on the basis of their contents rather than on the basis of the transmission technology employed*. This is the only viable approach to accommodate the fact that digital contents can be technically transferred to other media without any editing. This is why important quality standards can be safeguarded only if we adopt an approach that is based on the contents and their function" (emphasis added – K.J.).

This point is made emphatically also in the third structural paper on "The distinction of broadcast services and media services:

According to the current opinion of the DLM, *the mode of electronic transmission cannot be the determining factor in classifying a service as broadcasting*; this

means no conclusions with regard to classification may be drawn exclusively from the technical conditions of a service. In the age of convergence, the question of broadcast quality cannot depend on technical coincidence. The type of transmission mode does not, on its own, represent a characteristic that determines the classification “broadcasting” or “media service” (BVerfG 74, 297, 350). Moreover what is decisive is *broadcast content’s relevance to opinion formation; its effect on the receiver*. The magnitude of this may vary based on various technical requirement. (emphasis added – K.J.)

Along these lines, it is pointed out in the third structural paper on “The distinction of services and media services” that:

A service is more typical of broadcasting,

- the higher the intensity of the broadcast content’s effect is as such,
- the stronger the editorial programming is,
- the more realistically the content is presented,
- the broader the coverage and its ability to be received simultaneously/and its actual use is,
- the less the user’s interactivity determines the reception (user passiveness and the simple use of the receiving device).

What may significantly complicate matters, however, is that, as the Directors’ Conference points out in its paper:

Characteristics of that type can occur in gradation, which means may be more or less present, may even be absent and may nonetheless enable classification under the term broadcasting. Consequently, on the one hand, a classification marked by fluid gradations resulting from borderline cases is possible; on the other hand where change occurs primarily in the area of technology, the characteristics of broadcasting need not be constantly adjusted. Moreover the characteristics enable the technical developments to be classified correctly.

*This means that a medium of communication similar to mass media, has to be characterized as being more typical of broadcasting, the more and more pronounced certain characteristics are.* The potential to influence individual and public opinion formation serves as a model both for the constellation of characteristics as well as for the conclusive assessment. The starting point is the criterion of mass-effect, the relevance to the present, and the power of suggestion. (emphasis added – K.J.)

This is why the German authorities say in their contributing paper that “the various criteria of the list must be weighted on a case-by-case basis”.

An example of how this could work is provided by the third structural paper on “The distinction of services and media services”. It says that teleshopping is to be treated, for regulatory purposes, as broadcasting if:

- (i) the object being shown contains informational parts which do not refer to the product’s features, (ii) the presentation of the product has been integrated into shows, and (iii) the sales characteristic is clearly located in the foreground.

Such an assessment, it is pointed out, “has to be made in each respective case”. If the assessment shows that the features of broadcasting are to be found in tele-shopping only as an exception in individual cases, then a supervision problem arises for those cases where tele-shopping presents itself as broadcasting. “If a state regulatory authority for broadcasting *comes to the conclusion that a tele-shopping offer shall be categorized as broadcasting* owing to the systematic excess of the developed criteria, then the necessary measures shall be taken” (emphasis – K.J.).

It goes without saying that it would be hard to imagine these kinds of discussions in the Standing Committee with a view to deciding – on a case-by-case basis – just which services the Convention should apply to in a particular instance. This is why the “criteria” approach, as it was called by Dr Grünwald in his paper (see below), has been considered inapplicable for revising the Convention.

#### 1.2.4. “Regulatable content”: some preliminary ideas

The French delegation in its contributing paper favours retaining the present approach whereby the Convention applies to “conventional-type television” and says: “In view of the importance of this medium in political, social and cultural life, and of its characteristics (*the same content is received simultaneously by a number of persons*), specific legal treatment is fully justified” (emphasis added – K.J.).

Also the paper from Portugal highlights the fact that “Recourse to the fundamental ideas of the (direct or indirect) reception by the public and, conversely, the intended exclusion of services operating on individual demand from the scope of the Convention, will be the key premises to determine the new media services that can be considered as subjected to the Convention regulatory regime”.

A similar approach appears to have been taken in the UK Communications Act of 2003 where section 232 defines a “television licensable content service” as follows:

- (1) In this Part “television licensable content service”<sup>163</sup> means (subject to section 233) any service falling within subsection (2) in so far as it is provided with a view to *its availability for reception by members of the public* being secured by one or both of the following means—
  - (a) the broadcasting of the service (whether by the person providing it or by another) from a satellite; or
  - (b) the distribution of the service (whether by that person or by another) by any means involving the use of an electronic communications network.

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163. In its Response to consultation on the TVWF directive, Channel 4 of the UK made the point that the definition of ‘television licensable content service’ contained in the Communications Bill was too widely drawn, “allowing webstreaming services that are accessible via digital television but not directly linked to it to be classified as television rather than on-line services”. This, however, serves to point up the technologically neutral approach adopted in the Act.



- (2) A service falls within this subsection if it—
  - (a) is provided (whether in digital or in analogue form) as a service that is to be made available for reception by members of the public; and
  - (b) consists of television programmes or electronic programme guides, or both.
  
- (3) Where—
  - (a) a service consisting of television programmes, an electronic programme guide or both (“the main service”) is provided by a person as a service to be made available for reception by members of the public ...

Of course, content is not made “regulatable” by virtue of being addressed to the general public alone. The following excerpt from the contributing paper of the German authorities points to “impact on formation of public opinion” as another key feature of such content:

In our view, the following criteria should be applied to assess the impact of an offer on the formation of public opinion:

- the broad effect of an offer/the maximum technical range/possibility of simultaneous reception
  - the relevance of the contents for community life; the variety of subjects; the topicality of subjects;
  - the editorial design/structural sequence of contents, which prevents the viewer from switching off or switching to another channel; selection and editing of the contents; live offers;
  - the passive nature of the users’ behaviour; the ease with which the receiver can be operated;
  - the presentation’s suggestive power/closeness to reality.

Further clues are provided by Recommendation Rec(2004)16 of the Council of Europe Committee of Ministers to member states on the right of reply in the new media environment defines the term “medium”<sup>164</sup> as referring “to any 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”. A similar approach has been adopted in the draft recommendation of the Committee of Ministers on the right of the public to information on major events where exclusive rights have been acquired, a technologically-neutral definition of “a provider of a news service” is proposed, as meaning

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164. The term “medium” is also highlighted in the draft recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry (COM(2004) 341 final) which recommends that member states “consider the introduction of measures into their domestic law or practice in order to ensure the right of reply across all media, and defines the scope of the recommendation as focusing on “the content of audiovisual and information services covering all forms of delivery, from broadcasting to the Internet”. Incidentally, this shows that “regulatable content” need not necessarily be only audiovisual in nature.

“any person who offers on a professional basis a news service to the public, in the form of texts, images and/or sounds, whether in return for remuneration or not”.

In her speech, Commissioner Reding added still more considerations, noting that:

the first meeting of the expert groups revealed some consensus on the need for a new graduated regulatory framework for the delivery of audiovisual editorial content to the general public. Graduation could be linked to:

1. the impact of the medium (as indicated also in the contributing paper of the German authorities<sup>165</sup> – K.J.)
2. the choice and control users can exercise – this is also linked to the distinction between linear and non-linear programming.

All this makes it possible to formulate a preliminary list of criteria for distinguishing “regulatable” content from that which should not be subject to regulation. And so, content may be classified as “regulatable” when:

- it is provided by a medium (that is, in most cases by an organisation devoted to providing on a professional basis audiovisual and information content or service(s), in the latter case consisting of edited, periodically updated information);
- it is provided for reception by the general public;
- it is of public relevance (that is, purports to represent reality and/or raises topical issues of importance for society) and/or has the ability to influence public opinion;
- it is delivered in a linear mode, preventing the receiver from exercising control over it, for example, by influencing the sequence and structure of content being received, selecting elements of content, as it is being distributed, etc.

Naturally, the matter requires further analysis and consideration.

### *Conclusion*

In a technology-neutral approach, the current legal framework of the Convention, based on the concept of “transmission” as defined in Article 2(a) and the distinction between “broadcasting” and “information society services” will progressively provide less legal certainty. Therefore, a technologically-neutral approach is strongly indicated. The concept of “regulatable content” may be seen to emerge as a potential way of substituting the concept of transmission as a foundation for a future regulatory regime. The matter requires further consideration.

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165. This is highlighted in the German contributing paper: “In order to preserve this function, the scope of the convention must, in our view, be defined in such a way that the key criterion is the way in which a given offer influences the formation of public opinion. The transmission technology used is, by comparison, only a criterion of secondary importance”.

### 1.3. *The pros and cons of extending the field of application*

#### 1.3.1. *The original reasons for content regulation: do they apply to the new services?*

Consideration of whether to extend the scope of the Convention to other technologies, and if so, how, must begin with a reminder of the reasons why traditional broadcasting was originally subjected to extensive, both negative and positive (and largely market-overruling) sector-specific regulation.

One obvious reason was spectrum scarcity and the need to create a system ensuring that if a rare public resource (that is, a frequency) is to be used on an exclusive basis by one operator, then this should be done in the general interest. Hence, broadcasting regulation usually serves not only negative, but also positive goals. In his final report to the Standing Committee (T-TT (2003) 2), Dr Andreas Grünwald recalls other considerations behind this approach: "The justification of the current ECTT regime of television regulation is based on the assumption that television has a special impact on the formation of opinion". The impact of television naturally goes beyond just the formation of opinion: it also influences lifestyles, world outlooks, value, behaviour and consumption patterns, etc.

Dr Grünwald lists the following special features of television (and radio) which justify sector-specific content regulation:

- "spread effect" – television is addressed to and received by an undefined number of viewers. This means a multiplication effect for television content that is achieved by no other (traditional) media, reaching literally millions of viewers at a time;
- "suggestive power" that contributes to the importance of television for the formation of opinion, more intense and authentic effect on the viewer than written or oral information sources, as well as the fact that the decision about what to see and when to see it is vested with the broadcaster. The viewers' role is limited to that of a passive consumer of the information he is offered. "The suggestive power of television could be described as the intrusiveness and persuasiveness of the purposefully designed continuous programming of moving images and sound";
- "particular immediacy in the provision of content", especially in the case of live broadcasts.

There seems little doubt that originally uncertainty and apprehension about, or indeed fear of, the presumed great power of the new medium of radio (and then television), especially if it fell into the wrong hands, provided a strong motivation for the imposition of far-reaching regulation on the audiovisual media. Practically every new development in this area has been met with both high expectations

and fear,<sup>166</sup> leading – in the latter case – to the introduction of measures which later (once the fear had subsided) were often rescinded or liberalised.

As one examines the rationale for regulation, as presented by Dr Grünwald, a further remark must be made about “spread effect”. Dr Grünwald speaks of a “multiplication effect for television content that is achieved by no other (traditional) media, *reaching literally millions of viewers at a time*”. This is not always the case, given the different audience and market shares of particular programme items, and indeed of whole stations. The regulatory regime is not substantially changed depending on whether it applies to nationwide, regional, local or indeed community station, which may have a minuscule audience. Thus, “the general public” is not an easily quantifiable concept and can mean different things in different circumstances. This is important in the context of the possible extension of scope to new technologies, since a television programme service subject to traditional content regulation could easily have a much smaller audience than the same service delivered via webcasting on the Internet.

In reality, the feature of traditional radio or television that was used to justify regulation was not only the scale, but also the *simultaneity* of impact – both in the sense that content was received in real time, as it was being disseminated, and in the sense that it impacted on, and influenced, large numbers of people at the same time, potentially with great effectiveness. With the introduction of time-shifting technologies, making possible asynchronous communication, impact is now more extended over time than in the case of traditional radio and television, but the regulatory approach has not changed fundamentally.

Another change that has taken place since the early days of radio and later television is, of course, the multiplication of sources of information, entertainment and other content. Compared to the days of broadcasting monopoly, the impact of any one programme item, however suggestive and powerful, must necessarily be much less, given that audiences have access to many more sources of information and representations of reality. Still, there has not been a commensurate change of the broadcasting regulatory regime.

Nevertheless, it is true that different licensing regimes and obligations are being introduced for thematic channels, as compared with generalist ones, as well as for pay-TV, as compared with free-to-air TV. It is proposed in some cases that

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166. An interesting comment on this aspect of regulatory approaches is made by David Mitchell and Mark Armstrong: “We can learn from the history of satellite TV. In the 1970s, countries feared that their whole broadcasting system would be overturned by killer satellites subverting all local television, and substituting US content. Looking back we can see that satellites have changed some things, but for a host of reasons including local languages, terrestrial distribution and commercial imperatives, the worst fears were not realised. Five years ago, many feared that the internet would overturn local culture and local values, but now that seems unlikely. Countries like Vietnam and Laos, both greatly concerned with the influences of overseas media sources, have gradually diminished access restrictions in the years since they legalised internet access in 1997. Concerns about the impact of overseas content still exist, but less than five years ago”. David Mitchell and Mark Armstrong “Broadcasting regulatory mechanisms and the internet”, *Intermedia*, Dec. 2001, Vol. 29, No. 5/6.

licences to broadcast may no longer be necessary, though broadcasters (or TV content providers) would still be obliged to respect a body of standards. This trend may intensify in the future, militating in favour of a graduated approach to content regulation (see below).

The explanatory report states in paragraph 84 that services such as subscription television services, pay-per-view or near video on-demand services, or tele-text services remain covered by the Convention. The only decision a recipient can take with regard to such services as are mentioned in paragraph 84 of the explanatory report, but also with regard to streaming video on the Internet is, exactly as in the case of traditional television, whether to turn them on (in some cases after making an additional payment) or not.

As we saw above, availability to the general public and the presumed impact of content on public opinion remain as important reasons for content regulation. At the same time, it is admitted that both are subject to variation, depending on the particular method of distributing content. Hence, efforts to substantiate the regulation of the new services sometimes go in the direction of proposing forms of graduated regulation – as the scope of content regulation is extended to the new technologies – based on such criteria as:

- existence (or otherwise) of journalistic/editorial content capable of influencing the public;
- extent of the availability and “publicness” of the service;
- degree of viewer control over the act of reception;
- and consciousness of the choice that is made to receive the service.

According to this view, there could be a graduated approach to content regulation, providing a very broad spectrum of content control from an extremely light touch for most services to a more rigorous approach for mainstream free-to-air TV networks. This approach is illustrated in Table 2.

**Table 2. Graduated regulation**

Nature of service	Degree of regulation
On-demand services, interactive TV services, the Internet	Relying mainly on self regulation and international co-operation in addition to the requirements of national civil and criminal law
Multi-channel/pay-TV services where viewers generally choose what they subscribe to	Requiring light touch, taste and decency regulation
Mainstream, free-to-air networks enjoying spectrum privileges	Requiring reasonably rigorous regulation

Adapted from: Response to the EU Green Paper “The convergence of the telecommunications, media and information technology sectors and the implications for regulation”, BBC (1998), London, p. 12.

One example of graduated regulation is provided, as noted above, by German legislation concerning media and teleservices. Table 3 compares the graduated German regulatory regimes for broadcast, media- and teleservices.

**Table 3. Broadcasting, media- and teleservices: features and regulation in Germany**

<b>Broadcasting</b>	<b>Media services</b>	<b>Teleservices</b>
Interstate Treaty on Broadcasting	Interstate Treaty on Media Services	Teleservices Act
Point-to-multipoint Fixed programming schedule	Point-to-multipoint Point-to-point Relevant editorial content	Point-to-point No relevant editorial content
TV (and radio) programmes Free TV and Pay TV services	On-demand TV services; Teletext Online magazines and websites, i.e. CNN.com	E-commerce transaction services, (i.e. online banking) Online databases
<b>High level content regulation</b>	<b>Low level content regulation</b>	<b>No significant content regulation</b>
<ul style="list-style-type: none"> <li>- Licensing requirement</li> <li>- Concentration control</li> <li>- Standards of journalism</li> <li>- Programming quotas</li> <li>- Access rights</li> <li>- Listed events</li> <li>- Advertising restrictions</li> <li>- Sponsoring restrictions</li> <li>- Protection of youth</li> <li>- Right of reply</li> <li>- Privacy (Pay TV)</li> </ul>	<ul style="list-style-type: none"> <li>- Notification requirement</li> <li>- Transparency</li> <li>- Standards of journalism</li> <li>- (Minor) restrictions on advertising &amp; sponsoring</li> <li>- Protection of youth</li> <li>- Right of reply</li> <li>- Liability for content</li> <li>- Privacy</li> </ul>	<ul style="list-style-type: none"> <li>- Notification requirement</li> <li>- Liability for "content"</li> </ul>

Source: Andreas Grünwald, "What future for broadcasting in the digital era?", paper presented during an expert seminar on The European Convention on Transfrontier Television in an Evolving Broadcasting Environment", Strasbourg, 2001.

A solution could therefore be to develop "tiers" of graduated content regulation and then decide which service should be covered by which "tier".

The Swiss contributing paper seems to drive the point about regulation home:

Switzerland is also in favour of a restrictive application of broadcasting law to "pure" broadcasting services ("one to many" traditional broadcasting). The field of application must therefore be linked to the concept of programme (Article

2.c of the Convention). ... In the context of a technologically neutral law, nevertheless, it is immaterial whether a broadcaster broadcasts a continuous series of emissions intended for the public at large, at a time set by the broadcaster, via cable or via a telephone line. Thus it is insignificant whether the audience uses a traditional radio or television to receive the service or a computer terminal. In future, as well, provisions relating to radio and television must come into play only when established communication patterns are noted which entail a specific danger (such as a risk to young people, manipulation of public opinion). Services transmitted by means of telecommunications techniques, which of course have elements of mass communication, but which are of only limited importance in journalistic terms, must not be subject to broadcasting law.

### *Conclusion*

This appears to confirm that in a technology-neutral “broadcasting-type” regulation should apply to forms of communication addressed to the general public, providing editorial (“journalistic”) content and capable of exerting an impact, especially a harmful one.

Another pointer as regards extending the field of application is offered by the decision of the Canadian regulatory authority CRTC of 19 May 1999, that it would not regulate new media or “webcasting” under the Broadcasting Act. The CRTC explained that regulating new media or webcasting as broadcasting was not necessary to advance the goals of the Broadcasting Act and might hinder their development. The Commission acknowledged that some material conveyed over the Internet would fall within the definition of broadcasting under the Broadcasting Act, but it exempted it from regulation for reasons set out in the decision, for example, new media were still just a complement to broadcasting, not a substitute, and so regulating new media or webcasting would not advance the goals of the Broadcasting Act.

**Conclusion:** This might indicate that the question of extending the field of application is not one of “if”, but of “when” – when the new services are widespread enough to provide a “substitute” to broadcasting. It would just appear to be a question of timing: should we wait for this to happen, or does it make sense to anticipate this development and think of regulating the new services (which satisfy the criteria listed above) before they have achieved the status of a substitute for broadcasting.

The German regulation of “media services” and “teleservices” appears to be based on a decision to adopt the second approach. On the other hand (and this is no reflection on the German way of proceeding), it is also possible to make the mistake of regulating prematurely, before the new services have matured and taken anything like their final shape.

### *1.3.2. Extending the field of application: to what?*

Development of technology-neutral “horizontal” content regulation, covering all content, regardless of the mode of delivery, just as the electronic communications

infrastructure has been regulated in a horizontal way in the EU Telecoms Package 2003, has actually been proposed by the Committee on Culture, Youth, Education, the Media and Sport of the European Parliament in its 2003 report on the application of Directive 89/552/EEC Television Without Frontiers. The report calls for the definition of audiovisual content to be expanded to take account of media convergence and for the development of a Content Framework Package, bringing together revised versions of the Television Without Frontiers directive, the e-Commerce directive and the directive concerning copyright related to satellite broadcasting and cable retransmission and providing an overarching framework for the audiovisual sector.

The issue has been dealt with in Dr Grünwald’s paper where he identified three possible ways of identifying the new services which should potentially be covered by the revised convention: the “criteria”, “listing” or “comprehensive” approach.

The three approaches are compared in Table 4.

**Table 4. Three approaches to defining services to be regulated**

<b>Approach</b>	<b>Description</b>	<b>Pro</b>	<b>Contra</b>
“Criteria”	Service-oriented criteria, referring to editorial content, user control, etc.	Strong reference to opinion-forming potential of a service	Difficult to implement, “ideal” criteria do not exist
“Listing”	Lists of media services within scope, to be updated on a regular basis by Council of Europe or member states	Precise definitions Transparent	Not “flexible” unless regularly updated Likely to face ongoing co-ordination problems
“Comprehensive”	Broad scope, but only minimum standards for most services	Minimal definition problems Flexible towards future services	Many “regulated services”

Source: Andreas Grünwald, Final Report to the Standing Committee (T-TT (2003) 2).

As already noted, the practical application of the “criteria” approach would be very cumbersome and would probably fail to provide legal certainty, given that different services might be defined differently, and the very procedure to applying it could often involve a delay in applying regulation to a service requiring it.

For his part, Dr Grünwald seemed to favour the “comprehensive approach”, describing it as based on the assumption that any electronic [“point-to-multipoint”] communications service is at least potentially relevant for the



formation of opinion, as long as it transmits any kind of editorial content to an undefined number of users. This comes close to the concept of “regulatable content” (see above, section 1.2.4.).

Taking this as the relevant media service definition, a future framework would need no further criteria looking at the specific nature or at the type of content of a service. Every other electronic point-to-multipoint service than broadcast television would then be considered a media service within the meaning of the future framework, as long as it would not consist in the sole provision of data.

The major advantage of such an approach, according to the author, would be that on the one hand, it qualifies as flexible and future-oriented and on the other hand avoids most of the problems that arise when trying to implement service-based criteria. As a consequence, all kinds of services such as video on-demand, business TV and editorial websites would be covered by the convention in the first place, leaving out only the printed press (for not being an “electronic” service), individual communications such as voice telephony and e-mail (for not being addressed to an “undefined number of users”), and pure data services such as a stock market ticker, for example. This, adds the author, may certainly attract the allegation of over-regulation. Against this, the design of the actual material provisions of the convention would have to act as a counterbalance, trying to limit the actual regulatory obligations to an absolute minimum wherever possible.

This would indeed amount to something like a content package. The idea has not been taken up so far, probably because it is premature at present. The contributing paper from Spain takes the view that: “It does not seem to be currently feasible to work up an audio-visual [content] package that include all the services of contents together, though it turns out to be reasonable to ensure as much co-ordination as possible when revising legal instruments concerning contents and intellectual property rights”.

A more modest proposal is made by the French authorities in their contributing paper. They believe that content regulation should apply to conventional television, but they add:

For reasons of legal clarity and certainty, it might be useful to define the concept of “television programme services” which currently appears in Article 2(d) of the European Convention on Transfrontier Television, so as to include webcasting. This service could in fact be dealt with in the same way as traditional television services, in so far as these two categories of services have much in common (the programme service at any given time is the same for all those demanding it).

This view is shared by German authorities in their contributing paper: “Germany holds the view that *live-streaming* (terrestrial, cable or satellite transmission and simultaneous or relatively shortly deferred transmission via Internet technology) and *webcasting* come under the scope of the TV Convention since their influence on the formation of public opinion is comparable to that of classical TV” (emphasis added – K.J.).

However, the paper from Portugal points out that “webcasting services” refer to a wide variety of cases commonly characterised by the diffusion of audio or audiovisual content through the recourse (exclusive or not) to the World Wide Web. Not all of these services necessarily fit with the requirements of Articles 2(a) and 3 of the ECTT; a delicate assessment on a case-by-case basis will be needed as to determine which webcasting services fulfil such requirements. Moreover, and as result of the particular nature of the online environment and the inherent characteristics of the new media services, some of the provisions of the current ECTT have to be considered inappropriate: “together with the rules on jurisdiction and the parallel procedures for resolving disputes on this issue, the imposition of transmission quotas and many of the provisions concerning advertising are perhaps the most impressive examples in this context”.

As we saw above, the Canadian Radio-Television Commission (CRTC) has decided to forgo regulating webcasting, though it seemed to leave itself the possibility of doing that later.

### *1.3.3. Extending the field of application: to whom?*

As pointed out in the draft report to the CDMM on convergence, prepared by the Advisory Panel on convergence (AP-CV), AP-CV(2004)001 digitisation and network convergence lead to the separation in broadcasting between “programme-supplying broadcasters” (without transmitting facilities) and “facility-supplying broadcasters” (not engaged in programme production and composition).

Put another way, we are seeing the emergence of:

- service publishers, that is, operators who assume editorial responsibility for a public communication service. In practice, they are the broadcasters of television or sound radio services, or publishers of electronic media such as a website or a discussion forum;
- service distributors, that is, operators who ensure commercial delivery of service provision to the public, such as the operators of satellite packages (BskyB, Canal Satellite etc), but also the hosts of an Internet site;
- operators of electronic communications services, that is, operators who ensure the transmission of service provision from the place of delivery by the service distributor to the final user, that is the public in the case of the media. They are the network operators who establish the networks and make them available to the suppliers of electronic communication services;
- then, there are the operators of associated facilities, such as multiplexes, conditional access systems, EPGs, etc.

Several comments have been made in this connection as concerns this emergence of new stakeholders. It is pointed out in the Spanish contributing paper that “a growing number of entities are exclusively devoted on the elaboration and

production of channels ('edition'), while others are focused in the mere transmission of a channel provided by the 'editors' (we may call it 'transmission'). Therefore, the aforementioned circumstances must be taken into account as far as the revision of the rules on the broadcasters responsibilities is concern (towards a 'shared' responsibility among 'editors' and 'transmitters-diffusers' of contents?)."

The contributing paper from Portugal adds in this connection: "Consequently, and more accurately, the main of stress of the Convention should be put on the organisation of programme services rather than on the transmission of programmes. It would therefore make sense to change the order in which the definitions appear in the ECTT so that the first definition would be of 'television operator'" (rather than "broadcaster" – K.J.).

Transposition of the EU electronic communications directives has proceeded in different ways in different EU member states. In some of them, however, the operators of associated facilities are covered by broadcasting regulation. They, too, therefore extend the number of operators to whom content regulation applies, at least in some countries.

#### *1.3.4. Extending the field of application: how?*

One thing appears certain: the case-by-case approach advocated in the third structural paper on "The distinction of services and media services", or indeed by the German authorities in their contributing paper – whereby the characteristics of a particular service are carefully examined before a decision can be taken whether content regulation can be applied to it – would be hard to implement in a revised convention. This procedure is similar to the "criteria" approach identified, but rejected by Dr Grünwald.

A separate issue is whether to regulate the new technologies in a separate instrument ("multimedia convention"), or to introduce a different category of services into the existing instrument, thereby extensively transforming it. As already noted, discussions held in the Standing Committee so far seemed to lead to the conclusion that one instrument is more appropriate than two.

On the other hand, debate in Focus Group 1, devoted to a discussion, *inter alia*, of the scope of the Television Without Frontiers directive, has produced also some other ideas:

1. Adoption of a general "directive of principles", leaving detailed regulation to member states;
2. Adoption of a general framework directive, as well as of a number of other documents containing different regulatory regimes for particular aspects of content (for example, advertising) in linear and non-linear content services;
3. Adoption of one or more directives, complemented by other instruments such as recommendations.

The contributing paper from Portugal notes that the need to ensure that the ECTT remains focused on its main principles and objectives will also probably demand the future adoption of regulatory flexible solutions:

Less detailed and constraining rules (at least in some areas) combined with the reinforcement of basic principles and objectives could be the most adequate approach in this context. Even tentatively, the use of co-regulation and self-regulation schemes could also be envisaged, provided that a clear definition of these terms and its extent are previously determined in an acceptable way for all interested parties

Self-regulation and co-regulation are relied on more and more for two reasons:

1. modern ICTs and new communication services often do not – for a variety of reasons (including, for example, jurisdiction) – lend themselves to traditional regulation, enforced by a state body or regulatory authority; thus, combating illegal and harmful content requires the co-operation and involvement of all stakeholders;
2. “changes in society and the decreasing role played by the State have to be taken into account. Enforcing regulation by state law to support objectives which are in the public interest has become more and more ineffective. For one thing, it is becoming more and more difficult to attain these goals, and for another the undesirable side-effects of regulation (that is stopping the progress of the specific branch of industry) are able to cancel out the benefits of regulation.”<sup>167</sup>

Self-regulation can be described as follows: different players agree to rules regulating their activities and they define and enact codes of conduct (“intentional self-regulation”). Self-regulation may also include the participation of third parties (that is, besides the state and industry) in the process of regulating.<sup>168</sup>

Co-regulation (also known as “regulated self-regulation” or “audited self-regulation”) refers to a situation where self-regulation is supported by traditional regulatory instruments: the state structures the legal framework to enable self-regulation, or intervenes if the objectives are not met by self-regulation, or if there are undesirable side effects.<sup>169</sup>

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167. Schulz W. and Held T., Regulated self-regulation as a form of modern government, study commissioned by the German Federal Commissioner for Cultural and Media Affairs Interim Report, Hans Bredow Institute for Media Research at the University of Hamburg, October 2001, p. 3.

168. For an extensive review of self-regulation see Self-regulation of digital media converging on the Internet: industry codes of conduct in sectoral analysis, Programme in Comparative Law and Policy, Centre for Socio-Legal Studies, Oxford University, Oxford, 30 April 2004. See also Group of Specialists on On-Line Services and Democracy, Summary of the replies to the questionnaire on self-regulation and user protection against illegal or harmful content on the new communications and information services, Secretariat memorandum prepared by the Directorate General of Human Rights, April 2002.

169. See Palzer C. “Co-regulation of the media in Europe: European provisions for the establishment of co-regulation frameworks”, IRIS plus, a supplement to IRIS, Legal Observations of the European Audiovisual Observatory, Issue 2002-6, Strasbourg, June 2002.

## *Conclusion*

1. The original reasons for content regulation continue to apply to the new communication services, but only in relation to “regulatable content”. A case for extending the scope of regulation to them will be much more convincing once they have become or are close to becoming a substitute for broadcasting. Graduated regulation seems to emerge as the way to deal with differences between the new services.
2. Despite all the debate about extending content regulation to new communication services, no clear view has emerged as to precisely which of these services could be covered by such regulation. A general content package seems premature at present.
3. New stakeholders are emerging and the role of traditional stakeholders (such as broadcasters) appears to be changing. The main reason for applying content regulation to them is their editorial role in, and responsibility for, developing services capable of influencing public opinion.
4. Given that many of the new services are delivered via the Internet, solutions have to be found to the regulation-defying features of the Internet. To this end, co- and self-regulation will have to be built into the regulatory regime.

### *1.4. The way forward*

As noted in the Introduction, if it is agreed that extension of the convention to “broadcast-like” content distributed by the new technologies is desirable, but impracticable at the present time, then we should press on. Convergence certainly will, making broadcasting-specific regulation more and more outdated and irrelevant. As noted above, the current convention will in future provide less and less legal certainty and the number of “grey areas” will grow.

Another argument in favour of seeking to develop a harmonised international regulatory approach to new technologies is the fact that some countries have developed content regulation for the new services, and other countries have not, or the existence of different regulatory approaches for the same technologies in different countries. For example, the broadcasting of programmes on the Internet is expressly included in the legal definition of broadcasting in Greece, but elsewhere it is not; in some countries web TV is classified as TV, in others as an information society service. Failure to move to this goal will result in a variety of different national regulations vis-à-vis the same services, making international co-operation more and more difficult.

Future debate on this issue should concentrate on:

1. Refining technology-neutral methods of specifying which content delivered by the new technologies should be subject to content regulation;
2. Refining the scope and methods of graduated regulation;

3. Identifying new market players and their involvement in the process of “broadcast-like” communication, to refine the regulatory regime and apply it to the right players;
4. Determining the regulatory architecture capable of extending the Convention to the new technologies;
5. Introduction of co- and self-regulation into the regulatory regime.

### *Conclusion*

For all the reasons provided above, the view appears to be spreading that a rationale for extending the scope of the convention to “regulatable” editorial content delivered by the new technologies and capable of influencing public opinion and people’s minds, may be said to exist, though the view that this should not be done is also forcefully expressed. The fact, however, that such regulation may be desirable does not mean that it is practicable at this stage. This is justified by the fact that (1) The new technologies have not evolved into a stable form yet, so development of a full regulatory regime for them in the short term would be premature; (2) No new technology delivering “regulatable” content has achieved an importance and impact justifying regulation; (3) New technologies enhance the possibility of international “jurisdiction shopping” to evade national regulation, making development of both national and international regulatory regimes like those of the convention (involving enforcement of international standards at the national level) practically impossible at present. This last fact is, however, in reality a powerful argument in favour of developing a harmonised international regulatory framework (see below).

Nevertheless, there is a clear and urgent need to continue work in the five areas listed above. New communication services are developing and spreading. Piecemeal regulations already being introduced in some countries to deal with this issue will soon require international harmonisation.

## **2. Jurisdiction and related issues (Articles 4, 5, 9a, 16, 24, 24a, 28)**

### *2.1. General principles: more mixed signals*

Article 5 establishes the “country of establishment” principle as of key importance in determining the party which has jurisdiction over a broadcaster. It also lays down cascading criteria for determining which party it is. It is the duty of that party to “ensure that all programme services transmitted by a broadcaster within its jurisdiction comply with the terms of this Convention”. It can only do so by developing a legislative and regulatory framework which is consistent with the convention. Under Article 4, other parties to the convention “shall guarantee

freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention".<sup>170</sup>

It must immediately be noted that this principle is to some extent contradicted or weakened by other provisions of the convention. This is especially true of:

- Article 16, paragraph 1 ("In order to avoid distortions in competition and endangering the television system of a Party, advertising and tele-shopping which are specifically and with some frequency directed to audiences in a single Party other than the transmitting Party shall not circumvent the television advertising and tele-shopping rules *in that particular Party*");
- Article 9a (lists of major events *adopted by some parties* must, if accepted by the Standing Committee, *be respected by other parties*).

The impression is thus created that if interests of sufficient (primarily economic or financial) importance are at stake, the country-of-establishment principle can to some extent be modified.

The convention's approach to jurisdiction must also be seen in the context of the Political Declaration adopted by the 5th European Ministerial Conference on Mass Media Policy (Thessaloniki, 11-12 December 1997). It stated in recital 10 that "States [should] develop their media policy in accordance with *the principles of independence*, respect for fundamental rights and pluralism, in the spirit of Article 10 of the European Convention on Human Rights and having regard to *cultural diversity*". This would suggest a degree of national sovereignty as regards media policy and, by the same token, principles of media operation and indirectly also content available to the national audience – naturally within the limits imposed by Article 10 of ECHR.

This principle finds expression to some extent in Article 28 of the convention which states that "Nothing in this Convention shall prevent the Parties from applying *stricter or more detailed rules* than those provided for in this Convention to programme services transmitted by a broadcaster deemed to be within their jurisdiction, within the meaning of Article 5".

The principle of independence in media policy is also reflected in Article 24a, referring to cases "When the programme service of a broadcaster is wholly or principally directed at the territory of a Party other than that which has jurisdiction over

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170. Note that in its Opinion No. 3 (1995) on the notion of "broadcaster" (Article 2 (C)), adopted at its 6th meeting (24-25 April 1995), the Standing Committee on Transfrontier Television concluded that "the guarantees offered by Article 4 of the convention only apply to broadcasting organisations which have a lawful status under the domestic law of a transmitting Party. ... Should the authorities of the transmitting Party refuse to provide the declaration [as to the status of a broadcaster], or fail to provide it after the lapse of a reasonable period of time, or declare that the broadcaster has no lawful status in its domestic law, the authorities of the receiving Party are not obliged to allow the retransmission of the programme services of the broadcaster. Without prejudice to the application of other relevant international rules, the authorities of the receiving Party could invoke the procedures contained in Articles 25 and 26 of the convention".

the broadcaster (the 'receiving Party'), and the broadcaster has established itself with a view to evading *the laws in the areas covered by the Convention which would have applied to it had it fallen within the jurisdiction of that other Party*'. The assumption must therefore be that the laws in the receiving party will be different from those in the country of establishment. According to the article, deliberate evasion of such laws by choosing the country of establishment to achieve this purpose "shall constitute an abuse of rights" granted by the convention.

At the same time, this principle of "independent national media policy" is contradicted to some extent in the explanatory report, which states in paragraph 121 with reference to Article 4 "that a Party will not be entitled to rely on the specific provisions of its domestic broadcasting legislation or regulations in areas covered by the Convention (advertising and tele-shopping, sponsorship, responsibility of the broadcaster in maintaining programme standards, etc.) to restrict reception or to prevent the retransmission, on its territory, of a programme service transmitted from another Party which complies with the provisions of the Convention" (though Article 4 is without prejudice to areas which are not governed by the convention, for example, civil and criminal law responsibility of the broadcaster).

This is reinforced by paragraph 127 of the explanatory report: with reference to Article 28, it points out that "a Party is not entitled to rely on such stricter or more detailed rules in order to restrict the retransmission on its territory of programme services which are transmitted by entities or a technical means within the jurisdiction of another Party and which comply with the terms of the Convention, namely Articles 6 to 18b".<sup>171</sup>

Let us note, on the other hand, that Article 24a defines no limits – in terms of the provisions of the convention, or of national law – on situations in which a receiving party may allege what might be called "abusive delocalisation", that is, abuse of the rights conferred by the convention, when a broadcaster established itself on the territory of another party in order to evade "the laws in the areas covered by the Convention" of the receiving party. This would appear to contradict the careful delimitation of legal grounds, as laid down in Article 24, for potentially taking measures against a transfrontier broadcaster.

These differences of approach can be given different interpretations:

- a positive interpretation could suggest that some margin of appreciation is left to parties to the convention, enabling them to enjoy some room of manoeuvre within a common framework;
- a negative interpretation could suggest that they result from an attempt to strike an uneasy balance between a desire to develop and apply a common framework, and a determination to pursue independent national policies.

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171. This leads to a situation pointed out by Switzerland, whereby programme windows on German channels targeting Switzerland contain split-screen advertising which is not permitted by Swiss legislation – yet Switzerland cannot react.



## *Conclusion*

As is clear from the above, there continues to exist a tension between the desire to create a “European audiovisual area” governed by a common legal framework, and the determination of many countries to pursue independent media policies. The free and unhindered transfrontier circulation of television programme services complying with the terms of the convention is a value that must be protected. At the same time, a growing need appears to be felt for ways of promoting diversity of cultures and of national media policies, and in this context for measures that can be applied when that freedom is abused. With that will most likely come calls for further efforts to find a better and more effective balance in this field.

### *2.2. Different types of transfrontier television*

Eight different types of transfrontier television can be distinguished.<sup>172</sup>

Unintended transfrontier distribution:

1. Natural signal “spill-over” across a border; programme service explicitly tailored for the home audience in country A, but also available to a (limited) audience in country B

Intended transfrontier distribution:

- i. Regional/continental/global transfrontier television;
  - ii. A programme service explicitly tailored for the home audience in country A, but also available to audiences in other countries through satellite and/or cable distribution (TF1 of France);
  - iii. Channels in a single language, but with a clear pan-European vocation (TV5 Europe, BBC World, BBC Prime, 3sat, BVN, MTV Europe, VH-1;
  - iv. Pan-European services with distinct linguistic versions (Eurosport, Euro-news, Cartoon Network, Discovery Networks Europe, Animal Planet etc.);
2. “Delocalised channels”
    - v. Channels which were originally established in country A, but explicitly target the market of country B: RTL-4 and RTL-5 (established in Luxembourg and targeting the Netherlands); RTL9, (established in Luxembourg and targeting France and Switzerland); TMC (established in Monaco and targeting France); TV3 and 3+ (established in the UK and targeting the Nordic countries); Kanal 5 (established in the UK and targeting Sweden);

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172. This typology elaborates on that proposed by Dr André Lange (European Audiovisual Observatory), *The Impact of Transfrontier Broadcasting Services on Television Markets*, presentation during an EU Informal Ministerial Conference on Broadcasting, Dublin and Drogheda, 1-3 March 2004.

- vi. Channels established and tailored for market A, but with advertising and/or programming windows addressed to one or more neighbouring markets: Swiss and Austrian windows on private German channels (SAT.1, RTL, Pro7, Kabel1); Irish windows on Sky News. Some of these channels have obtained a licence from the targeted country (SAT.1 Schweiz);
  - vii. Channels not established in Europe but broadcast through European satellites (in general with the signal picked up from a non-European satellite): HBN Herbalife Broadcasting Network (Europe), TV Globo International;
3. "Relocated" channels;
- viii. Channels which were originally established in country A, but moved to country B in a process of "jurisdiction shopping", to evade the laws in the areas covered by the convention which applied to it when it was within the jurisdiction of Party A (a theoretical possibility, but examples can probably be found).

Experience suggests that cases v, vi and viii are probably most likely to give rise to concern in the receiving parties.<sup>173</sup> The many examples of cases v and vi show that the problem is real.

The convention offers the following possible remedies against "abusive delocalisation" or "relocation", or in the case of other disputes:

- Article 16.1 of the convention, requiring that "advertising and tele-shopping which are specifically and with some frequency directed to audiences in a single Party other than the transmitting Party shall not circumvent the television advertising and tele-shopping rules in that particular Party" (this, of course, aims to prevent "abusive delocalisation", rather than to provide a remedy against it);
- Friendly resolution of problems and settlement of disputes, as provided for in Articles 24.1, 24a.2 in the context of Articles 19, 20, 25;
- Arbitration (Article 26);
- Provisional suspension of retransmission, as specified in Articles 24.2 and 24.3;
- Procedures to be applied in the case of abuse of rights conferred by the Convention, as laid down in Article 24.2 (b), (c) – 24.5.

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173. In this context, it might be useful to recall paragraph 63 of the explanatory report: "Although the possible deletion of Article 16 concerning advertising directed specifically at a single Party was considered, it followed from the analysis that the issue remained important for the contracting Parties and that the way in which the issue was dealt with by the convention prevented the emergence of distortion in competition between national broadcasters and foreign broadcasters and enabled the countries with a limited linguistic coverage to face competition from broadcasters in the larger countries sharing the same language. In addition, experience had shown that the provision included in the convention on this issue had been successfully invoked in concrete cases which might not have been resolved on the basis of the abuse of rights' criteria."

## *Conclusion*

The Convention thus seems to provide an array of methods of dealing with “abusive delocalisation” or “relocation”. However, few of them are designed to deal specifically with specific cases of this phenomenon, or provide effective procedures. Article 24a merits special attention in this regard. First, it puts the burden of proof that a broadcaster deliberately sought to evade the laws of the receiving party on that party itself – and that is not easy to do. Second, it involves extremely long procedures, which may discourage states party to the convention from invoking it. Third, and most importantly, it is too broad in scope. Perhaps a way forward would be to specify general cases when “delocalisation” is indeed abusive and specify ways in which receiving parties could react in each case, at the same time providing for procedures which take significantly shorter amounts of time. Considerations of desirability and practicability of such regulation should be carefully weighed before proceeding, but if the preceding conclusion is correct, then the need for it will become increasingly apparent.

Another idea to consider could involve the contribution of the transmitting state to preventing “abusive delocalisation”. Since establishment of a broadcaster in another country with a view to evading the laws in the areas covered by the convention which would have applied to it had it fallen within the jurisdiction of the receiving state is recognised as an abuse of rights conferred by the convention, the transmitting state, when licensing broadcasters in cases v, vi and viii listed above, could require such broadcasters not to evade the law in the areas covered by the convention which are in force in the receiving state. Alternatively, it could be requested by the receiving party to so modify the terms of the licence, should the receiving state find that its laws are indeed being evaded by the broadcaster established in that transmitting state.

### *2.3. Difficulties raised by the text of Article 5*

#### *“Head office”*

Article 5.3.a introduces the criterion of the broadcaster’s head office in a particular party. While this might seem clear enough, this criterion disregards the complex organisational structures of multinational corporations. The broadcaster may turn out to be a subsidiary of another company, with a head office in another country, which will usually reserve for itself the right to take strategic decisions. This raises the question of the transmitting party’s ability to assume effective jurisdiction over a broadcaster, which is subject to policy making and decision making conducted in another country.

This points to the need for a clearer interpretation of the term “head office”.

#### *“Decisions on programme schedules”*

Another criterion introduced in Article 5.3.a is “decisions on programme schedules”.

The nature of this particular problem is exacerbated by the use of different terms in Directive 97/35/EC of the European Parliament and of the Council of June 1997, amending Council Directive 89/552/EC on Television Without Frontiers:

- “editorial decisions about programme schedules” in Article 2.3.b, and
- “decisions on programming policy” in recital 12 of the preamble.

The directive is, of course, a separate legal instrument. However, precisely the need to “maintain a coherence with the revised Directive, in the interest of legal certainty of both States and transfrontier broadcasters” was (as noted in paragraph 39 of the explanatory report) a crucial reason for the elaboration of the amending protocol.

This raises the question of what precisely is meant by “decisions on programme schedules”:

- a. general decisions on programming policy, which in a transnational corporation may be taken by the head office of the mother company in another country;
- b. the once-a-season decisions on adopting the programme schedule for the given season which could be taken by a concrete person or executive body within the broadcaster’s organisation;
- c. or the editorial decisions on the contents of particular parts of the day or time slots within the schedule, and any changes which may need to be made in the schedule in the course of the season.

Again, this points to the need for a more precise interpretation of the term.

*“Significant part of the workforce”*

Another imprecise term is that of “a significant part of the workforce involved in the pursuit of the television broadcasting activity” (Article 5.3.b). The operative word here is “significant”. Is this term to be understood in a quantitative or qualitative sense, that is:

- does it refer to a “majority part of the workforce”, that is, a numerical majority (over 50% of the number of all employees) of the workforce;
- or does it refer to the policy- and decision-making (that is, managerial) part of the workforce, deriving its significance not from the number of people involved, but from their role in running the broadcasting establishment?

The issue is made even more complicated by the phrase in Article 5.3.b which reads “if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Parties”. If the “significant part of the workforce” can be split in two (or more?) parts, then neither of the two above interpretations would seem to be correct. Accordingly, the meaning of the term “significant” appears all the more unclear.

Paragraph 137 of the explanatory report states that this criterion is oriented to establishing “considerable material evidence of the place where the broadcasting activity is effectively carried out”. This raises yet another question concerning the definition of “broadcasting activity”? Does this cover the management of the station, production of content and then its transmission, or only one or two of these kinds of activities?

*“Stable and effective link with the economy of the Party”*

This term, too could profit considerably from a closer definition. The context in which this phrase first appears in Article 5.3.b is as follows: “if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Parties, the broadcaster shall be deemed to be established in the Party where it first began broadcasting in accordance with the system of law of that Party, provided that it maintains a stable and effective link with the economy of that Party”. If so, then the suggestion is that it is possible to maintain “a stable and effective link” with the economy of a party without maintaining “a significant part of the workforce” in that party. That “link with the economy of a country” must appear in conjunction with that fact that the broadcaster “first began broadcasting in accordance with the system of law of that Party”, and that it either has a head office, or takes decisions on programme schedules in that party. If the two elements in a particular case are that the broadcaster takes decisions on programme schedules and begins broadcasting (which can be a purely technical element of its activities) in a party, then the actual number of its employees based in that party may be minimal. Does this constitute “a stable and effective link” with the economy of that party, if the head office, “significant part of the workforce”, sale of air time, payment of most taxes etc. are all based or conducted in another country?

*Conclusion*

Where possible, these concepts should be specified and defined more clearly in order to remove difficulties of interpretation and application.

*2.4. Jurisdiction in the digital age*

The level of complexity of this issue is suggested by the extensive provisions of the Convention on Cybercrime of 2001 concerning matters of jurisdiction over offences committed in cyberspace, international co-operation, mutual assistance, extradition and procedures pertaining to mutual assistance requests in the absence of applicable international agreements.

Also Ulrich Siebert<sup>174</sup> points out that “law enforcement within the Internet must be internationally efficient since it is dealing with perpetrators and data

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174. Siebert U., Legal regulation, law enforcement and self-regulation. A new alliance for preventing illegal and harmful contents in the Internet, University of Würzburg, September 1999.

which are not limited to national boundaries". He points to the need to have harmonised or fairly uniform rules as an indispensable way of dealing with the problem. It is impossible for international services and content providers to take into consideration content regulations existing in all the countries from which the data can be accessed. International harmonisation of laws and the limitation of extra-territorial application of laws appear to be the only workable solution. The development of an internationally harmonised body of law will, of course, require a great deal of time.

### *Conclusion*

Difficulties with jurisdiction in the digital age appear to provide one more argument in favour of developing international standards of content regulation for "broadcast-like" new technologies.

### **3. Freedom of reception and retransmission (Article 4)**

This provision is, of course, the heart of the convention and should remain in its present form. However, should the issue of "abusive" delocalisation and relocation and of forms of reacting to them be developed in the convention, then a second paragraph might be needed, referring to exceptions to the general rule and to other articles of the convention, detailing the specific cases and providing remedies for them.

### **4. Duties of the parties of the convention (Articles 5, 6)**

The provision of Article 5.1 is another key feature of the convention and should also remain its present form.

As for Article 6, it could be extended to cover two main areas:

- Provision of information required to resolve potential disputes and difficulties with the application of Article 9a;
- If the issue of "abusive" delocalisation and relocation and possible remedies against them is taken up in the revision of the convention, then this would require co-operation among parties to the convention and provision of information required in such cases (for example, about "delocalised" broadcasters and their activities). This should be considered as part of a broader package of possible amendments dealing with this issue.

## **5. Advertising directed at a single party (Article 16)**

There does not appear to be a need to amend this article.

### **Appendix**

#### ***Preliminary proposals***

*Submitted by the delegate of Poland for revising the European Convention on Transfrontier Television in such areas as the scope of the Convention, jurisdiction, freedom of reception and retransmission, the duties of the Parties of the Convention, advertising directed at a single Party and the abuse of rights granted by the Convention*

*(Articles 1, 2, 3, 4, 5, 6, 16 and 24a)*<sup>175</sup>

Extension of the scope of the Convention will probably – depending on the choice of the regulatory architecture for the new instrument(s) – require a fundamental rewriting of the text, in that at present it deals solely with circumstances arising out of the broadcast mode of communication. Much will also depend on the regulatory architecture that will be applied, that is, whether there will be one instrument (perhaps divided into parts, dealing with linear and non-linear modes of delivery), or more than one. Therefore, these proposals should only be regarded as indicative of the extent of change that may have to be introduced.

Some issues covered by these proposals are highly controversial in nature. Nevertheless, they are raised here to offer an opportunity for further discussion, so that any decisions taken in a future revision of the Convention will spring from a thorough examination of all possible points of view.

#### **Title**

If the scope of the Convention is to be extended beyond television, then its title will obviously have to be changed.

#### *Article 1: Object and purpose*

*This Convention is concerned with programme services embodied in transmissions. The purpose is to facilitate, among the parties, the transfrontier transmission and the retransmission of television programme services.*

The future Convention(s) will no longer deal with “programme services embodied in transmissions”. Perhaps this can be replaced with “audiovisual and information services”

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175. The present “Preliminary proposals” complement the final version of a discussion document prepared by the delegate of Poland on questions concerning the scope of the convention, jurisdiction, freedom of reception and retransmission, the duties of the parties of the convention, advertising directed at a single Party and the abuse of rights granted by the convention (Articles 1, 2, 3, 4, 5, 6, 16 and 24a).

#### *Article 2: Terms employed*

1. Assuming that the concept of “regulatable content” or some such term is accepted, then a definition of the term will have to be added.
2. The definition of “broadcaster” will need to be replaced by, or supplemented with a broader term, perhaps “provider of an audiovisual and/or information service”.
3. Phrases like “Advertising’ means any public announcement broadcast ...” will have to be reformulated, as the Convention will no longer apply to broadcasting alone.

#### *Article 3: Field of application*

*This Convention shall apply to any programme service transmitted or retransmitted by entities or by technical means within the jurisdiction of a Party, whether by cable, terrestrial transmitter or satellite, and which can be received, directly or indirectly, in one or more other Parties.*

A more general and technologically-neutral definition of the field of application is needed.

#### *Article 4: Freedom of reception and retransmission*

*The Parties shall ensure freedom of expression and information in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services, which comply with the terms of this Convention.*

“Freedom of reception and ... retransmission” refers to broadcasting (especially as concerns “retransmission”). Language referring to a wider field of communication modes will have to be found, perhaps speaking of “freedom of communication”, as in the Declaration on Freedom of Communication on the Internet, adopted by the Committee of Ministers on 28 May 2003.

This provision is, of course, the heart of the Convention and should remain in its present form. However, should the issue of “abusive” delocalisation and relocation and of forms of reacting to them be developed in the Convention, then a second paragraph might be needed, referring to exceptions to the general rule and to other articles of the Convention, detailing the specific cases and providing remedies for them.

#### *Article 5: Duties of the transmitting parties*

1. Again, provisions on jurisdiction refer only to broadcasting and cannot be extended to new communications services, especially to the Internet.



In provisions relating to jurisdiction over broadcasters, such terms as “head office”, “decisions on programme schedules”, “significant part of the workforce”, “stable and effective link with the economy of the Party” require clearer definitions.

2. Should the concern for more balance between European and national media policy find reflection in work on revising the Convention, this article could be renamed “Rights and duties of parties to the Convention”, specifying both duties, as at present, and areas where parties may define and pursue policy objectives.
3. Should the issue of “abusive delocalisation” be taken up in work on revising the Convention, transmitting parties could be charged with specific duties to prevent such phenomena. Since establishment of a broadcaster in another country with a view to evading the laws in the areas covered by the Convention which would have applied to it had it fallen within the jurisdiction of the receiving state is recognised as an abuse of rights conferred by the Convention, the transmitting state, when licensing certain types of delocalised or relocated broadcasters, could require such broadcasters not to evade the law in the areas covered by the Convention which are in force in the receiving state. Alternatively, it could be requested by the receiving party to so modify the terms of the licence, should the receiving state find that its laws are indeed being evaded by the broadcaster established in that transmitting state.

*Article 6: Provision of information*

1. *The responsibilities of the broadcaster shall be clearly and adequately specified in the authorisation issued by, or contract concluded with, the competent authority of each Party, or by any other legal measure.*
2. *Information about the broadcaster shall be made available, upon request, by the competent authority of transmitting Party ...*

These provisions will need to be reformulated, or (if there are separate parts for linear and non-linear modes of delivery) written differently for non-broadcast content providers.

They could also be extended in the following ways:

- by obliging parties to the Convention to provide clearly specified information required to resolve potential disputes and difficulties with the application of Article 9a;
- if the issue of “abusive” delocalisation and relocation and possible remedies against them is taken up in the revision of the Convention, then this would require co-operation among parties to the Convention and provision of information required in such cases (for example, about “delocalised” broadcasters and their activities). This should be considered as part of a broader package of possible amendments dealing with this issue.

*Article 16: Advertising and tele-shopping directed specifically at a single party*

There does not appear to be a need to amend this article, provided it is retained only in relation to broadcasting as such.

*Article 24a: Alleged abuses of rights conferred by this Convention*

This article could be clearer in defining “abusive delocalisation” and “relocation” (in relation to broadcasting). It should also give receiving parties the ability to react, in strictly defined ways and under close scrutiny by the Standing Committee, to abuses of rights much more quickly than at present.



**Part VI. Legal expertise: keeping  
media free and democratic**



# Analysis and review of the “Gasparri Law”<sup>176</sup>

by Karol Jakubowicz and David Ward

## ***I. Foreword***

Law No. 112 of 3 May 2004 “Principles governing the broadcasting system and RAI-Radiotelevisione italiana Spa, and the authority delegated to the government to issue the consolidated legislation on television broadcasting” (widely known as the Gasparri Law) follows a long list of earlier Italian broadcasting statutes, all or most of which remain in force<sup>177</sup> (see the appendix for a list set of amendments to earlier statutes contained in the present law).

Article 1 describes the scope and purpose of this law as follows:

The present law sets out the general principles governing the national, regional and local radio and television broadcasting system and adapts it to the advent of digital technology and the convergence of radio and television broadcasting with other sectors of interpersonal and mass communications, such as telecommunications, publishing, including electronic publishing, and the Internet in all its applications. The present law covers broadcasts of television, radio and data programmes, including conditional access programmes, and the provision of associated interactive services and conditional access services, on terrestrial frequencies, by cable and satellite.

The law consists of five main parts:

1. General principles (Chapter I)
2. Legislative authority and consolidated broadcasting legislation (Chapter III)
3. Media concentrations and pluralism (Chapter II)
4. Public broadcasting service (Chapter IV)
5. Digital terrestrial broadcasting (Chapter V).

The law also serves to transpose some provisions of the package of European Union directives on electronic communications of 2002. Thus, its scope is in fact broader than suggested by Article 1.

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176. This analysis and review, written with David Ward in 2004, was one of the documents used by the European Commission For Democracy Through Law in the preparation of its opinion on the compatibility of the laws “Gasparri” and “Fratini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, adopted by the Commission at its 63rd Plenary Session (Venice, 10-11 June 2005).

177. A list of some of these statutes can be found on the website of the parliamentary commission for the general direction and surveillance of radio-TV services [www.parlamento.it/Bicamerale/6/643/658/paginabicamerale.htm](http://www.parlamento.it/Bicamerale/6/643/658/paginabicamerale.htm).

Below, an attempt will be made, where possible, to separate information about the contents of particular parts from analysis of their provisions in a broader context, and finally from comments and assessment of them.

## **II. Background**

The situation in Italian broadcasting in general,<sup>178</sup> and the Gasparri Law in particular, has attracted considerable attention and has been the subject of wide-ranging debate in Europe. A number of European institutions and organisations have expressed their views on the subject, including:

- the European Parliament’s report of 5 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights);
- Resolution 1387 (2004) “Monopolisation of the electronic media and possible abuse of power in Italy”, and a report under the same title adopted by the Council of Europe’s Parliamentary Assembly on 3 June 2004;
- “Crisis in Italian media: how poor politics and flawed legislation put journalism under pressure”, report of the IFJ/EFJ Mission to Italy, 6-8 November 2003;
- “Italy. A media conflict of interest: anomaly in Italy”, investigation by Soria Blatmann, *Reporters sans frontières*, Paris, April 2003.

## **III. General assessment and comments**

The present law is not a complete or comprehensive new broadcasting act, but an attempt to regulate selected aspects of the broadcasting system and amend selected provisions of earlier laws, often with a view to liberalising them. A full analysis of its provisions and of its place in the Italian legal framework in relation to broadcasting would require a study of an extensive body of legislation adopted over a period of a few decades.

### **Public service broadcasting**

1. The present law creates a mechanism for the continuation of a public broadcasting service after the expiry of a 12-year franchise for RAI, but does not fully guarantee it.
2. The present law does not call for, nor does it require or guarantee full institutional independence and autonomy of the public service broadcasting organisation. On the contrary, it introduces no changes (save for those resulting from the eventual privatisation of RAI) in a situation where various state authorities have wide-ranging and direct involvement in the affairs of the public broadcasting service licensee.

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178. For a general overview of the broadcasting scene in Italy see Autorità per le garanzie nelle comunicazioni, Annual Report on activities carried out and work programme, Roma, 30 June 2003, [www.agcom.it/rel\\_03/eng/Relaz\\_eng\\_part02.pdf](http://www.agcom.it/rel_03/eng/Relaz_eng_part02.pdf).

3. The privatisation of RAI could be described as amounting to its partial re-nationalisation for an unforeseeable period of time. For as long as the present government stays in office, the prime minister will directly or indirectly control all major national television channels. The Italian situation is not, strictly speaking, a television monopoly, but there is sufficient evidence to show that both commercial and public national television channels (and in RAI's case, also radio channels) are controlled by one person to such an extent that a real threat of monopolisation clearly exists. The present law may change this eventually, but only gradually and potentially only after a considerable period of time.

### ***Media concentration***

1. The framework for regulating the basic principles of media pluralism is set out in this law and normatively aims to protect media diversity to ensure that the radio and television sectors are plural.
2. The framework to guarantee these principles, however, is essentially aimed at retaining the current level of media concentration of the media sector (specifically in the television market as the radio and press sectors demonstrate a high degree of pluralism). The provision that a broadcaster may not operate more than 20% of national radio and television channels, once the digital plan has become fully operational in 2006, may be unsuitable in a digital environment with the introduction of a range of niche channels that enjoy very small audience shares.
3. The concept of the integrated communications system devised in this law to establish a maximum threshold for share of revenues is also inadequate to clearly assess market pluralism in any one market and abandons the concept of "relevant market". That is an essential tool for providing competition analysis.
4. The law facilitates greater scope for cross-media ownership. Although there is a period when broadcasters are not allowed to enter the press market, once this period has expired the strong financial position of television broadcasters in the overall communications sector may lead to television companies building a strong position in related media markets.
5. The status quo will be maintained until digital switch over is achieved. And it is unlikely that the provisions in this law will alter the present levels of concentration.

### ***Provisions for migration from analogue to digital transmission***

1. Many of the central provisions of Section V support and extend the provisions of Law 66/2001 and *Autorità per le garanzie nelle comunicazioni* (AGCOM) Regulation and act to extend deadlines and therefore the continuation of the present conditions for the migration of broadcasters between frequencies.



2. The main tools to support digital rollout are a mix of: 1) state subsidies to promote the diffusion of hardware into households as well as indirect subsidies in terms of the allocation of a minimum amount of the state advertising budget to the print sector; 2) public policy deadlines that oblige RAI to meet coverage deadlines and thresholds set for operators to apply for licences and authorisations on local, national and regional levels; 3) free market mechanisms, that is, spectrum trading between operators and a reconfiguration of the categories for licensing purposes.
3. There are also transitional limits on channel share established to protect a degree of pluralism in the migration period. Many of these features are established in Law 66/2001 and AGCOM's regulation.

#### ***IV. General principles (Chapter I)***

This chapter contains a number of provisions that outline the aims of public broadcasting policy and the principles to be honoured in the broadcasting field. These provisions, which are unobjectionable, are left out of consideration here.

Article 2 contains definitions of terms, many of them referring to electronic communications networks and services. A number of definitions deserve special attention.

Article 2(1a) appears to be reflective of a technology-neutral approach to broadcasting, whereby “programmes” mean “all content provided under a single editorial trade mark for broadcasting to the public on television or radio, respectively, by any means”. Thus, broadcasting is not defined here by the technology it uses to deliver the signal.

Article 2(1b) introduces the term “data programmes”, referring to “information services consisting of electronic publishing products broadcast by television networks, other than television programmes, not supplied on individual request, including teletext information pages and data pages”.

Article 2(1g) defines an “integrated communications system” as “the economic sector comprising the following activities: daily newspapers and periodicals; annuals and electronic publishing including publishing on the Internet; radio and television; cinema; advertising; information on products and services; sponsorship”. This is to serve as a frame of reference for analysing media concentration and pluralism.

Article 2(1h) refers to “general public television broadcasting service” as a “public service performed under franchise in the television broadcasting sector by means of the full range of programmes, including programmes other than information programmes, provided by the company holding the franchise in accordance with the detailed rules and within the limits specified in the present law and the other measures referred to”. As shown below in Section 3, this means that the public service remit can, in theory, be entrusted to any broadcaster.

Article 3 seeks to define “fundamental principles”. What should be remarked on here is the fact that one important element has been left out of what is essentially a quotation from Article 10 of the European Convention of Human Rights: “to protect the freedom of expression of each individual, including freedom of opinion and freedom to receive or communicate information or ideas without limits imposed by frontiers [regardless of frontiers]”, whereas in fact the pertinent provision of Article 10 reads as follows: “to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

Article 4 lays down guarantees for listeners and viewers that the Italian broadcasting system will be governed by generally accepted rules and standards of broadcasting in Europe.

Article 5 and Article 7 are discussed below, in the part dealing with Chapter II.

Article 6 regulates services in the general interest in broadcasting in relation to (i) all broadcasters, and (ii) to the public broadcasting service licensee (see below, Chapter IV).

Pursuant to this article, provision of information by any broadcaster is defined as a service of general interest. As such, it must comply with the following principles, among others:

- a) truthful presentation of facts and events, so as to encourage opinions to be formed freely, with no sponsorship of news bulletins;
- b) access for all political persons to information, election and party political broadcasts, on fair and equal terms, in the forms and in accordance with the rules prescribed by law;
- c) transmission of announcements and official statements by constitutional bodies prescribed by law.

Thus, any broadcaster who carries news programmes is under an obligation to “transmit announcements and official statements by constitutional bodies”.

The article authorises AGCOM to lay down further rules for national television broadcasters to ensure that information and current affairs programmes comply with the principles contained in this chapter.

Article 6(5) puts the public broadcasting service licensee under an obligation to use the licence fee revenue exclusively to perform the general public service duties entrusted to that company, with regular audits and without upsetting the balance of trade and competition in the European Community.

Article 8 refers to “interconnected broadcasts” which most likely means effective networking of radio or television stations by broadcasting the same programming simultaneously. It liberalises some provisions (for example, allowing longer periods of “interconnection” for television stations), regulates networked

programming and requires broadcasters wishing to network their programming to apply for an authorisation from the Ministry of Communications.

Article 10 deals with protection of minors in television programming. It reinforces the protection of minors by prohibiting the employment of minors less than 14 years old in advertising. Fines for breaching provisions on the protection of minors are increased to a range between €25 000 and 350 000. AGCOM is entrusted with the duty to ensure respect for fundamental rights and to report to Parliament every year on the protection of minors.

Article 12 seeks to safeguard efficient use of the electromagnetic spectrum. To this end, AGCOM has been put in charge of the adoption and implementation of the national frequency plan. AGCOM will both encourage experimentation and safeguard existing broadcast services. During the transition to digital, current broadcasters will continue their analogue transmissions while they invest in digital frequencies – obtaining them by purchase from other broadcasters. It is expected that frequency trading will be the main method for the acquisition of new frequencies (see Section V). AGCOM will monitor the correct allocation of spectrum. The authority will issue its own regulation, defining the general criteria for establishing electronic communications networks. Where new networks cannot be established, the authority will establish rules for sharing infrastructures, broadcasting stations and network facilities.

### ***V. Legislative authority and consolidated broadcasting legislation (Chapter III)***

Article 16(1) authorises government to issue consolidated broadcasting legislation “co-ordinating the current rules, integrating them and introducing the amendments and repeals required in order to co-ordinate them or to ensure that they are as effective as possible”. Article 16(3) describes the various consultation procedures that the resulting Legislative Decree must undergo before it takes effect.

Article 16(2) defines legislative and administrative powers conferred on, respectively, provincial, regional and local bodies, regarding:

- 16(2a): frequency bands for regional or provincial digital television programmes;
- 16(2b): the issue of permits, authorisations and franchises required for access to the sites set aside in the national plan for the allocation of frequencies;
- 16(2c): the issue of authorisations to content providers or to providers of associated interactive services or conditional access services for broadcasts at regional or provincial level respectively;
- 16(2e): the definition of specific public service duties that the company holding the general public broadcasting service franchise is required to perform within the programming schedule and network for broadcasting content at regional level;

- 16(2f): the conclusion, in the case of the regions and the autonomous provinces of Trento and Bolzano, and with the agreement of the Ministry of Communications, of specific service contracts with the company holding the general public broadcasting service franchise, defining the obligations referred to in sub-paragraph e) with due regard to the right of the company holding the franchise to take economic decisions, including decisions as to the organisation of the firm; further fundamental principles relating to the specific sector of regional or provincial broadcasting may be covered by the legislative provisions in force on the date on which the present law enters into force with respect to local television broadcasting, having due regard to the legal and economic unity of the state and ensuring that services relating to civil and social rights are maintained at the necessary level and that public safety and security are protected.

### ***Analysis***

These provisions are consistent with the constitutional system of Italy, as defined in Article 5 of the constitution: "The Republic, one and indivisible, recognises and promotes local autonomies; implements in those services which depend on the State the fullest measure of administrative decentralisation; accords the principles and methods of its legislation to the requirements of autonomy and decentralisation".

Article 114 of the constitution states that "Municipalities, Provinces, Metropolitan Cities and Regions are autonomous entities with their own Statutes, powers and functions according to the principles laid down in the Constitution". Finally, Article 117 provides that "Legislative power shall be exercised by the State and by the Regions in accordance with the Constitution and within the limits set by European Union law and international obligations".

With the state retaining sole legislative power on major issues, Chapter III is designed to give effect to these constitutional principles by defining the relative legislative and administrative powers of central state authorities on the one hand, and of regional, provincial and local authorities on the other.

### ***VI. Media concentration issues (Chapters I and II)***

1. Many of the provisions in the Gasparri Law are already provided for pursuant to Law 66/2001 and AGCOM's Regulation of November 2001, Title 5 (Articles 24-29), which contains provisions aimed at safeguarding pluralism and transparency in the digital television market. The present law therefore seeks to adopt these instruments as well as to introduce a new element to the regulations pertaining to media concentration (discussed below). The following measures are set out in AGCOM's regulation:

- one third of digital terrestrial transmission capacity is reserved for local content providers (Article 24[1a]);

- no subject is allowed to hold authorisations as a content provider that enable them to broadcast more than 20% of the total number of television channels (free-to-air or pay-TV) available via DTT at national level (Article 24[1b]);
- no subject can be holder of authorisations for content provider at national and local level at the same time (Article 24[2]);
- transparency requirements for content providers include a requirement to maintain separate accounting systems for holders of more than one authorisation as content provider for each authorisation they hold, which also applies to holders of an authorisation as content and as service provider (Article 25);
- transparency requirements for the network operators include a requirement for local network operators who are also content providers to maintain separate accounting systems which is also applicable to companies that qualify as a national network operator who are also content providers (Article 27).

In reference to media pluralism, the law's objectives are principally set out in Articles 3, 4 and 5 that establish the fundamental principles of the Law.

Article 4(a) also guarantees access to a "number of national and local operators ... In conditions of pluralism and free competition" (Article 4[a]). Article 5[1a] also guarantees competition in media markets and furthermore guarantees that either the creation or maintenance of dominant positions that are damaging to pluralism will not be allowed.

A number of articles are dedicated to the question of media pluralism and concentration of ownership. The general principles are established in Articles 3(1), 4(1a), 5, 12(3), 24(1b), 25(1), 25(11) and extend the concept set out in Articles 3, 4 and 5 to the digital terrestrial platform on national and local levels. The provisions also cover radio and cross media ownership.

2. The law proposes two extremely radical changes in the legal framework that will bring about fundamental changes to the shape of previous anti-concentration measures, especially the ones pertaining to the national broadcast media. The two principal changes that affect media pluralism are:
  - the introduction of a maximum threshold of 20% of national channels that a broadcaster is allowed to operate pursuant to Article 15(1);
  - the introduction of the concept of an integrated communications system used to establish financial thresholds across electronic and print media sectors pursuant to Article 15(2).

**Table 1. Concentration thresholds for national television broadcasters**

Not allowed to have local and national licence	Article 5(d)
Max. 20% channel share of terrestrial digital channels once frequency plan is finalised	Article 15(1)
Max. 20% of revenue share of the integrated communications system	Article 15(2)
Until 2010 a company with more than one national TV network cannot own a newspaper	Article 15(6)

3. Article 15(1) establishes limits on market share for national radio and television broadcasters once the frequency plan for digital terrestrial television has become operational.

The framework for establishing the 20% limit of market share is (in the translation that we have used) ambiguous. Article 15(1) rules that a content provider may not hold authorisations allowing them to broadcast more than 20% of all television programmes or more than 20% of radio programmes that may be broadcast on terrestrial frequencies at the national level through the networks provided for in the plan.

Article 25(8), which rules for the transitory period, affirms that until the complete implementation of the plan for the assignment of digital television frequencies, the overall number of programmes for each subject is limited to 20% and is calculated on the overall number of television programmes authorised or aired at the national level on either analogue or digital terrestrial frequencies, as under Article 23(1).

On the basis of Article 15(1), the most likely interpretation is that the 20% limit is calculated on the total number of channels that it is possible to broadcast via DTT at national level, according to the technical plan, whereas, on the basis of Article 25(8), the 20% limit is calculated on the overall number of television programmes available (aired or authorised) at the national level. This seems to be more logical and also in line with what is ruled by Article 24(1b) of AGCOM's DTT regulation of 2001. Here it is ruled that no subject is allowed to hold authorisations as a content provider that enable them to broadcast more than 20% of the total number of television channels (free-to-air or pay-TV) available via DTT at national level. Also in this case, therefore, the 20% limit is calculated on the overall number of television programmes aired at the national level.

4. Complementing Article 15(1) is Article 15(2) that sets out the concept of the integrated communications system that establishes a threshold for market share based on revenue share.

The umbrella term integrated communications system has been devised to establish a revenue threshold and is calculated to include a wide range of media pursuant to Article 15(3): 1) national and local broadcasting including broadcasters funded by pay-per-view, advertising, licence fees, sponsorship and

tele-shopping revenue streams; 2) any type of publishing (newspapers, magazines, books, electronic publishing); 3) cinema, television and music production and distribution; and 4) any form of advertising (including outdoor advertising) as well as revenues from the Internet.

Pursuant to Article 15(2) any one company may not earn more than 20% of revenues enjoyed by the whole media sector that is included in the concept of integrated communications system.

- Local broadcasting has been granted a significant place in the television sector and one third of spectrum capacity allocated to television is reserved for local television. Significantly the ban on national broadcasters owning a local broadcaster pursuant to Article 5(d) has remained. The measures that affect local television broadcasters are stricter than the ones that have been devised for national broadcasters and they are set out in Article 7 (2,3,4).

**Table 2. Concentration thresholds for local broadcasters**

Reserved third of the broadcasting capacity	Article 7(2)
One person may not hold more than three franchises within each local area	Article 7(3)
One person may not hold more than six franchises for each regional area. Maximum limit of six franchises	Article 7(3)
Until the national plan for the allocation of digital radio and television frequencies is fully operational, local television broadcasters may broadcast programmes for no more than a quarter of the daily transmission time for the various areas comprising the user area for which the franchise or authorisation has been issued	Article 7(4)
Not allowed to have local and national licence	Article 5(d)

- Pursuant to Article 15(1) the national radio sector comes under the same rules as the television sector in that national radio broadcasters are restricted to 20% of the number of national channels, and pursuant to Article 15(2) 20% of the overall revenues of the integrated communications system.

**Table 3. Concentration thresholds for radio broadcasters**

Max. 20% channel share of terrestrial digital channels once frequency plan is finalised	Article 15 (1)
Max. 20% of revenue share of the integrated communications system	Article 15 (2)

- Cross-media provisions are contained in Article 5 (g1 and g2) and Article 15 (4 and 6). Pursuant to Article 15(6) there is a restriction on television broadcasters who operate more than one national network owning shares of newspaper companies until the end of 2010. Newspaper publishers will be allowed to enter the television market with the introduction of the law.

Article 15(4) also restricts telecommunications operators with earnings that exceed 40% of revenues in the telecommunications sector from earning more than 10% of earnings in the integrated communications system.

**Table 4. Cross-media thresholds**

A national content provider that is also a service provider must keep separate accounts	Article 5(g1)
“a national television network operator who is also a content provider and an interactive or conditional access service provider shall be required to maintain separate companies” (not cable, local or satellite)	Article 5(g2)
“Restricts telecommunications operators with earnings that exceed 40 percent of revenues in the telecommunications sector from earning more than 10 percent of earnings in the integrated communications system”	Article 15(4)
Ban on national TV company owning a newspaper until 2010	Article 15(6)

Article 5 (g1 and g2) sets out that where a national content provider is also either a service provider, or a national network operator is either a content provider or conditional access system provider, then separate accounts for the different services must be maintained.

### ***Analysis***

The concept of the integrated communications system defined in Article 2(g), and set out in Articles 15(2) and (3) is unique in terms of the collapse of hitherto separate media markets for the purposes of media concentration measures. The activities included in the integrated communications system can only really be understood as belonging to the same market within an extremely broad definition of the media market that is unprecedented in Europe.

The concept of an integrated communications system as an economic indicator of market share considerably dilutes the effectiveness of instruments to protect pluralism based on share of revenues on individual markets. An individual company could enjoy extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20% threshold for the whole sector.

The convergence of the different markets in the Italian media sector for the purposes of anti-concentration measures through the introduction of the concept of an integrated communications system also appears to be at odds with the definition of media markets that the European Commission has employed in its competition related decisions involving the television sector. In a number of competition cases involving the media



sector<sup>179</sup> the European Commission has distinguished between different markets (including Pay-TV and free-to air television markets) based on different kinds of revenue streams and types of services supplied by operators. The “relevant markets” have been abandoned to some extent in the new law. However, general anti-trust measures presumably will remain applicable, despite the redefinition of “relevant markets”, or more accurately perhaps the lack of a “relevant market” definition.

The concept makes no such distinction between markets and the revenue threshold indicates that it is perceived to be one sector. Such a model does not appear to be suitable for setting a threshold that protects the individual sectors from a dominant position by one individual actor and it is unclear what kind of restriction this actually represents. At some future point in time these markets may converge to form a single market, but this is far from certain, and it is highly unlikely that these markets will entirely converge in the foreseeable future.

Examples in other European countries of digitalisation suggest that many more channels will come on stream (although Sky Italia has signed an agreement with the EC not to move to the DTT platform as a condition of its clearance). The DTT platform, however, is planned to carry, according to the National Frequency Plan 12 multiplexes for national broadcasting each of them carrying from four to six channels (some of these channels are /will be used for radio broadcasting and interactive applications).

It is not set out in this law whether national digital radio stations will be allowed to own local ones. I assume it is allowed, given that it is not included in the articles of this law. The framework would allow a great deal of consolidation in the sector.

Local and regional broadcasting is protected due to the generous threshold of the frequency allocated to local and regional channels and the fact that there is a disqualification placed on national broadcasters operating local and regional channels. This might encourage newspapers to invest in the local television sector.

### ***Comments and assessment***

1. The Charter of Fundamental Rights of the European Union Article 11(2) recognises that media pluralism is a central part of the rights of European citizenship and the European Parliament has also stressed the importance of maintaining media pluralism in the European Union by guaranteeing a diverse television sector. In 2004 a resolution passed by the European

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179. *Inter alia* Commission of the European Communities. (2000). Case No. COMP/ JV.37-BskyB/Kirch Pay TV. Regulation (EEC) No. 4064/ 89 Merger Procedure 21/03/2000. Commission of the European Communities. (2003). Case No. COMP/ M.2876-NEWSCORP/TELEPIU. Regulation (EEC) No. 4064/ 89 Merger Procedure 2/04/2003.

Parliament on “the risks of violation, in the EU and especially Italy, of freedom of expression and information (Article 11[2] of the Charter of Fundamental Rights 2004 (0373)). The European Parliament called on the member states and the European Commission “to safeguard pluralism in the media and to ensure, in accordance with their powers, that the media in all Member States are free, independent and plural” (EP, 2004 [0373]).

The Council of Europe’s Recommendation No. R(99)1 on measures to promote media pluralism also recognises the importance of pluralism both in terms of the multiplicity of outlets and open access where bottlenecks form. The European Convention on Transfrontier Television also reaffirms in its preamble “the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties;” and “Article 10*bis*. The Parties, in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction, within the meaning of Article 3, endanger media pluralism”.

The Council of Europe Recommendation (99)1 on measures to promote media pluralism calls on all member states to consider introducing measures to protect media pluralism and establish a clear and coherent framework to guarantee the pluralism of the media. A range of measures are recommended by the Council of Europe to this end, although it is the right of the member states to establish a system to protect pluralism and select a suitable range of instruments catering to the specificities of the national market.

2. Given the structure of the new regulatory regime for the regulation of media concentration set out in this law and the wide definition of the media market, together with the notion that pluralism can be measured through a quantitative assessment of total channels this law is unlikely to radically change the current dominance of the television market by the Mediaset/RAI channels. Indeed given that the concept of an integrated communications system has been devised to regulate financial share of the sector, companies can be expected to expand into new markets. The law appears to support the present situation, rather than attempt to promote pluralism in the Italian media sector. This suggests the law has been modified to suit the situation in Italy.
3. The threshold protecting media pluralism, as measured by 20% of channels, is not a clear indicator of market share as many of these channels are likely to have very small audience shares, but with similar amounts of output. It is certainly not an indicator of balance and pluralism in the television market as a whole. Larger companies will enjoy greater purchasing power in a wide range of activities such as programme acquisitions and will enjoy significant advantages over other national content providers. They can also enjoy an unlimited share of the audience if this scheme is put in place. The channel

share threshold is also insufficient as an indicator of both market power and pluralism in the television and radio sectors.

The model is ill-suited in terms of protecting pluralism as the digital plan foresees a significant growth of channels. This will inevitably lead to growth in channels and output on a national level, but it does not mean that growth in output and channels will lead to an acceptable degree of pluralism. Ultimately, the measure of concentration based on share of channels or programme output cannot account for market power or in assessing the position of a company in the national radio and television markets. Without an audience share threshold and relevant market indicator this threshold is largely redundant as an indicator of diversity.

Even in terms of competition policy that does not have specific media-based measures the framework provides little as an instrument to provide a framework for ensuring competition and pluralism in the national radio and television markets. The combined effect of the new framework set out in Article 15(1) and (2) provide for liberalising the previous anti-concentration rules that were surpassed both by Mediaset and RAI. They seem to be designed to accept this dominance of two companies in the television sector and rather than seek to resolve this level of concentration support the transference of this dominance to digital platforms.

4. The development of digital terrestrial television in Italy is also, at the present time slow, though industry forecasts suggest DTT could experience rapid diffusion into households over the next five years. The fact that the law will not become fully applicable in reference to media pluralism and concentration until AGCOM has achieved the full frequency plan for switchover is a matter of concern. Another central issue is that the law does not deal with the question of concentration today. The approach is one of attempting to hold back on finding a real solution to the problem of media concentration in the television market to some future point in time and it relies heavily on the point when digitalisation will come to full fruition. Ultimately, it means that the status quo will be continued and Mediaset and RAI will remain the dominant actors in Italian television.
5. The law liberalises the rules on cross-media ownership considerably. This is a concern because of the dominant position of television in the Italian media market overall. The radio sector is highly fragmented and thus vulnerable to consolidation and concentration. The press sector also performs below the average across similar-sized markets in Europe and the readership rates are considerably lower than other EU countries.

The requirement placed on AGCOM to assess concentration in the media sector pursuant to Article 14(2) to ensure that dominant positions do not arise in the media sector is seriously hindered by the framework set out by the concept of the integrated communications system. A dominant position

(presumably) will only occur in situations whereby the thresholds set out in Article 15 are surpassed by a company or related companies. This does not adequately provide for pluralism in the individual media sectors themselves. That, both in terms of markets and services, even when digitalisation is achieved, may not converge to the extent suggested by the framework set out by these thresholds. It would suggest that levels of concentration in the national television market would, to a large extent be transferred to digital platforms. As a consequence the duopoly of Mediaset and RAI will continue in the digital television sector, though with the changes brought about in this law this will be within the legal parameters set. Indeed with the relaxation of cross-ownership rules Mediaset could expand into other sectors to increase its presence across different media markets.

The law facilitates high levels of concentration in individual media sectors; most notably in the national television sector, but it also considerably liberalises other parts of the media sector and in this respect it is extremely debatable whether it meets international standards that attempt to safeguard media pluralism.

## **VII. Public broadcasting service (Chapter IV)**

### **1. Provision of a public broadcasting service**

Article 2(1h) defines “general public television<sup>180</sup> broadcasting service” as a “public service performed under franchise [licence<sup>181</sup>] in the television broadcasting sector” (see also Article 6(4)). Article 17 adds that “the general public television broadcasting service shall be entrusted by franchise to a joint-stock company [public limited company], which shall perform the service on the basis of a national service contract signed with the Ministry of Communications, regional service contracts and, in the case of the autonomous provinces of Trento and Bolzano, provincial service contracts, which shall define the rights and obligations of the company holding the franchise. The contracts shall be renewed every three years”. Article 20 names RAI-Radiotelevisione italiana Spa as the company to which “the general public television broadcasting service franchise shall be granted to for a period of 12 years” – that is, until 2016.

Article 19 entrusts AGCOM with the task of “verifying that the general public television broadcasting service is effectively provided in accordance with the provisions contained in the present law, the national service contract and the specific service contracts . . . , with due regard also to the parameters of service quality and indications of user satisfaction”. It lays down requisite procedures of verification and gives AGCOM the powers needed for execution of

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180. This reference to “public television broadcasting” (in this article and in all other articles) is a mistranslation. The original Italian text refers to “public radio and television broadcasting”. Thus, the law covers a public broadcasting service provided via both radio and television.

181. Additions in square brackets provide alternative translations of terms used in the law.

this task, including that of imposing fines for non-compliance with the remit and programme obligations. In the event of repeated failure to comply, the AGCOM may order the holder of the general public broadcasting service franchise to cease trading for up to 90 days.

### *Analysis*

1. Under this law, performance of a public broadcasting service remains formally dissociated from any specific broadcasting organisation. The public broadcasting franchise may be awarded to any broadcasting organisation (which, however, has to have the legal form of a joint-stock company). It will perform it on the basis of the provisions of the law itself (see below), as well as of national, provincial and regional public service contracts, renewable every three years.

RAI has so far been the sole public service licensee by virtue of a series of conventions with the Italian Government. The latest convention of 1994 has a duration of 20 years, that is, it will expire in 2014, two years before the expiry of the new franchise. The present law does not appear to affect this state of affairs, nor does it mention the existence of such a convention.

Article 2 of the Law No. 223 of 6 August 1990 (“Mammi Law”) has specified that the franchise may be awarded only to a wholly publicly-owned company, which in reality meant RAI. This provision has now been removed, meaning that – formally speaking – the franchise may be awarded to any broadcasting joint-stock company. As we will see below, RAI is to be privatised.

This raises, first of all, a number of formal and procedural questions: the present law now awards the franchise to RAI. Will another law have to be adopted to grant the franchise, once the present one has expired? And if not, who will be responsible for awarding the franchise when the current one expires, and by what procedure (a contest, tender, auction, other)? What criteria will be applied in selecting from among candidates? Why can the franchise be awarded only to joint stock companies?

2. As already noted, RAI has had a series of conventions with the government. It also has to conclude a national service contract with the Ministry of Communications, regional service contracts and, in the case of the autonomous provinces of Trento and Bolzano, provincial service contracts. The national service contract has to be approved by the president of the republic. The director general of RAI is appointed by the chairman of the board and the minister of economic affairs.

In addition, the public broadcaster is subject to control by a parliamentary commission for the general direction and surveillance of radio-TV services. The commission has, and looks set to retain, extensive powers and competencies

vis-à-vis RAI, including some decision-making powers concerning programming and finance.<sup>182</sup>

Pursuant to Article 17 (4), guidelines on the content of obligations incumbent on the general public television broadcasting service “shall be laid down by decision to be adopted in agreement with the *Autorità per le garanzie nelle comunicazioni* and the Minister for Communications prior to each 3-yearly renewal of the national service contract”. These guidelines are to be “defined in relation to market developments, technological advances and changes in local and national cultural requirements”.

Law No. 249 of 31 July 1997 on AGCOM and the regulations for telecommunications and radio and television broadcasting systems, provides in Article 1 (6.b.10) that AGCOM “proposes arrangements to the Ministry of Communications to be introduced for the agreement on the concession [franchise, licence] of the public radio-television service”. This can be taken to mean that AGCOM mediates between the broadcaster holding the general public broadcasting service franchise and the ministry of communications in the conclusion of the service contract. As noted above, it is also involved in adopting the guidelines for the content of such a contract.

All this provides evidence of considerable and direct involvement of various state authorities in the affairs of the public broadcasting service licensee. More evidence of this is added below.

3. The remit and programme obligations of the public broadcasting service are defined in Article 17 of the law and, more extensively in the public service contracts.<sup>183</sup> Two things merit attention:
  - the involvement of a government department (ministry of communications) first in defining – together with the independent broadcasting regulatory authority (AGCOM) – guidelines for the service contract, and then in negotiating and signing it on behalf of the government;
  - the provision of Article 17(1g) calling on the public broadcasting service to provide “free broadcasts of messages of social utility or public interest, requested by the Presidency of the Council of Ministers”, counterbalanced

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182. Under Article 4 of the Law No. 103, 14 April 1975 (as amended), the parliamentary commission “formulates the general directions for the execution of the principles mentioned in Article 1, the arrangement of programmes and their equal distribution in the time available; it checks that the directions are being respected and rapidly adopts the necessary decrees to ensure they are observed; establishes ... the regulations to guarantee access to radio-TV ...; indicates the general criteria for the creation of annual plans and those lasting several years for expenditure and investment by referring to the prescription of the concessionary act; approves the maximum plans for annual programming and those lasting several years and watches over their execution; it receives reports on programmes broadcast by the provider company’s administrative council and ascertains compliance with the general directions formulated”.

183. The current national service contract is available at the following address: [www.segretariatosociale.rai.it/INGLESE/regolamenti/indice\\_regolE.html](http://www.segretariatosociale.rai.it/INGLESE/regolamenti/indice_regolE.html).

by the provision of Article 17(1d) to provide “access to programming ... for parties and groups represented in Parliament and in regional assemblies and councils, organisations associated with local authorities, national trade unions, religious denominations, political movements, political and cultural bodies and associations, legally recognised national associations of the co-operative movement, social welfare associations entered in the national and regional registers, ethnic and language groups and such other groups of substantial social interest as may request access”.

Two tendencies are evident here:

1. Potential abuse by the government of the right to obtain free airtime on request could turn the public broadcaster into a mouthpiece of the government.
2. On the other hand, public access to airtime serves democracy, provided, of course, that it is granted in an appropriate manner.<sup>184</sup>

### ***Comments and assessment***

1. The present law creates a mechanism for the continuation of a public broadcasting service after the expiry of a 12-year franchise for RAI, but does not fully guarantee it. As a matter of the Italian state’s general broadcasting policy, and of the future of the dual broadcasting system, the question is what would happen if no broadcaster applied for the franchise after the expiry of the current one (and the expiry of the convention between RAI and the Italian Government)?

In Recommendation No. R(96)10 on the guarantee of the independence of public service broadcasting, the Council of Europe Committee of Ministers recommended that member states “include in their domestic law or in instruments governing public service broadcasting organisations provisions guaranteeing their independence”. An appendix to this recommendation adds that the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy. Article 16(2f) notes, in the context of the public broadcasting licensee’s service contracts at the regional and provincial level, that due regard should be given in such contracts to “the right of the company holding the franchise to take economic decisions, including decisions as to the organisation of the firm”. Presumably, the same applies in the case of the national service contracts. Still, the present law does not call for, nor does it require or guarantee full institutional independence and autonomy of the public service broadcasting organisation.

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184. This may not be the case, however. The European Parliament noted in its report of 5 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI); A5-0230/2004 FINAL) that “broadcasters ... continue to grant access to the national television medium in an essentially arbitrary manner, even during electoral campaigns” (emphasis added – KJ).

The appendix stresses that this is especially important in areas such as: the definition of programme schedules; the conception and production of programmes; the editing and presentation of news and current affairs programmes; the organisation of the activities of the service; recruitment, employment and staff management within the service; the purchase, hire, sale and use of goods and services; the management of financial resources; the preparation and execution of the budget; the negotiation, preparation and signature of legal acts relating to the operation of the service; the representation of the service in legal proceedings as well as with respect to third parties. Compared with this list, the two instances mentioned above (economic decisions and organisation of the firm) where external authorities are barred from interfering with the autonomy of the public broadcasting licensee can offer only very limited protection of PSB independence.

2. The role of the parliamentary commission in programme matters and the manner of developing the service contracts, with strong government participation, can hardly be described as compatible with Recommendation No. R(96)10 on the guarantee of the independence of public service broadcasting of the Council of Europe Committee of Ministers referred to above. This should also be considered in terms of Article 10 of ECHR: "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".

## **2. Legal form, governance and funding of RAI**

1. RAI has so far been a publicly-owned company, governed by a five-member board, appointed by the speakers of the Chamber of Deputies and of the Senate (three from the governing coalition and two from the opposition). As noted above, the director general of RAI is now appointed by the chairman of the board and the minister of economic affairs.

Article 21 of the present law provides for:

- The incorporation of RAI-Radiotelevisione italiana Spa in RAI-Holding Spa (the licences, authorisations and franchises held by RAI-Radiotelevisione italiana Spa have been transferred automatically to the incorporating company), and
- Sale of state shares in the company. A proportion of the shares is to be reserved for persons attending the sale who produce evidence that they have paid the licence fee (without the right to sell them within 18 months of the date on which they were purchased). An upper limit of 1% on shareholdings carrying voting rights has been imposed. Voting pacts between syndicates or block votes are prohibited, as are agreements made through controlled, controlling or linked persons, between persons whose total holdings exceed the limit of 2% on shareholding,



with respect to shares carrying voting rights, or joint presentation of lists by persons in that position.

2. The law provides for two methods of appointing the nine-member RAI Board of Governors [Directors], to be applied before and after the sale of at least 10% of RAI's capital.
  - In the first case, seven members of the board will be designated by the parliamentary commission for the general direction and surveillance of radio-TV services and two (including the chairman) by the majority shareholder, that is, the minister of economic affairs. The appointment of the chairman must be endorsed by a two-thirds majority in the parliamentary commission.
  - In the second case, the board will be elected by the general meeting of shareholders, with each shareholder holding at least 0.5% of shares entitled to present a list of candidates. Until the state has sold all its shares, the minister of economic affairs will continue to present a list of candidates (drawn up by the parliamentary commission) indicating the maximum number of candidates in proportion to the number of shares held by the state. The voting method is designed to some extent to favour, in some cases, candidates proposed by shareholders holding fewer shares.<sup>185</sup> Election of the chairman will still have to be endorsed by a two-thirds majority in the parliamentary commission. The board of governors (directors) has a three-year term of office.
3. Pursuant to Article 18, the holder of the general public broadcasting franchise is funded by, *inter alia*, licence fees whose amount is set so as to enable the company to cover the costs associated with the public broadcasting service. Pursuant to Article 6(5), the company may sign contracts or agreements with public authorities for paid services, but may not receive any other form of public funding. Article 17(5) authorises the company to pursue commercial activities, provided that they are not detrimental to its public service remit. This includes advertising, sponsorship and tele-shopping, which are regulated elsewhere. An official auditor appointed by RAI and approved by AGCOM will supervise the yearly budget.

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185. Article 20.6 states: "Save as otherwise provided in this article in respect of the maximum number of candidates on the list presented by the Ministry of Economic Affairs and Finance, each list shall contain a number of candidates equal to the number of board members to be elected. Each shareholder with a right to vote may vote for one list only. Should more than one list be presented, the votes cast for each list shall be divided by whole numbers from one to the number of candidates to be elected; the resulting quotients shall be allocated progressively to the candidates on each list, in the order in which they appear on the list, to form a single graded list on which candidates are placed on the basis of the quotient obtained. Those obtaining the highest quotients shall be elected. Should candidates have equal quotients, the candidate on the list presented by the shareholder holding fewer shares shall be elected. The procedures referred to in this paragraph shall also apply to the election of the trade union college [board of auditors]" (emphasis added – K.J.).

## Analysis

1. The success of the move to privatise RAI will depend on its attractiveness for potential shareholders, given that no single entity may hold more than 1% of shares. If, as some observers predict, interest in the purchase of shares will be low, this would effectively leave the minister of economy in control. However, that remains to be seen.
2. For the time being (until the sale of at least 10% of RAI shares), the change of rules on RAI governance means that the effect of the reform law of 1975, placing RAI under the control of Parliament, and not of government (as before), is partly reversed. The parliamentary commission will continue to designate seven of the nine members of the board of directors, but the system appears to be designed to give the governing party/coalition a built-in majority.<sup>186</sup> When more than 10% of the shares have been sold, the minister of economic affairs may continue to maintain a powerful position in the general meeting for a considerable time as the largest shareholder, whereas all other shareholders will have only 1% of the shares and cannot, formally speaking, combine their voting power. Even when all the shares have been sold, the appointment of the chairman of the board of directors will still have to be approved by a two-thirds majority of the parliamentary commission, giving the ruling party/coalition an effective veto over his/her election. Even if shares are sold quickly, the first board of directors with a government majority will serve out its term of three years.
3. Methods of funding RAI (setting the level of the licence fee for only a year; possible contracts with public authorities for paid services) are not fully consistent with Recommendation No. R(96)10 on the guarantee of the independence of public service broadcasting of the Council of Europe Committee of Ministers, which says in its Appendix that:
  - the decision-making power of authorities regarding funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the PSB organisation;
  - payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning;
  - the use of the contribution or licence fee by the public service broadcasting organisation should respect the principle of independence and autonomy.

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186. See Christopher Sverige (Italy's new media law tailor-made for Berlusconi, 10 September 2003, [www.wsws.org/articles/2003/sep2003/ital-s10.shtml](http://www.wsws.org/articles/2003/sep2003/ital-s10.shtml)).

## *Comments and assessment*

Change at RAI could be described as amounting to its partial renationalisation for an unforeseeable period of time. For as long as the present government stays in office, the prime minister will directly or indirectly control all major national television channels. In the cases of *Radio ABC v. Austria* and *Informationsverein Lentia and others v. Austria*, the European Court of Human Rights ruled that the state monopoly on broadcasting constituted an unnecessary interference with freedom of expression. The Italian situation is not, strictly speaking, a monopoly, but there is sufficient evidence to suggest that both commercial and public national television channels (and in RAI's case, also radio channels) are controlled by one person to such an extent that a real threat of monopolisation clearly exists. The present law may change this eventually, but only gradually and potentially only after a considerable period of time.

### **VIII. Switchover to digital terrestrial transmission (Chapter V)**

Section V covers the transitional phase between analogue and digital terrestrial distribution. It aims to provide a legal framework for the gradual move of existing, and where relevant new network operators and radio and television broadcasters, to digital terrestrial delivery.<sup>187</sup> The essential provisions are contained in Law No. 66 of 20 March 2001, AGCOM Resolution No. 435/01/CONS of 15 November 2001 (regulation on terrestrial television broadcasting by digital technology) and Law No. 112 of 3 May 2004.

#### **Background**

The legal framework for the transition to digital broadcasting was first established by Law 66/2001 that set out some of the basic principles that are reaffirmed and extended in the Gasparri Law that are invoked on completion of the transition from analogue to digital broadcasting. These include a distinction between providers:

- Network operators
- Content providers
- Service providers

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187. There are some infelicities in the translation of this law – in fact there are quite a few that make it very confusing. For instance, Article 23(6) refers to “television channel operator licence” and is unclear whether it refers to the role of “network operator” or that of “content provider”. Terminology referring to the different qualifying titles that enable broadcasters to operate is misleading. In the Italian version you have three different types of qualifying titles: *concessione*, *licenza* and *autorizzazione*: *concessione* is the title that is held by a national and, sometimes, local analogue broadcaster: “franchise”; *licenza* is the title that will be awarded to network operators when digital transmissions will be fully implemented: “licence”; *autorizzazione* is the title that it will be hold by content providers for digital television: “authorisation”. Presently also some analogue local broadcasters qualify to transmit by virtue of an authorisation.

The distinction is based upon the different activities undertaken by the operators and is designed to replace the existing analogue system categories. In the new system there will be two types of licences issued to operators. The first is “authorisations” (content and service providers) and the second are “licences” (network operators).<sup>188</sup>

2. Prior to analogue switch-off, Law 66/2001 provides (Article 2bis (1)) for a transitory phase during which “in order to promote the roll out of the DTT market, subjects who legitimately operate as broadcasters (via analogue terrestrial, cable and satellite) are qualified to experiment with television transmissions and Information Society services by digital technology.” This “authorisation for the experimentation of digital terrestrial broadcasts” is valid only for network operators, as content providers are awarded authorisation directly without intermediary passages.

Law 66/2001 also prescribes that holders of more than one analogue terrestrial television franchise which are awarded “authorisation for the experimentation of digital terrestrial broadcasts” must reserve at least 40 percent of transmission capacity, for each digital multiplex they operate, to independent content providers at fair and no-discriminatory conditions (Article 2bis (1) and two multiplexes must be reserved for RAI on which it must provide free-to-air programming (Article 2bis (9)).

3. Law 66/2001 also obliged AGCOM to adopt, by 30 June 2001, a regulation detailing, among other things, criteria and requirements for issuing licences and authorisations, application procedures and deadlines, obligations imposed on content providers, service providers and network operators, and provisions for the transitory period and rules to safeguard pluralism, competition and transparency. AGCOM adopted such regulation in November 2001, with Resolution No. 435/01/CONS. AGCOM’s DTT regulation establishes the following phases, before analogue switch-off:

1. Market start-up phase: the period of time between the coming into force of AGCOM’s Regulation (December 2001) and the termination of analogue terrestrial television franchises.

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188. Authorisations for content providers run for 12 years and are renewable (Article 4(1)). National and local content providers are subjected to all obligations concerning editorial content imposed on analogue terrestrial broadcasters (national and local respectively), in matters of the right of reply (Article 7(1)), advertising, sponsorship and telesales (Article 8), programming and production quotas (Article 9), promotion of European audiovisual works (Article 10), protection of minors and disabled members of the public (Article 11). Conditional access service providers must abide by technical standards (Article 12(3a)) and must submit to AGCOM a “service charter” that must be signed by third parties who are in contractual agreements with them as providers, on their behalf, of services to final users (Article 12(4)). Licences for network operators run for 12 years and are renewable (Article 23(1)). National and local network operators are subjected to all obligations concerning the transmitting activities imposed on analogue terrestrial broadcasters (radio electrical and technological projects, functioning of transmitters, sharing of infrastructure, transmission plants and network equipment, minimal investment thresholds for the construction of transmission plants etc., observance of health and environmental legislation etc.).

2. Transitory phase: the period of time between the coming into force of the AGCOM's Regulation (December 2001) and the switch-off of analogue transmissions (that is, December 2006, as prescribed by Article 2bis (5) of Law 66/2001).

Pursuant to Article 2bis (1) of Law 66/2001, Article 32 of the regulation states that subjects who legitimately operate as broadcasters (via analogue terrestrial, cable and satellite) are allowed to request an "authorisation for the experimentation of digital terrestrial broadcasts" until 30 March 2004. The length of the "authorisation for the experimentation of digital terrestrial broadcasts" cannot extend beyond 25 July 2005. In substance this authorisation replaces the licence that network operators are required to hold in order to continue their activities once digital transmission is fully available.

Article 35 of the regulation states that, "starting from 31 March 2004 and, in any case, subsequently to the adoption by AGCOM of the measures prescribed by Article 29 of the present Regulation, subjects who have qualified for digital experimentation can apply to the Ministry of Communications for the award of licence for network operator for the service area they have been qualified to experiment" (see also Article 13(1)).

In short, Law 66/2001, as interpreted and implemented by AGCOM's regulation of November 2001, envisages gradual implementation of the dual regime based on licences for network operators and authorisations for content providers, by introducing a transitory qualification ("authorisation for the experimentation of digital terrestrial broadcasts") valid for future licensed network operators.

## ***Analysis***

### *Provisions for digital migration*

Article 22, 23, 24 and 25 are concerned with the roll-out of digital terrestrial television broadcasting and switch-off of analogue frequencies to establish full conversion of the current system. It is important to put the Gasparri Law into the context of the provisions established in Law No. 66 of 20 March 2001, AGCOM Resolution No. 435/01/CONS of 15 November 2001 (Regulation on terrestrial television broadcasting by digital technology) and Law No. 112 of 3 May 2004.

2. Article 22(1) obliges AGCOM to "prepare a programme for the implementation of the nation plan for the allocation of digital frequencies" The article therefore extends the principles set out in Law 66/2001 and continues to oblige AGCOM to set out a detailed plan for the migration of services. This plan was approved by AGCOM on 29 January 2003 (Resolution No. 15/03/CONS). This is the so-called "First Level Plan" (it has allocated frequencies for national channels and regional channels). On 12 November 2003 AGCOM approved the so-called "Integrated Plan" (Resolution 399/03/CONS), which integrates the "First Level Plan" with a "Second Level Plan" (which allocates

frequencies for local channels). Previously, on 15 November 2001, AGCOM approved the regulation (*regolamento*) for awarding licences and authorisations to digital terrestrial operators (Resolution No. 435/01/CONS). In this plan AGCOM must encourage experimentation and safeguard existing services. At the current time, as we understand the situation, there are five digital multiplexes covering over 50% of the population. These are allocated as follows:

<b>Content provider</b>	<b>Multiplexes</b>	<b>New channels available, June 2004</b>
RAI	2	5
Mediaset (RTI)	1	5
Telecom Italia Media	1	
D-Free	1	1
		Others in negotiation stage

Source: Mediaset 2004

Until the implementation of the plan, content providers (national and local) that qualify for authorisation can experiment (either run an existing service on digital or apply for a licence to operate a digital channel) pursuant to Article 23(1) until full switch over, which is planned for December 2006. This provision basically extends the previous provisions established in Law 66/2001 and in AGCOM's regulation that state the current regime for experimentation of digital terrestrial broadcasting ended 25 July 2005.

3. Article 23(1) also rules that subjects who qualify to experiment with digital terrestrial broadcasting can apply for a licence or authorisation to launch digital terrestrial broadcasting services as of the date the law comes into force. Article 35 of AGCOM's regulation of November 2001 also stated that starting from 31 March 2004 and, in any case, subsequently to the adoption by AGCOM of the measures prescribed by Article 29 of that regulation (not yet adopted), subjects who qualify for digital experimentation could apply to the ministry of communications for a licence as a network operator for the service area they have been qualified to experiment.

Article 23(3) also extends the practice of "spectrum trading", which is a central innovation introduced in Law 66/2001 (Article 2*bis* [2]). The system was introduced in order to promote the roll-out of the market, given the lack of terrestrial frequencies available to transmit via digital technology. The "frequency trading" system was allowed for a period of three years starting from the coming into force of Law 66/2001 (that is, until March 2004). However, the Gasparri Law reaffirms the validity of this system without, apparently, temporary limitations (Article 23[3]). From the second half of 2003 RAI and Mediaset have been

acquiring frequencies from local television broadcasters. The system allows entities that are legitimately undertaking television activities to transfer transmitters or company branches in order to set up digital networks, provided that the acquisitions are used for digital broadcasting.

Article 23(5) provides that a network operator licence is issued, on request, to subjects that legitimately exercise television broadcasting activities, provided they cover an area of no less than 50% percent of the population or of the local service area they serve. There is a temporary exemption for local operators (Article 25[11]) who are also allowed to apply for a national network operator licence, provided they satisfy certain requirements and commit to certain target in terms of coverage (Article 23[7]).

Article 23(7) applications for a national network operator licence can also be made by subjects legitimately operating at local level that can prove they satisfy all the requirements for a national operator licence and declare their intention to cover, within six months of the application, an area of no less than 50% of the population, renouncing any right they may hold for local television broadcasting.<sup>189</sup>

4. Article 24 deals with the introduction of digital radio services, and AGCOM are obliged to provide a national strategy to manage the migration of radio analogue broadcasters to digital delivery. The plan, in parallel to the television plan has already been approved by AGCOM and in this sense Article 24 refers to the draft of AGCOM's regulation. The plan is based on, *inter alia*, the following principles of development from analogue to digital: Article 24(b) pluralism of programmes and services and a balance between national and local; Article 24(c) defining the phases of development and the role of RAI in supporting roll-out; Article 24(g) setting out the limits of frequency assignment and radio programmes owned by individual companies; and, Article 24(2) establishes the right for a support plan to be put in place after an industry hearing to assist the roll-out of digital radio services.
5. Article 25(1) establishes that digital terrestrial television has been introduced to promote pluralism in the television sector.

The law adopts a two-step approach for the migration from analogue to digital frequencies, with a special set of obligations for RAI. The two initial phases are envisaged as:

- DTT should cover 50% of the population by 1 January 2004.
- DTT should cover 70% of the population by 1 January 2005.

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189. The distinction between network provider and content provider was first introduced by Law n.66 of 20 March 2001. Network operators are subject to the authorisation regime whereas content providers are subject to a licence regime (see above). Network operators are in charge of the transmission network; content providers are in charge of editing a television or radio channel.

During the transitional period there are therefore certain obligations placed on the “company holding the general public broadcasting licence” (RAI) to achieve strategic thresholds in coverage of its DTT services set out in Article 25(2). These are coverage of: 50% of the population from 1 January 2004, and 70% of the population by 1 January 2005. AGCOM is (was) required by the law to assess the development of digital terrestrial television based on three principles pursuant to Article 25(3) based on:

- DTT coverage of at least 50% of the population;
- affordable availability of decoders;
- satisfactory range of programmes different to those broadcast on analogue.

In May 2004 AGCOM provided a positive assessment that these goals had been fulfilled with the caveat that the high degree of concentration of financial resources in the sector might act as a threat to media pluralism. This allowed the gradual migration process to continue and existing analogue broadcasters to continue transmissions. AGCOM did not draw upon the provisions indicated in Article 2(7) of Law No. 249 of 31 July 1997 based on Article 25(4) as the conditions have been met.

Article 25(5) obliges RAI to consult with the ministry of communications to identify either an area or areas that have problems receiving analogue signals in order to begin a process of full migration to digital by January 2005. Regardless of the provisions of Article 25(5) RAI must ensure, under the provisions of Article 25(6), that three free-to-air analogue television channels and three digital television channels (Article 25[6]) on the basis of the coverage set out in Article 25(2) during the switch-over period.

Article 25(6) also has a provision to protect the publishing industry. Support for the press industry is set out in the law under Article 25(6). Article 25(6) states: “at least 60 percent of the overall budget set aside by a public administration office or public body or public limited company for the purchase of advertising space for institutional communication on means of mass communication, each financial year, must be used for daily newspapers and magazines”.

There are also provisions in the law to encourage the purchase of set-top boxes that include financial subsidies for households set out in Article 25(7). There is a clause stating that this should only be introduced after the proceeds of the privatisation of RAI are collected pursuant to Article 21(3). Public subsidies for DTT receivers have also been approved by the Annual Budget Law 2003 (*Legge Finanziaria*).

As the conditions set out in Article 25 (3 and 4) have been achieved (coverage and conditions of the assessment) a provisional transitional measure is established according to Article 25 (8) that restricts market share based on the number of national terrestrial channels (analogue and digital) during the transitional phase. Each broadcaster is limited to a maximum of 20% share of channels based



on the total number of television channels until the digitalisation of networks, according to the plan, is fully implemented. This includes national channels of experimental nature and/or simultaneous/repeat programming (under Article 23(1)) regardless of analogue or digital delivery form. However, pursuant to Article 25(9) these conditions are only applicable to broadcasters that have coverage of over 50% of the population (companies with a national multiplex). RAI is excluded from the threshold, apart from for purposes of calculating the limit of 20%. In this respect, RAI channels contribute to the total number of channels available (this was also the system adopted by Law 259/1997 for analogue terrestrial television).

With the positive evaluation of AGCOM of the conditions set out in Article 25 (1 and 3) according to Article 25(11) the licences for analogue transmissions are extended on request to the date of final switch-over. A request may be submitted either by an incumbent transmitting in digital or a national digital broadcaster (with services above 50% of the population). A request can also be submitted by broadcasters who are transmitting on digital frequencies. In the case of national digital broadcasters they must reach over 50% of the population. Local broadcasters who intend to apply for a local network operator licence (for DTT), as an exception to the provisions of 23(5), can request one if they reach just 20% (instead of 50%) of the analogue coverage. Therefore if a network operator (until the frequency plan is fulfilled) can demonstrate that they have coverage of 20% through digital frequencies they can apply to operate as a local digital operator on the condition that they commit to invest, within a five-year period, a minimum sum of €1 million in each region covered by that said licence. Furthermore, there is a reduction to €500 000 where licences are restricted to areas smaller than the region<sup>190</sup> (and for cases where an “additional licence for further broadcasting activities” are carried out within that said region €250 000).

### ***Assessment and comments***

The provisions set down in Section V for the migration of radio and television broadcasters from analogue to digital frequencies establish an extraordinary rate of migration according to the deadlines set for switch-off and full migration.

Many of the central provisions of Section V support and extend the provisions of Law 66/2001 and it acts to extend deadlines and therefore the continuation of the present conditions for the migration of broadcasters between frequencies. The main tools are a mix of:

1. State subsidies to promote the diffusion of hardware into households as well as indirect subsidies in terms of the allocation of a minimum amount of the state advertising budget to the print sector;

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190. Italy is divided into three main administrative levels: regions (20 overall, for example, Tuscany, Sicily, Lombardia, Lazio, Piemonte etc.), provinces (approx. 100 provinces including cities and their surrounding areas) and towns (more than 1 000 towns including both big cities such as Rome, Florence, Milan and very small towns).

2. Public policy deadlines that oblige RAI to meet coverage deadlines and thresholds set for operators to apply for licences and authorisations on local, national and regional levels;
3. Free market mechanisms, that is, spectrum trading between operators. There is also a reconfiguration of the categories for licensing purposes and transitional limits on channel share established to protect a degree of pluralism in the migration period. Many of these features were previously established in Law 66/2001 and AGCOM's Regulation.

AGCOM is key to the transitional measures set out in this section and although it has been obliged to set certain parameters some of these measures have, as yet, not been adopted by AGCOM. For example Article 29 of the regulation states that AGCOM, in order to promote diversity of information and pluralism, adopts, by 31 March 2004, a measure containing provisions in matters of agreements between network operators and content providers, in order to guarantee, in particular, access to networks for independent content providers of particular value. At the time of writing, such a measure has not been adopted. AGCOM has initiated a public consultation that has been completed and it is available on the web site. The adoption of this measure is considered by the regulation (Article 13(1) and Article 35) as a precondition for awarding licences to network operators.

In accordance with Law 66/2001, AGCOM's regulation contemplates a transitory phase during which the licence regime for network operators does not apply and it sets out the steps in order to complete the transition from the regime for individual permits valid for analogue broadcasting, to the dual regime (authorisations for content provider and licences for network operator) envisaged by Law 66/2001 in a fully digitalised television environment.

Council of Europe Recommendation (2003)<sup>9</sup> requests the member states to "create adequate legal and economic conditions for the development of digital broadcasting that guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes" (Council of Europe 2003[9]a). As well also to "protect and, if necessary, take positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in the sector".

Given that this law appears to simply accommodate the conditions in the analogue market and transfer these to the nascent digital market the present conditions are not fundamentally altered by this law. It is highly questionable that an enlarged choice will be achieved through digitalisation in terms of the range of operators at national level, though some new operators can be anticipated. The fundamental issues of economies of scale and high costs of television production will work to favour the incumbents.

**Law No. 66 of 20 March 2001**

Article 1	Postponement of the deadlines for the prosecution of analogue local television broadcasting and radio broadcasting
Article 2	Transfer and renewal of transmission networks
Article 2bis	Digital terrestrial radio and television
Article 3	Entry into force

*Key provisions*

- Article 2bis (1) In order to promote the roll-out of the DTT market, subjects who legitimately operate as broadcasters (via analogue terrestrial, cable and satellite) are qualified to experiment with television transmissions and information society services by digital technology.
- Article 2bis (1) holders of more than one analogue terrestrial television franchise must reserve at least 40% of transmission capacity, for each digital multiplex they operate, to independent content providers at fair and non-discriminatory conditions.
- Article 2bis (2) “frequency trading” is allowed in order to promote the roll-out of the market. It is permitted for a period of three years starting from the coming into force of the present law (that is, until March 2004).
- Article 2bis (5) analogue switch-off by 31 December 2006.
- Article 2bis (7) obligation placed on AGCOM for the adoption, by 30 June 2001, of a detailed regulation on DTT (see AGCOM Resolution No. 435/01). Such regulation must include, *inter alia*: a distinction between content providers (holders of authorisation) and network operators (holders of licences); provisions for the transitory period; rules safeguarding pluralism, competition, transparency etc.
- Article 2bis (9) the company holding the general public broadcasting service licence (RAI) is reserved one multiplex for radio broadcasting and one multiplex for television broadcasting. The channels and services offered by RAI must be free-to-air. RAI’s multiplexes must remain separate from those of the other operators.

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191. The experts would like to acknowledge the assistance of Alessandro D’Arma who collected and translated these provisions and subsequently provided comments.

**AGCOM Resolution No. 435/01/CONS of 15 November 2001**

Title 1 (Article 1)	Definitions
Title 2 (Article 2-11)	Authorisations for content providers
Title 3 (Article 12)	Authorisations for service providers (that is, interactive services)
Title 4 (Article 13-23)	Licences for network operators
Title 5 (Article 24-29)	Rules for the safeguard of diversity of information, transparency, competition and no-discrimination
Title 6 (Article 30-31)	Provisions on radio broadcasting
Title 7 (Article 32-37)	Provisions for the transitory regime of terrestrial television broadcasting
Title 8 (Article 38-39)	Provisions for the company holding the general public broadcasting service licence (RAI)

*Key provisions*

- Article 13(1) licences for network operators are awarded from 31 March 2004 and, in any case, subsequently to the adoption by AGCOM of the measures indicated in Article 29 of the present Regulation.
- Article 15(3) licences for national network operators are awarded to holders of a franchise for analogue terrestrial television, provided they are up-to-date with the payment of franchise fees and they have not revoked their franchise.
- Article 24(1a) 1/3 of digital terrestrial transmission capacity is reserved to local content providers.
- Article 24(1b) no subject is allowed to be holder of authorisations as a content provider that enable them to broadcast more than 20% of the total number of television channels (free-to-air or pay) available via DTT at national level.
- Article 24(2) no subject can be holder of authorisations for content provider at national and local level at the same time.
- Article 25 transparency requirements for content providers including a requirement of accounting separation for holders of more than one authorisation as content provider for each authorisation they hold; requirement of accounting separation for holders of authorisation as content and as service provider.
- Article 27 transparency requirements for network operators including a requirement of accounting separation for local network operators who are

also content providers; requirement of company separation for national network operators who are also content providers.

- Article 29 in order to promote diversity of information, pluralism etc, AGCOM adopts, by 31 March 2004, a measure containing dispositions in matter of agreements between network operators and content providers, in order to guarantee, in particular, the access to networks of independent content providers of particular value (for the quality of content and pluralism of information, both at national and local level). At the time of writing, such measure has not been adopted yet.
- Article 32 subjects who legitimately operate as broadcasters (via analogue terrestrial, cable and satellite) are allowed to request an “authorisation for the experimentation of digital terrestrial broadcasts” (see above, Article 2bis of Law 66/2001) until 30 March 2004. The “authorisation for the experimentation of digital terrestrial broadcasts” cannot extend beyond 25 July 2005.
- Article 35 starting from 31 March 2004 and, in any case, subsequently to the adoption by AGCOM of the measure prescribed by Article 29 of the present Regulation, subjects qualified for digital experimentations can apply to the ministry of communications for the award of licence for network operator for the service area they have been qualified to experiment.

***Amendments to previous legislation in the present law***

<b>Earlier legislation</b>	<b>Amended in the present law to read:</b>
<p><b>Article 8(8) of Law No. 223 of 6 August 1990</b></p> <p>The broadcasting time devoted by private radio broadcasters to advertising messages (spots) cannot exceed, for each hour:</p> <p>...</p> <p><b>5%</b> as far as community radio stations (transmitting both at local and national level) are concerned.</p>	<p><b>Article 5(2)</b></p> <p>The broadcasting time devoted by private radio broadcasters to advertising messages (spots) cannot exceed, for each hour:</p> <p>...</p> <p><b>10%</b> as far as community radio stations (transmitting both at local and national level) are concerned.</p>
<p><b>Article 8 (9ter) of Law No. 223 of 6 August 1990</b></p> <p>As far as local television broadcasters are concerned, the daily advertising ceiling increases to <b>35%</b> when other forms of advertising, such as tele-shopping programmes, are included, provided there is compliance with the daily and hourly ceilings for spots (as set out in paragraph 9 of Article 8).</p>	<p><b>Article 7(6)</b></p> <p>As far as local television broadcasters are concerned, the daily advertising ceiling increases to <b>40%</b> when other forms of advertising, such as tele-shopping programmes, are included, provided there is compliance with the daily and hourly ceilings for spots (as set out in paragraph 9 of Article 8).</p>

<p><b>Article 8 (9ter) of Law No. 223 of 6 August 1990</b></p> <p>As far as local television broadcasters are concerned, the daily advertising ceiling increases to <b>35%</b> when other forms of advertising, such as tele-shopping programmes, are included, provided there is compliance with the daily and hourly ceilings for spots (as set out in paragraph 9 of Article 8).</p>	<p><b>Article 7(5)</b></p> <p>Local television broadcasting firms which undertake, within two months from the date on which the present law enters into force, to broadcast tele-shopping programmes amounting to more than 80% of their overall programmes <b>shall not be subject to the 40% congestion limit laid down in Article 8, paragraph 9ter, of Law No. 223 of 6 August 1990, as amended by paragraph 6 of this article, or to the information obligations incumbent on local television broadcasters.</b></p>
<p><b>Article 1(1) of Law No. 175 of 5 February 1992<sup>192</sup></b></p> <p>Advertising related to the medical professions (as defined by the current regulations) is allowed only through ... through daily newspapers and periodicals.</p>	<p><b>Article 7(8)</b></p> <p>Advertising related to the medical professions (as defined by the current regulations) is allowed only through ... through daily newspapers and periodicals <b>and local television broadcasters.</b></p>
<p><b>Article 6(1)(b) of the regulation referred to in Decree No. 430 of the President of the Republic of 26 October 2001</b></p>	<p><b>Article 7(9)</b></p> <p><b>The following words are added:</b></p> <p>... in the case of radio broadcasters, listeners who take part in events through a radio link or any other remote link shall also be deemed to be present.</p>
<p><b>Article 8(8) of Law No. 223 of 6 August 1990</b></p> <p>The broadcasting time devoted by private radio broadcasters to advertising messages (spots) cannot exceed, for each hour:</p> <p>...</p> <p><b>20%</b> as far as radio broadcasting at the local level is concerned;</p>	<p><b>Article 7(14)</b></p> <p><b>Amend as follows:</b></p> <p>The broadcasting time devoted by private radio broadcasters to advertising messages (spots) cannot exceed, for each hour:</p> <p>...</p> <p><b>25%</b> as far as radio broadcasting at the local level is concerned;</p>

192. As amended by Article 3 of Law No. 42 of 26 February 1999 and Article 12(1) of Law No. 362 of 14 October 1999.

<p><b>Article 8(9) of Law No. 223 of 6 August 1990</b></p> <p>The broadcasting time devoted by local private television broadcasters to advertising cannot exceed 15% of daily programming and <b>20%</b> of hourly programming.</p>	<p><b>Article 7(15)</b></p> <p>The broadcasting time devoted by local private television broadcasters to advertising cannot exceed 15% of daily programming and <b>25%</b> of hourly programming.</p>
<p><b>Article 21(2) of Law No. 223 of 6 August 1990</b></p> <p>The authorisation entitles local radio or television broadcasters transmitting in different geographic areas to transmit simultaneously for not more than 6 hours daily, apart from the case of news broadcasts of exceptional and not foreseeable events.</p>	<p><b>Article 8(1)</b></p> <p><b>Amend as follows:</b></p> <p>The authorisation entitles local broadcasters transmitting in different geographic areas to transmit simultaneously for not more than 6 hours daily <b>in the case of radio broadcasters and 12 hours in the case of television broadcasters</b> (apart from the case of news broadcasts of exceptional and not foreseeable events). <b>Changes of the transmission time of simultaneous broadcasts by authorised persons shall be permitted, provided that the Ministry of Communications is notified at least 15 days in advance.</b></p>
<p><b>Article 39(1) of the regulation referred to in Decree No. 225 of the President of the Republic of 27 March 1997</b></p>	<p><b>Article 8(2)</b></p> <p><b>The following words to be added:</b></p> <p>6 hours a day <b>in the case of radio broadcasters and 12 hours in the case of television broadcasters</b></p>
<p><b>Article 2(2) of Decree-Law No. 5 of 23 January 2001</b></p> <p>The renewal actions set in Article 5 of Decree No. 381 of 10 September 1998 enacted by the Ministry of Environment are arranged by the regions and the autonomous provinces and are borne by the owner of the transmission network. Subjects who don't comply, within the terms prescribed by law, with the environmental or health requirements, are charged with a pecuniary administrative sanction ranging from 50 to 300 million Lire.</p>	<p><b>Article 9</b></p> <p><b>The following sentence to be added:</b></p> <p>The sanctions referred to in the preceding sentence, reduced by one third, shall apply to authorised persons, operating legitimately, who are affected by orders to bring broadcasting stations into line with urban development, environmental or health requirements and who have submitted redevelopment plans to branch offices of the Ministry of Communications, obtaining authorisation for alterations to the stations, with which they have complied within a period of 180 days</p>

<p><b>Article 1(6)(b)(6) of Law No. 249 of 31 July 1997</b></p> <p>[AGCOM]</p> <p>6) ascertains that the regulations for the safeguarding of minors in the radio-television broadcasting sector are observed, taking account of self-regulation codes that may be in place concerning the relations between minors and television, as also the guidelines provided by the parliamentary commission for general policy and superintendence on radio and television services;</p>	<p><b>Article 10 (4)</b></p> <p><b>The following text to be inserted at the end:</b></p> <p>In the event of failure to comply with the rules on the protection of minors, including the rules laid down in the Code on TV self-regulation and minors approved on 29 November 2002, as subsequently amended, the products and services committee of the Authority shall decide whether to impose the sanctions provided for in Article 31 of Law No. 223 of 6 August 1990. The sanctions shall apply even if the act constitutes an offence and irrespective of any criminal proceedings. Sanctions imposed either by the Authority or by the committee for the application of the Code on TV self-regulation and minors must be given adequate publicity and the broadcaster on which the sanction is imposed must mention it among the news items broadcast at appropriate or peak viewing times</p>
<p><b>Article 114(6) of the Code of Criminal Procedure</b></p> <p>Article 114 Ban on publication of items [acts, deeds]. (6) It is prohibited to publish personal information or images of minors (witness, offender or injured party) until they are eighteen years old. The children's court, in the interest of the minor, or the minor who is sixteen, can allow the publication.</p>	<p><b>Article 10(8).</b></p> <p><b>The following sentence to be inserted after the first sentence:</b></p> <p>"The publication of items which may lead, even indirectly, to the identification of the abovementioned minors shall also be prohibited".</p>



<p><b>Article 2(16) of Law No. 249 of 31 July 1997</b></p> <p>16. For purposes of identifying the dominant positions forbidden <b>by the present law</b>, the shareholdings in the capital acquired or owned through companies controlled directly or indirectly, trust companies or third parties will be taken into consideration. ... When agreements exist among the various shareholders, in whatever manner it may be concluded, as regards concerted voting behaviour, or the management of the company, other than the mere consultation among shareholders, each of the shareholders is regarded, <b>for purposes of the present law</b>, as owner of the sum of the shares or shareholdings held by the shareholders in agreement among themselves or which such shareholders may control.</p>	<p><b>Article 14(5)</b></p> <p><b>Amend as follows:</b></p> <p>16. For purposes of identifying the dominant positions forbidden <b>in the integrated communications system</b>, the shareholdings in the capital acquired or owned through companies controlled directly or indirectly, trust companies or third parties will be taken into consideration. ... When agreements exist among the various shareholders, in whatever manner it may be concluded, as regards concerted voting behaviour, or the management of the company, other than the mere consultation among shareholders, each of the shareholders is regarded, <del>for purposes of the present law</del>, as owner of the sum of the shares or shareholdings held by the shareholders in agreement among themselves or which such shareholders may control.</p>
<p><b>Article 2(7) of Law No. 249 of 31 July 1997</b></p> <p>The Authority, in obedience to the changes in the characteristics of markets <b>and having regard to the criteria indicated in clauses 1 and 8</b>, without prejudice to the non-enforceability as indicated in clause 2, will adopt the measures necessary for the elimination or prevention of the creation of positions as set out in clause 1 or which are in any way harmful to pluralism.</p>	<p><b>Article 15(5)</b></p> <p><b>Amend as follows:</b></p> <p>The Authority, in obedience to the changes in the characteristics of markets <del>and having regard to the criteria indicated in clauses 1 and 8</del>, without prejudice to the non-enforceability as indicated in clause 2, will adopt the measures necessary for the elimination or prevention of the creation of positions as set out in clause 1 or which are in any way harmful to pluralism.</p>
<p><b>Article 8(7) of Law No. 223 of 6 August 1990</b></p> <p>The broadcasting time devoted by nation-wide private television broadcasters to advertising <b>messages</b> cannot exceed 15% of daily programming and 18% of hourly programming.</p>	<p><b>Article 15 (7a)</b></p> <p><b>Amend as follows:</b></p> <p>The broadcasting time devoted by nation-wide private television broadcasters to advertising <b>spots</b> cannot exceed 15% of daily programming and 18% hourly programming.</p>

<p><b>Article 8(9bis) of Law No. 223 of 6 August 1990</b></p> <p>The broadcasting time that nation-wide private television broadcasters can devote to advertising messages [spots] increases to 20% if including forms of advertising such as the offers made directly to the public for the sale, the acquisition and the rent of products or for the provision of services are included, provided there is compliance with the daily and hourly ceilings (as set in paragraph 7 of Article 8) for advertising other than the offers referred to in this paragraph. However, the transmission time dedicated by broadcasters to such forms of <b>offers</b> cannot exceed 72 minutes daily.</p>	<p><b>Article 15(7b)</b></p> <p><b>Amend as follows:</b></p> <p>The broadcasting time that nation-wide private television broadcasters can devote to advertising messages [spots] increases to 20% if including forms of advertising <b>different from advertising spots</b> such as the offers made directly to the public for the sale, the acquisition and the rent of products or for the provision of services are included, provided there is compliance with the daily and hourly ceilings (as set in paragraph 7 of Article 8) for advertising other than the offers referred to in this paragraph. However, the transmission time dedicated by broadcasters to such forms of <b>advertising other than advertising spots</b> cannot exceed 72 minutes daily.</p>
<p><b>Article 10 of Law No. 62 of 7 March 2001</b></p> <p><b>– (Advertising messages to promote books and reading)</b></p> <p>1. Advertising messages forming part of initiatives taken by specialist institutions, bodies and associations, with a view to mobilise public opinion vis-à-vis books and reading, broadcast free of charge or on favourable terms by public or private television or radio broadcasters, shall not be taken into consideration for the purpose of calculating the upper limits referred to in Article 8 of Law No. 223 of 6 August 1990, as subsequently amended.</p>	<p><b>Article 15 (8)</b></p> <p><b>Replace with the following text:</b><sup>193</sup></p> <p>1. Advertising messages forming part of initiatives taken by specialist institutions, bodies and associations, producers and publishers, with a view to mobilise public opinion vis-à-vis books and reading, broadcast free of charge or on favourable terms by public or private television or radio broadcasters, shall not be taken into consideration for the purpose of calculating the upper limits referred to in Article 8 of Law No. 223 of 6 August 1990, as subsequently amended.</p>

193. The two texts appear to be identical. The same seems to be the case with the Italian original. Article 10 of *Legge 7 marzo 2001*, n. 62 “*Nuove norme sull’editoria e sui prodotti editoriali e modifiche alla legge 5 agosto 1981, n. 416*” pubblicata nella *Gazzetta Ufficiale n. 67 del 21 marzo 2001* is as follows: “1. *I messaggi pubblicitari facenti parte di iniziative, promosse da istituzioni, enti, associazioni di categoria, volte a sensibilizzare l’opinione pubblica nei confronti del libro e della lettura, trasmessi gratuitamente o a condizioni di favore da emittenti televisive e radiofoniche pubbliche e private, non sono considerati ai fini del calcolo dei limiti massimi di cui all’articolo 8 della legge 6 agosto 1990, n. 223, e successive modificazioni*”. In the Gasparri Law, the text which is to replace it reads as follows: “1. *I messaggi pubblicitari facenti parte di iniziative, promosse da istituzioni, enti, associazioni di categoria, produttori editoriali e librai, volte a sensibilizzare l’opinione pubblica nei confronti del libro e della lettura, trasmessi gratuitamente o a condizioni di favore da emittenti televisive e radiofoniche pubbliche e private, non sono considerati ai fini del calcolo dei limiti massimi di cui all’articolo 8 della legge 6 agosto 1990, n. 223* ([www.urpcomunicazioni.it/normativa/radiotv/rtv\\_223\\_1990.htm](http://www.urpcomunicazioni.it/normativa/radiotv/rtv_223_1990.htm)), e successive modificazioni”.

<p><b>Article 1 (2-quarter) of Law No. 66 of 20 March 2001</b></p> <p>Local radio broadcasting companies may transmit signals to a maximum of four regions (in the north of Italy) or five regions (in the centre and in the south of Italy), providing that they are neighbouring regions and the total population served does not exceed 15 million persons.</p>	<p><b>Article 24(4)</b></p> <p><b>Replace with the following text:</b></p> <p>A single person, exercising local sound broadcasting activity, directly or through a number of interlinked or controlled persons, may transmit signals to a maximum coverage of 15 million people.</p>
<p><b>Article 19(1)(b) of Law No. 103 of 14 April 1975</b></p> <p>Beyond the running of the services licensed, the company holding the public television broadcasting franchise must supply the following services: ... to broadcast – in accordance with the directives of the Presidency of the Council of Ministers, heard by the competent parliamentary commission – television and radio services for television and radio stations abroad in order to promote the Italian language and culture <b>and to short wave outside the country, in accordance with Legislative Decree No. 1132 of 7 May 1948 and Decree No. 1703 of the President of the Republic of 5 August 1962.</b></p>	<p><b>Article 25 (13a)</b></p> <p><b>Amend as follows:</b></p> <p>Beyond the running of the services licensed, the company holding the public television broadcasting franchise must supply the following services: ...to broadcast – in accordance with the directives of the Presidency of the Council of Ministers, heard by the competent parliamentary commission – television and radio services for television and radio stations abroad in order to promote the Italian language and culture <del>and to short wave outside the country, in accordance with Legislative Decree No. 1132 of 7 May 1948 and Decree No. 1703 of the President of the Republic of 5 August 1962.</del></p>
<p><b>Article 20(3) of Law No. 103 of 14 April 1975</b></p>	<p><b>Article 25 (13b)</b></p> <p><b>Amend as follows:</b></p> <p>b) the whole of the passage in Article 20(3) from the words: “through transmissions” to the end of the paragraph shall be deleted.</p>

## Analysis and review of the “Frattini Law”<sup>194</sup>

by Karol Jakubowicz and David Ward

### **Foreword**

The present review, commissioned by the Venice Commission of the Council of Europe, deals with “Rules for the resolution of conflicts of interest” (Frattini Law), adopted by the Italian Chamber of Deputies on 13 July 2004. The purpose of this review is to ascertain whether the law is compatible with international standards and whether, in the light of those standards, it truly resolves the issues which prompted its adoption.

### **Background**

#### **Conflict of interest**

According to a dictionary definition, a conflict of interest “refers to a situation when someone, such as a lawyer or public official, has competing professional or personal obligations or personal or financial interests that would make it difficult to fulfil his duties fairly” ([www.lectlaw.com/def/c095.htm](http://www.lectlaw.com/def/c095.htm)). The following are listed as the most common forms of conflict of interest:

- self-dealing, in which public and private interests collide, for example issues involving family, or privately held business interests;
- outside employment, in which the interests of one job contradict another;
- accepting of benefits, including bribes and other gifts accepted to curry favour,
- influence-peddling, using one’s position to influence other realms;
- use of government/corporate/legal property for personal use;
- unauthorised distribution of confidential information (see: [http://en.wikipedia.org/wiki/Conflict\\_of\\_interest](http://en.wikipedia.org/wiki/Conflict_of_interest)).

Conflict of interest is a widespread and growing phenomenon and it is regulated and managed in different countries in different ways.<sup>195</sup> International standards in this field are defined, *inter alia*, in Recommendation No. R (2000)10

194. This analysis and review, written with David Ward in 2004, was one of the documents used by the European Commission For Democracy Through Law in the preparation of its Opinion on the Compatibility of the Laws “Gasparri” and “Frattini” of Italy With The Council Of Europe Standards in the Field of Freedom of Expression and Pluralism Of The Media, adopted by the Commission At its 63rd Plenary Session (Venice, 10-11 June 2005).

195. See *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*. Paris: OECD, 2004.

of the Council of Europe Committee of Ministers to member states on codes of conduct for public officials, and in the recommendation of the OECD Council on guidelines for managing conflict of interest in the public service (2003).

Recommendation No. R(2000)10 defines conflict of interest in Article 13 in the following way:

1. Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.
2. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.

The recommendation does not cover publicly elected representatives, members of government and holders of judicial office, but it still sets standards which are applicable in any conflict-of-interest situation.

This includes the following principles:

- Article 6: In the performance of his or her duties, the public official should not act arbitrarily to the detriment of any person, group or body and should have due regard for the rights, duties and proper interests of all others;
- Article 7: In decision making the public official should act lawfully and exercise his or her discretionary powers impartially, taking into account only relevant matters.
- Article 8: 1. The public official should not allow his or her private interest to conflict with his or her public position. It is his or her responsibility to avoid such conflicts of interest, whether real, potential or apparent. 2. The public official should never take undue advantage of his or her position for his or her private interest.
- Article 14: The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests.
- Article 21: 1. The public official should not offer or give any advantage in any way connected with his or her position as a public official, unless lawfully authorised to do so. 2. The public official should not seek to influence for private purposes any person or body, including other public officials, by using his or her official position or by offering them personal advantages.

An annex to the OECD Council recommendation defines conflict of interest as involving "a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could

improperly influence the performance of their official duties and responsibilities". The annex distinguishes three types of conflict of interest:

- actual, a current conflict-of-interest situation,
- apparent, when it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case,
- potential, where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (that is, conflicting) official responsibilities in the future.

According to the annex, where a private interest has in fact compromised the proper performance of a public official's duties, that specific situation is better regarded as an instance of misconduct or abuse of office, or even an instance of corruption, rather than as a conflict of interest.

The annex recommends that clear rules should be set on what is expected of public officials in dealing with conflict of interest situations:

- a) Dealing with conflicting private interests – public officials should be required to accept responsibility for identifying their relevant private interests. An organisation's policy statement should make it clear that the registration or declaration of a private interest does not in itself resolve a conflict. Additional measures to resolve or manage the conflict positively must be considered.
- b) Resolution and management options – options for positive resolution or management of a continuing or pervasive conflict can include one or more of several strategies as appropriate, for example:
  - divestment or liquidation of the interest by the public official;
  - refusal of the public official from involvement in an affected decision-making process;
  - restriction of access by the affected public official to particular information;
  - transfer of the public official to duty in a non-conflicting function;
  - re-arrangement of the public official's duties and responsibilities;
  - assignment of the conflicting interest in a genuinely "blind trust" arrangement;<sup>196</sup>
  - resignation of the public official from the conflicting private-capacity function, and/or
  - resignation of the public official from their public office.

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196. This is defined as "A trust in which the beneficiaries do not have knowledge of the trust's specific assets, and in which a fiduciary third party has complete management discretion" ([www.investorwords.com/497/blind\\_trust.html](http://www.investorwords.com/497/blind_trust.html)) or as "A trust in which the executors have full discretion over the assets and the beneficiaries in contrast have no knowledge of holdings within the trust" ([www.investopedia.com/terms/b/blindtrust.asp](http://www.investopedia.com/terms/b/blindtrust.asp)).

### ***The main conflict-of-interest situation covered by the present law***

This law is a culmination of a long period of attempts to adopt similar regulations in Italy<sup>197</sup> to resolve a situation in which the prime minister owns extensive media interests, including Mediaset with three major commercial television channels,<sup>198</sup> operating alongside RAI, the public service broadcaster, which operates the other three major national television channels.<sup>199</sup> Both companies are, of course, in competition for audiences and advertising revenue.

This situation has long been openly acknowledged by everyone to constitute a conflict of interest. One reason for this is the extensive influence that the ruling party (in this case Forza Italia, led by Mr Berlusconi) and the government itself can exert on RAI.

RAI operates by virtue of a convention with the government. It also has to conclude a national service contract with the ministry of communications, as well as regional service contracts and, in the case of the autonomous provinces of Trento and Bolzano, provincial service contracts. The board of RAI is appointed by the presidents of both houses of Parliament.<sup>200</sup> Appointments are based on party political affiliation (three members representing the ruling party/coalition and two from the opposition). The director general of RAI is appointed by the chairman of the board and the minister of economic affairs.

In addition, the public broadcaster is subject to control by a parliamentary commission for the general direction and surveillance of radio-TV services. The commission has, and looks set to retain, extensive powers and competencies

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197. Unsuccessful earlier attempts are described, *inter alia*, in the minority report, presented in the Italian Senate by Senator Stefano Passigli, on the government bill of the present law, approved by the senate, 2 June 2002 (see Passigli S., "The politics and legislation of conflict of interest in Italy"; <http://users.ox.ac.uk/~hine/> and in Blatmann S. "Italy. A media conflict of interest: anomaly in Italy"; investigation by, *Reporters sans frontières*, April 2003, Paris; Resolution 1387 (2004) "Monopolisation of the electronic media and possible abuse of power in Italy", and a report under the same title adopted by the Council of Europe's Parliamentary Assembly on 3 June 2004).

198. However, the prime minister, Mr. Silvio Berlusconi, does not appear in the organisation chart of any of his businesses (except the Milan football club, of which he is the chairman). The companies are run by family members and associates.

199. For a description of the Italian media situation see Mazzoleni G., "Italy", in Kelly M., Mazzoleni G. and McQuail D. (eds), *The media in Europe. The Euromedia handbook*. Sage Publications, London, 2004; *European media ownership: threats on the landscape. A survey of who owns what in Europe* (Supported by the European Commission), European Federation of Journalists, September 2002; Ward D. (with Carsten Fueg O. and D'Armo A.), *A mapping study of media concentration and ownership in ten European countries*. Hilversum Commissariaat voor de Media 2004 ([www.mediamonitor.nl](http://www.mediamonitor.nl)).

200. A BBC report notes: "In a highly-symbolic departure from normal practice – in which one president is always a member of the opposition – Mr Berlusconi has instead appointed both from his government". "Storm gathers around Italian TV", 15 February 2002, <http://news.bbc.co.uk/1/hi/world/europe/1822643.stm>.

vis-à-vis RAI, including some decision-making powers concerning programming and finance.<sup>201</sup>

These and other provisions provide evidence of considerable and direct involvement of various state authorities, including those directly subordinate to the prime minister and leader of the ruling party, in the affairs of the public service broadcaster.

This state of affairs must be regarded as an actual conflict of interest, especially given the many instances of direct or indirect government influence on RAI.<sup>202</sup> It creates potential for actions constituting conflict of interest or abuse of office as defined in the Council of Europe and OECD documents cited above.

### **General comments and assessment**

1. This law defines a mix of *a priori* incompatibilities (primarily of an administrative nature) and the *a posteriori* examination of individual acts of government. It does not contain “preventive” measures for solving a potential conflict of interest; instead, the Anti-Trust and Broadcasting Authorities have to investigate abuses on a case-by-case basis when a government act is considered to be in violation of the law. This would mean examining a huge number of acts.
2. The law only declares incompatibility between the management of a company and public office, not between ownership and public office;
3. In the case of a conflict of interest, no sanctions are envisaged for owners, only for the company managers. Information on conflicts of interest must be brought to Parliament, which means that there could potentially be political sanctions;
4. Circumstances when the Anti-Trust and Broadcasting Authorities are authorised to act to resolve conflicts or interest are very carefully and narrowly defined. This refers to cases when companies under the authority of

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201. Under Article 4 of the Law No. 103, 14 April 1975 (as amended), the parliamentary commission “formulates the general directions for the execution of the principles mentioned in art. 1, the arrangement of programmes and their equal distribution in the time available; it checks that the directions are being respected and rapidly adopts the necessary decrees to ensure they are observed; establishes ... the regulations to guarantee access to radio-TV ...; indicates the general criteria for the creation of annual plans and those lasting several years for expenditure and investment by referring to the prescription of the concessionary act; approves the maximum plans for annual programming and those lasting several years and watches over their execution; it receives reports on programmes broadcast by the provider company’s administrative council and ascertains compliance with the general directions formulated”.

202. In addition to the other reports cited above, see also the European Parliament’s report of 5 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI); A5-0230/2004 FINAL); and “Crisis in Italian media: how poor politics and flawed legislation put journalism under pressure”, report of the IFJ/EFJ Mission to Italy, 6-8 November 2003.



government officials act improperly, but not when the government official acts improperly, for example, by acting to discriminate against, or weaken, a competing company.

5. Abuse of a dominant position is banned, but no mention is made of Law No. 112 of 3 May 2004 “Principles governing the broadcasting system and RAI-Radiotelevisione italiana Spa, and the authority delegated to the government to issue the consolidated legislation on television broadcasting” (Gasparri Law) which changes the framework of analysis of dominant position by adopting the concept of the “integrated communications system”. This vastly extends the scope of the “relevant market” and complicates the ascertainment of a dominant position.

### ***Detailed comments***

#### *Sections 1-3*

Section 1 identifies public officials affected by the provisions of the law (persons holding government office, that is, the prime minister, ministers, deputy ministers, junior ministers and special government commissioners) and puts them under an obligation to devote themselves solely to the public interest and refrain from taking measures and participating in joint decisions in situations where there is a conflict of interest.

Section 3 defines conflicts of interest as the occurrence of one of two situations:

- an act of commission (introduction or a measure, or the act of proposing a measure) or omission (failure to take a measure that should have been taken) while he/she is disqualified under Section 2 (1);
- or when the measure or omission has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest.

Section 2 (1) disqualifies persons holding government office from:

- holding specified types of offices or occupying specific kinds of posts, including in profit-making companies or other business undertakings;
- undertaking an occupational activity of any kind or any work in a self-employed capacity, on behalf of public or private undertakings, in an area connected with the government office in question, occupying posts, hold office or performing managerial tasks or any other duties in professional societies or associations;
- performing any kind of public- or private-sector job.

Pursuant to Section 2 (2), individual entrepreneurs must arrange to appoint one or more authorised managers.

### *Analysis*

Definitions of conflict of interest cited above refer in very general terms to situations when public officials have personal or financial interests that would make it difficult for them to fulfil their duties with nothing but the public interest in mind. Here, the approach is, on the whole, different. The definition refers in most cases to very specific situations: particular kinds of jobs or activities are defined as being incompatible with government office.

However, the broader approach is also manifested in some cases. This refers in particular to provisions relating to situations when an act of commission or omission by a government official “has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest”.

### *Comment*

The narrower and more administrative definition of conflict of interest suggests that no such conflict appears when specific circumstances listed in the law do not arise. In short, a conflict of interest appears when a government official is a manager of a company, but not when he/she is an owner of that company without holding any position in it.

This is contradicted to some extent by the prohibition of behaviour which could have “a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest”. The appearance of such a direct “specific and preferential” effect could be difficult to prove, however.

### *Section 4*

This section reaffirms existing regulations concerning the abuse of a dominant position and liability of persons found guilty of such behaviour.

### *Comment*

No mention is made in this Section of Law No. 112 of 3 May 2004 “Principles governing the broadcasting system and RAI-Radiotelevisione italiana Spa, and the authority delegated to the Government to issue the consolidated legislation on television broadcasting” (Gasparri Law) which changes the framework of analysis of dominant position by adopting the concept of the “integrated communications system”. This vastly extends the scope of the “relevant market” and complicates the ascertainment of a dominant position.

### *Sections 5 and 10*

Under these sections, government officials are under an obligation to declare, within 30 days of taking office, to the Anti-Trust Authority (and, where

appropriate, to the Broadcasting Authority) disqualification situations covered by Section 2(1), as well as, within 60 days of taking office, their own assets, including shareholdings. They must also declare any subsequent changes in the information concerning their assets as previously supplied, within 20 days of the events giving rise to those changes.

Under provisional provisions, incumbents holding offices when the law goes into effect also have an obligation to make such reports.

Such declarations must also be made by the spouse and relatives up to the second degree of the person holding government office.

### *Comment*

The law places no other obligations on government officials to act to remove conflict of interest in ways foreseen by the OECD Council Recommendation (divestment or liquidation of the interest by the public official;<sup>203</sup> recusal of the public official from involvement in an affected decision-making process; restriction of access by the affected public official to particular information; transfer of the public official to duty in a non-conflicting function; rearrangement of the public official's duties and responsibilities; assignment of the conflicting interest in a genuinely "blind trust" arrangement,<sup>204</sup> resignation of the public official from the conflicting private-capacity function, and/or resignation of the public official from their public office).<sup>205</sup>

### *Sections 6 and 7*

This section defines the obligations of the Anti-Trust Authority and the Broadcasting Authority to remove conflicts of interest, when they occur.

In the first instance, this means ensuring that a government official loses the posts, offices or jobs listed in Section 2(1) as incompatible with government office.

In the second instance, this means an obligation to act when:

- an undertaking under the authority of a person holding government office or that of his or her spouse or relatives up to the second degree, or

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203. It is argued that compulsory selling of assets could not be envisaged in this law as this would be anti-constitutional in Italy.

204. According to reports, earlier proposals involved this idea, but it has been rejected since the "trust" could never be really "blind", i.e. the owner of Mediaset could not help but find out what decisions had been taken with regard to this company.

205. According to one report (Passigli S., "The politics and legislation of conflict of interest in Italy", <http://users.ox.ac.uk/~hine/>) the opposition had proposed a system similar to the one used in the United States: an independent authority along the lines of the Office of Government Ethics which would negotiate on a case-by-case basis which assets should be sold, which assets could be held in trust, with a ban on exercising property rights over them (for example using the shares to vote with) while enjoying all the benefits accruing (for example, collecting the dividends), and which assets could be held freely. That proposal was not retained.

companies or other undertakings controlled by them, operate in such a way as to take advantage of measures introduced in a situation of conflict of interest within the meaning of Section 3, and there is proof that those concerned were aware of the conflict of interest (Section 6 [3]);

- companies operating in the sectors referred to in Section 2, paragraph 1, of Law No. 249 of 31 July 1997 that are under the authority of persons holding government office or their spouses or relatives up to the second degree or controlled by them, act in such a way as to provide preferential support for a person holding government office (Section 7[1]).

Where such circumstances arise, the two authorities are authorised to enjoin the company to refrain from any such conduct, to take steps to put a stop to the infringement, or to take the necessary remedial action. In case of non-compliance, they are under an obligation to inflict a fine according to the seriousness of the conduct, the maximum amount of which shall be proportional to the pecuniary advantage actually obtained by the company, or to the seriousness of the violation.

Both authorities must inform the speakers of the two houses of parliament of their actions to ascertain the existence (or otherwise) of conflicts or interest and of any action to remedy the situation.

#### *Analysis and comment*

Apart from the “administrative” incompatibilities (holding of specific posts, jobs and positions in addition to government office), circumstances when the authorities are authorised to act are very carefully and narrowly defined. This refers to cases when:

- an undertaking under the authority of a person holding government office or that of his or her spouse or relatives up to the second degree, or companies or other undertakings controlled by them, operate in such a way as to take advantage of measures introduced in a situation of conflict of interest within the meaning of Section 3, and there is proof that those concerned were aware of the conflict of interest;
- broadcasting companies that are under the authority of persons holding government office or their spouses or relatives up to the second degree or controlled by them, act in such a way as to provide preferential support for a person holding government office.

Thus, they are not authorised to act when the government official acts improperly, for example, by offering unfair privilege to his/her own company, or acting to discriminate against, or weaken, a competing company. This is indirectly mentioned in Section 3 as constituting conflict of interest, but there does not appear to be any provision for dealing with such situations.

### *Section 8*

The Anti-Trust Authority and the Broadcasting Authority must submit to Parliament a six-monthly report on the progress of the monitoring and supervisory activities referred to herein.

### *Section 9*

This section makes provision for increasing the staff of the Anti-Trust Authority and the Broadcasting Authority, in order to be able to take on additional duties resulting from this law.

### *Section 10*

This section sets deadlines for the execution of obligations resulting from this law.

## **Analysis and review of draft law on public television and radio broadcasting in the Moscow region**

### ***I. Foreword***

The present review, commissioned in 2004 by the media division of the Council of Europe, will concentrate on assessing the draft law in terms of its compatibility with Council of Europe standards, as well as of the question whether its adoption would lead to the creation of public service broadcasting in the Moscow region.

As noted by Recommendation 1641 (2004) on public service broadcasting adopted by the Council of Europe Parliamentary Assembly in January 2004, “public service broadcasting is a vital element of democracy in Europe ... In Russia ... the lack of independent public service broadcasting was a major contributing factor to the absence of balanced political debate in the lead up to the recent parliamentary elections, as mentioned by the International Election Observation Mission”.

A well-drafted law, which reflects the best standards in its field, can – even if its implementation is not perfect – serve as a model of the desired goal and a guide to what still remains to be done to achieve it. This is why it is important for a law to embody the proper definition of public service broadcasting and to seek to create the right conditions for its introduction. On the other hand, a law that may be based on acceptance of the fact that some aspects of public service broadcasting cannot be introduced in the given set of circumstances, might fail to provide such a standard and could legitimise a situation which is far from what public service broadcasting should be. The effect could therefore be counterproductive. This will also serve as a point of departure for assessing the Draft Law under consideration.

### ***II. Introduction***

Public service broadcasting is a universal feature of the dual system of broadcasting prevalent in Europe, a mainstay of democracy and a guarantee that the public will have access to programming that cannot be available either from government-controlled or from commercial stations. The reason it is called “public service” broadcasting is precisely that it is designed to serve the public and the public interest, and not any political, commercial or other interests.

From this point of view, the difference between the two terms – “public broadcasting” and “public service broadcasting” (PSB) is significant. “Public broadcasting” can mean publicly-owned stations, or stations forming part of the public sector, which can imply their subordination to the national or regional

government or administration. "Public service broadcasting" means stations which (though they may, from a formal point of view, be publicly owned) are independent, controlled by no-one except the law and their democratically appointed supervisory and management bodies, and dedicated to serving the general public. Council of Europe standards as concerns public service broadcasting are defined in a number of documents.

Resolution No. 1: "The Future of Public Service Broadcasting", adopted by the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994), defined the mission of PSB stations as follows:

- to provide, through their programming, a reference point for all members of the public and a factor for social cohesion and integration of all individuals, groups and communities. In particular, they must reject any cultural, sexual, religious or racial discrimination and any form of social segregation;
- to provide a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed;
- to broadcast impartial and independent news, information and comment;
- to develop pluralistic, innovatory and varied programming which meets high ethical and quality standards and not to sacrifice the pursuit of quality to market forces;
- to develop and structure programme schedules and services of interest to a wide public while being attentive to the needs of minority groups;
- to reflect the different philosophical ideas and religious beliefs in society, with the aim of strengthening mutual understanding and tolerance and promoting community relations in pluriethnic and multicultural societies;
- to contribute actively through their programming to a greater appreciation and dissemination of the diversity of national and European cultural heritage;
- to ensure that the programmes offered contain a significant proportion of original productions, especially feature films, drama and other creative works, and to have regard to the need to use independent producers and co-operate with the cinema sector;
- to extend the choice available to viewers and listeners by also offering programme services which are not normally provided by commercial broadcasters.

States participating in the Ministerial Conference also undertook to maintain and, where necessary, establish an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions. The level of licence fee or public subsidy should be projected over a sufficient period of time so as to allow public service broadcasters to engage in long-term planning.

Participating states also undertook to guarantee the independence of public service broadcasters against political and economic interference. In particular, day-to-day management and editorial responsibility for programme schedules and the content of programmes must be a matter entirely for the broadcasters themselves.

Recommendation No. R (96)10 of the Council of Europe Committee of Ministers on the guarantee of the independence of public service broadcasting states in an appendix that the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy, especially in areas such as:

- the definition of programme schedules;
- the conception and production of programmes;
- the editing and presentation of news and current affairs programmes;
- the organisation of the activities of the service;
- recruitment, employment and staff management within the service;
- the purchase, hire, sale and use of goods and services;
- the management of financial resources;
- the preparation and execution of the budget;
- the negotiation, preparation and signature of legal acts relating to the operation of the service;
- the representation of the service in legal proceedings as well as with respect to third parties.

Regarding the boards of management, supervisory boards and staff of public service broadcasting organisations, the recommendation states that they should not be put at risk of any political or other interference. Members of those bodies, and of the staff:

- should exercise their functions strictly in the interests of the public service broadcasting organisation which they represent and manage;
- may not, directly or indirectly, exercise functions, receive payment or hold interests in enterprises or other organisations in media or media-related sectors where this would lead to a conflict of interest with the management functions which they exercise in their public service broadcasting organisation;
- may not receive any mandate or take instructions from any person or body whatsoever other than the bodies or individuals responsible for the supervision of the public service broadcasting organisation in question, subject to exceptional cases provided for by law;



- should only be accountable for the exercise of their functions only to their superiors within the public service broadcasting organisation and should be able to appeal to competent courts against any decisions taken by those superiors.

The following principles should apply in cases where the funding of a public service broadcasting organisation is based either entirely or in part on a regular or exceptional contribution from the state budget or on a licence fee:

- the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation;
- the level of the contribution or licence fee should be fixed after consultation with the public service broadcasting organisation concerned, taking account of trends in the costs of its activities, and in a way which allows the organisation to carry out fully its various missions;
- payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning;
- the use of the contribution or licence fee by the public service broadcasting organisation should respect the principle of independence and autonomy mentioned in guideline No. 1;
- where the contribution or licence fee revenue has to be shared among several public service broadcasting organisations, this should be done in a way which satisfies in an equitable manner the needs of each organisation.

The legal framework governing public service broadcasting organisations should clearly stipulate that they shall ensure that news programmes fairly present facts and events and encourage the free formation of opinions. The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations. Any official announcements should be clearly described as such and should be broadcast under the sole responsibility of the commissioning authority.

Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting formulates the following principles applicable to public service broadcasting:

#### ***a. Remit of public service broadcasting***

Public service broadcasting should preserve its special social remit, including a basic general service that offers news, educational, cultural and entertainment

programmes aimed at different categories of the public. Member states should create the financial, technical and other conditions required to enable public service broadcasters to fulfil this remit in the best manner while adapting to the new digital environment. In this respect, the means to fulfil the public service remit may include the provision of new specialised channels, for example in the field of information, education and culture, and of new interactive services, for example electronic programme guides (EPGs) and programme-related online services. Public service broadcasters should play a central role in the transition process to digital terrestrial broadcasting.

#### ***b. Universal access to public service broadcasting***

Universality is fundamental for the development of public service broadcasting in the digital era. Member states should therefore make sure that the legal, economic and technical conditions are created to enable public service broadcasters to be present on the different digital platforms (cable, satellite, terrestrial) with diverse quality programmes and services that are capable of uniting society, particularly given the risk of fragmentation of the audience as a result of the diversification and specialisation of the programmes on offer.

#### ***c. Financing public service broadcasting***

In the new technological context, without a secure and appropriate financing framework, the reach of public service broadcasters and the scale of their contribution to society may diminish. Faced with increases in the cost of acquiring, producing and storing programmes, and sometimes broadcasting costs, member states should give public service broadcasters the possibility of having access to the necessary financial means to fulfil their remit.

The draft law will be assessed in terms of the standards defined in the three documents cited above, as well as of other standard-setting documents of the Council of Europe. Given that the law provides for a broadcasting regulatory authority, this will include Recommendation Rec(2000)23 of the Council of Europe Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, though it has to be noted that when this recommendation was adopted, the delegation of the Russian Federation expressed reservations concerning some of the guidelines which appear in the appendix to the recommendation.

### ***III. General assessment***

The draft law, intended to introduce public (service) broadcasting in the Moscow region, is a welcome development and deserves support. As discussed below, many of its provisions are broadly in line with Council of Europe standards in this area. However, as a whole, the draft law should be considered as only the first step in the preparation of a law that will serve its intended purpose. Many provisions are incomplete, and many also fail to reflect European standards. Therefore

the draft law requires considerable further work and revision in order to guarantee that public service broadcasting in the Moscow Region will fit the following description of PSB, contained in Recommendation 1641 (2004) on public service broadcasting adopted by the Council of Europe Parliamentary Assembly:

Public service broadcasting, whether run by public organisations or privately owned companies, is distinguished from broadcasting for purely commercial or political reasons by its specific remit, which is essentially to operate independently of economic and political power. It provides the whole of society with information, culture, education and entertainment, enhances social, political and cultural citizenship and stimulates the cohesion of society. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers variety of programmes and services catering for the needs of all groups in society and it is publicly accountable.

As argued below in “General comments” and then at greater length in “Detailed comments”, the draft law cannot guarantee that public broadcasting in the Moscow region will have the following features:

- independence;
- ability to serve the public interest;
- ability to enhance social and political citizenship;
- institutional autonomy;
- editorial independence and impartiality in the full sense of the word;
- public accountability;
- adequate financing.

Therefore, the draft law cannot be considered as compatible with Council of Europe standards. The drafters should be encouraged to continue work on the draft in order fully to incorporate the principles and standards of public service broadcasting.

#### **IV. General comments**

##### ***The notion of “public broadcasting”***

###### *Proposed provisions*

In a great majority of cases, PSB is established either by creating new broadcasting organisations to operate as public service broadcasters, or by transforming an existing station (usually state-controlled) into such a broadcaster. Additionally, a system of funding is usually created to allow the station to pursue a non-commercial programme policy. The present draft law pursues a different approach: existing and licensed stations (potentially unlimited in number) may

conclude contracts with the Council on Public Television and Radio Broadcasting in Moscow region (hereinafter: the council) to provide public broadcasting (Section 5). "Public broadcasting" thus refers to the goals and objectives to be pursued in programming, rather than – as is usually the case – to particular institutions created especially to provide programming of this nature, their legal and institutional form, system of funding, etc. A public broadcaster must have a reach of at least 70% of the population of the Moscow region or of the municipality (or municipalities) in which it operates (Section 2).

#### *Comment*

"Public service contracts" have been introduced in a number of countries (Belgium, Denmark, France, Ireland, Italy, Portugal, Sweden), but primarily as a way of developing a more detailed and precise set of obligations to be met by the existing public service broadcasting organisation, and determining the amount and sources of funding needed for that purpose. Nevertheless, the solution chosen in the draft law is in keeping with the situation in some countries (for example, the United Kingdom) where commercial stations are formally recognised as public service broadcasters. In Resolution No. 2 "Public and private broadcasting in Europe", the 1st European Ministerial Conference on Mass Media Policy (Vienna, 9-10 December 1986) acknowledged that the public service function "may be fulfilled by publicly or privately organised entities". However, while this solution is compatible with European standards, it remains to be seen whether it can be effective in the Moscow region and whether it will produce public service broadcasting compatible with European standards.

Under this draft law, the conclusion of a contract by a Moscow region station would mean the acceptance of more duties and obligations in programming, together with limitations as concerns advertising and sponsorship. Though the draft law is silent on this matter, presumably stations will be free to choose whether to conclude such a contract or not, and it will be up to them to propose this to the council once they have decided to do it. However, it is not clear why stations should want to conclude such contracts. If priority is to be given to stations owned by the Moscow region or Moscow region municipalities, then these stations are presumably already financed by local government authorities. The draft law does not guarantee more funding for these stations, meaning that with reduced revenues from advertising (see Section 11), the stations may in fact sustain a financial loss by concluding the contract. Moreover, the Draft Law is silent on what would happen if no station agreed to enter into a contract to provide public broadcasting.

In addition, there are no transitional provisions, describing the process consequent upon the conclusion of the contract. This would presumably need to include, at the very least:

- revision of the terms of the existing licence to broadcast;

- appointment of new governing bodies of the station in line with the provisions of the draft law (and a time-table for doing this, after the conclusion of the contract).

The requirement that a public broadcaster must have a reach of at least 70% of the population of its service area is in conflict with the fundamental principle of public service broadcasting, namely its universality. However, if there are many public broadcasters, presumably they will collectively have a near-universal reach.

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### **Conclusion**

The draft law does not fully regulate the provision of public broadcasting and – assuming freedom of choice for stations whether to conclude a contract or not – does not guarantee that public broadcasting will be provided at all.

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### **Remit of public broadcasters**

#### *Proposed provisions*

The remit of public broadcasters is defined in several sections:

- Section 2 describes the purpose of public broadcasting as “securing the interests of different social and age groups of citizens living on the territory of Moscow region in the diverse, objective and high quality television and radio broadcasting”.
- Section 3 describes the tasks of public television and radio broadcasting in Moscow Region as “informing, educating and securing rest and entertainment of subscribers by way of television and radio broadcasting”.
- Section 4 describes the “main principles of public television and radio broadcasting” as being “based on the constitutional principles of freedom of speech and freedom of mass information” and on “the principles of impartiality and balanced broadcasting for the purposes of preventing a manipulation of public opinion at broadcasting information, documentary programs and overviews of current events opening political, economic, social, ecological, inter-nations and other publicly important problems”.
- Section 7 deals with the duties of “the organisation effecting public television and radio broadcasting in Moscow Region”, including:
  - distributing information, materials or messages on activities of the bodies of state power and local self-government of Moscow region;
  - providing high quality and professionalism of television and radio broadcasting by contents and technical characteristics;  
meeting the information, social and cultural needs of the subscribers and providing pluralism of opinions;

- providing a wide diversity of programmes meeting the interests of different social, age, national, religious, political and other public groups of subscribers, as well as a wide selection of programmes in the interests of subscribers, including a required balance of television and radio programmes of different genres: news of Moscow Region, Russian Federation and world, sports programmes, programmes on arts, science, education, broadcasts of concerts and theatrical plays and also kids' programmes, scientific-educational and other programmes (percentage ratio between the programmes of listed topics in the broadcasting grid is established by the charter of the organisation effecting public television and radio broadcasting in Moscow region and by contract with the Council on Public Television and Radio Broadcasting in the Moscow region);
  - undertaking educational activities in the sphere of human rights and freedoms;
  - checking the reliability of the information put on air;
  - warning its viewers on the peculiarities of films and programmes containing episodes that may traumatise or irritate separate groups of subscribers.
- Section 8 puts public broadcasters under an obligation of impartiality in covering the activities of political parties and public unions in the television and radio programmes of public television and radio broadcasting in the Moscow region. They are to guarantee equal time in the news and current affairs programming to political parties and groups of deputies registered with the Moscow region Duma or with the representative body of the Moscow region local self-government.
  - Further obligations are defined in sections 9-12.

*Comment*

The sections quoted above broadly correspond to what is accepted as a public service remit. However, the provision of Section 7.3 ("distributes information, materials or messages on activities of the bodies of state power and local self-government of Moscow Region") and of Section 8.2 (equal time for all political parties and groups of deputies) shows that in reality the remit may primarily be that of serving as a mouthpiece for state and local government authorities, and a forum for politicians.

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**Conclusion**

Sections 7.3 and 8.2 would need to be changed if public broadcasters are not to serve, and are not to be seen, as a public-relations arm of local government authorities and a showcase for local politicians. Otherwise, it will be difficult to recognise public broadcasters as really performing a public, rather than a political service.

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## ***Status and independence of public broadcasters and other bodies***

“Regional public television and radio broadcasting” is defined in Section 2 as “public television and radio broadcasting available to be received by not less than 70% of citizens living on the territory of Moscow Region and effected independently from the state power bodies”. The intention below will be to check whether the law does indeed guarantee this independence.

### ***Public broadcasters***

#### *Proposed provisions*

Existing licensed broadcasters are to assume public duties and obligations by concluding a contract with the Council on Public Television and Radio Broadcasting in the Moscow region (Section 5). Priority in concluding these contracts is accorded to broadcasting organisations owned by the Moscow region or by Moscow region municipalities. Broadcasters owned by non-state organisations may conclude such a contract if the council is satisfied that they are capable of meeting the cost of fulfilling the obligations specified in the contract (Section 5).

In the case of stations fully or partly owned by the Moscow region, or Moscow region municipalities, the Council on Public Television and Radio Broadcasting in Moscow Region would, under Section 21, “realise the authority of an owner” in respect of these organisations, or that part of their shares which is held by local government bodies.

Public broadcasters are to be financed by local government (Moscow region or municipalities) and additionally by advertising, sale of programme rights, sponsorship and other legal sources (Section 14). Budgetary allocations are to be guaranteed not to fall below the level of the previous year and are to be indexed for inflation (Section 14.2). Full or partial funding for public broadcasters may also come from “subscription fees”, if they are introduced in the Moscow Region (Section 14.3).

#### *Comment*

Almost every aspect of the institutional framework described above testifies to the fact that public broadcasters are likely to have no editorial independence or institutional autonomy. This is clear from:

- Priority being given to stations owned by local government;
- The status of the council as the “owner” of stations owned by local government (Section 21.3);
- The ability of the council, when so requested by the director of a public station, to hold “consultations” with him/her on programme policy

(presumably beyond the terms of the station's licence to broadcast); given that the council could be the station's "owner", encouraging the director to ask for such consultations should not be difficult;

- The discretionary nature of the decision to be taken by the council whether a non-state broadcaster meets the financial requirements (it may theoretically decide that no non-state broadcaster satisfies this criterion);
- The decisive role of local government authorities in appointing boards of directors;
- The ability of the council in some cases to "initiate a procedure to discharge [a director] from office";
- Lack of rules on incompatibility which would prevent a politician or an official from being appointed director of a station (the director may not be a relative of the Moscow region governor, but there is nothing to prevent the council from appointing the governor himself/herself to the job).

An additional factor is the fact that probably all or most of the funding will come from the local government budget. Moreover, the ability of the council to impose very harsh penalties (Section 20) on the basis of vague criteria (the nature of violations justifying the various penalties is not specified) also shows that the draft law provides effective means of exerting pressure on stations.

In addition, nothing is known about the legal form and status of the public broadcasters, especially those owned by local government bodies. If, by virtue of this fact, they are legally considered to be part of the local government administration, then they will still be subordinate to local government in every way, even if "ownership" is formally taken over by the council.

### ***Council on public television and radio broadcasting in the Moscow region***

#### *Proposed provisions*

The council is described as a state body of the Moscow region, "established by Government of Moscow Region in accordance with the Law and formed by Moscow Region Governor and Moscow Region Duma" (Section 21.1). Four members are to be appointed by the Moscow region governor and four by the Moscow region Duma.

#### *Comment*

Again, not only will all members of the council be political appointees, but there is nothing to prevent the governor from appointing to the council politicians or officials subordinated to him/her, or to prevent the Duma from appointing deputies to it. In short, the council, which will be practically all-powerful in relations to public broadcasters (especially those that are owned by local government), is likely to be a direct extension of the power elite and to perform its functions in its



interest. This can hardly be recognised as compatible with Recommendation Rec(2000)23 of the Council of Europe Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector which states in an appendix that the rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:

- regulatory authorities are under the influence of political power;
- members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.

Furthermore, rules should guarantee that the members of these authorities:

- are appointed in a democratic and transparent manner;
- may not receive any mandate or take any instructions from any person or body. The provisions of Sections 21-23 do not guarantee such a result.

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### **Conclusion**

All the provisions summed up above directly contradict Council of Europe standards on the independence of public service broadcasters and broadcasting regulatory authorities. They are thus a reason for very serious concern.

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### **Governing bodies of public broadcasters**

#### *Proposed provisions*

The draft law is silent on the organisation or governing bodies of private stations who might conclude the contract to serve as public broadcasters. As for stations owned by the Moscow region or Moscow region municipalities, Section 18.1 states that the council appoints (and dismisses) directors of wholly-owned stations, and members of the boards of directors of partly-owned stations (see below for a detailed discussion of the procedures applied in each case).

Directors (managers), or, as the case may be, members of the boards of directors of public broadcasters are to be appointed by the council (Section 18). Candidates for the position of director (manager) are to have no ties of blood with the governor of the Moscow region, deputies of the Moscow region Duma and members of the council. If a public broadcaster is wholly or partly owned by the Moscow region, candidates for the board of directors must be

approved by the Moscow region governor (Section 18.6). If a public broadcaster is wholly or partly owned by the Moscow region, candidates for the board of directors are selected by the heads of municipalities and submitted to the council for approval (Section 18.7).

#### *Comment*

Nothing is known about the relative powers and competencies of the directors and boards of directors. Nothing is known also about whether stations wholly owned by the Moscow region, or Moscow region municipalities, are to have boards of directors and who would appoint them. Nothing is known about whether partly owned stations are to have directors and who would appoint them.

The council appears to have a free hand in potentially dismissing directors or members of boards of directors. The procedure for doing that is not described. Presumably, a vote needs to be held to take such a decision (given that the matter is unregulated, nothing but a simple majority would be required), but the draft law is silent on this matter.

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#### **Conclusion**

These regulations appear to be incomplete. This must be rectified. The relative powers of directors and boards of directors need to be clearly defined. The status of the board of directors also needs a clear definition: is it to be a supervisory or a managerial body? In each case its function in the organisation must be described in detail. In the second case, the delimitation of the powers of the director and the board of directors must be very precise, so as to avoid conflicts. The law should give both directors, and members of boards of directors, security in performing their tasks, similar to that enjoyed by the members of the council themselves.

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#### **Detailed comments**

No comments are made with regard to sections which do not require further discussion.

#### *Section 2, Section 4.2*

The term “subscriber” suggests a commercial, contractual relationship between the broadcaster and viewer/listener, with an obligation on the part of the broadcaster to deliver the service the viewer/listener has subscribed to. This is not the case in this instance. The term should be changed because it also suggests that the “subscriber” has a legal claim to that service and may refuse to pay the subscription if that service is not delivered according to his/her wishes.

The concept of “public television and radio broadcasting” does – as we have seen – have more to do with publicly-owned stations that with stations performing a real public service.

The Draft Law offers definitions of “impartiality of broadcasting” and “balanced broadcasting” which are confined to the obligations of particular journalists or commentators. However, both terms also refer to the programme and editorial policy of the station in general. Their definitions should be rephrased to imply also obligations for the station as a whole (see appendix for an excerpt from the BBC *Producers’ guidelines* which covers the concept of impartiality at length).<sup>206</sup> This is also necessary because Section 4.2 directly refers to impartiality and balanced broadcasting as the main principles of public broadcasting.

Section 4 should be developed to include the principles of serving the public interest in all programming, and of pluralism and diversity of opinion in news and current affairs programming.

### *Section 5*

As noted in General Comments, the regulation of the provision of public broadcasting is incomplete and should be supplemented by:

- describing the steps leading to the conclusion of a contract;
- definition of the criteria the council may apply to choose between stations wishing to provide public broadcasting, if for some reason it had to make such a choice;
- clearer definition of the criteria of financial capability to meet the cost of providing public broadcasting, so that the council is deprived of a chance of arbitrary decision making in this case;
- provisions in case a new licence applicant wants to provide public broadcasting from the start of his/her operation;
- provisions in case no station wishes to conclude the contract, so there is a danger that public broadcasting may not be provided at all (which does not, of course, mean that there should be a way of forcing them to do it).

The preference for stations owned by the Moscow region or Moscow region municipalities should be removed. All stations should have an equal chance of being considered.

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206. BBC *Producers’ guidelines* is an internal, self-regulatory document and discusses “impartiality” in considerable detail. This level of detail cannot be reproduced in a law, of course, but the document does provide an orientation as concerns an overall meaning and interpretation of the term “impartiality”.

### *Section 7*

The provision of Section 7.3 (that stations must “distribute information, materials or messages on activities of the bodies of state power and local self-government of Moscow Region”) should be deleted. This turns them into a mouthpiece of national and local government and gives the authorities a legal claim to their airtime. Such a provision is incompatible with the requirement of the editorial independence of public broadcasters. A requirement to provide information on matters of importance to the public will produce the same effect, since the activities of national and local government are naturally of interest and importance to the audience.

The provision of Section 7.9 should be reformulated. Naturally every broadcaster should ensure the reliability of the news and other information and this goal should be rigorously pursued. However, there may be cases when reliability and accuracy cannot be conclusively and fully established, yet the importance of information obtained by the station requires that it should be made public. Accordingly, the provision should be reformulated so as not to constrain the performance of journalistic duties in such situations, and not to imply legal liability for inaccurate information broadcast in good faith.

### *Section 8*

The provision of Section 8.2 is no doubt designed to prevent imbalance in presenting all shades of opinion, or discrimination against a political party or group of deputies. However, it reinforces the impression that public broadcasting is to serve politicians, rather than the public. It may also put an intolerable burden on the broadcaster, as a lot of airtime is taken up by politicians representing all possible political orientations.

The requirement of impartiality, balance and (if they are added) pluralism and diversity of opinion will achieve the same effect, without forcing the broadcaster to offer airtime to all politicians virtually on demand.

### *Section 9*

This section covers what is usually described as a right of reply, and what is called here “opportunity to publish a refutation”. This is to be granted in cases when “public television and radio broadcasting has put on air the data related to the specified person and which confuse the subscribers or affect honour, dignity or business reputation of that person”.

This legal construction of the right of reply is close to that in Resolution (74)26 of the Council of Europe Committee of Ministers “On the right of reply. Position

of the individual in relation to the press<sup>207</sup> and in the European Convention on Transfrontier Television.<sup>208</sup>

### *Section 11*

This section concerns limits on advertising for stations providing public broadcasting. Otherwise, advertising is regulated by the Russian Federation Advertising Law, adopted by the State Duma on June 14, 1995. That law is not fully in compliance with the provisions of the European Convention on Transfrontier Television (Articles 11-18).

### *Section 14*

Until a “subscription” (licence or broadcasting fee) is introduced (the likelihood of this happening remains to be established), the main sources of financing for public stations will remain the local government budget, advertising and sponsorship.

Pursuant to Section 14.2, the “amount of allocations from Moscow Region budget to secure public television and radio broadcasting in the current financial year shall not be less than the volume provided for this purpose by Moscow Region budget in the previous financial year and shall be subject to mandatory annual indexation in line with inflation”. That does not provide for increased funding to meet public service obligations and offset loss of revenue resulting from advertising and sponsorship rules for public stations, defined in Sections 11-12. However, Section 14.2 provides for “bonuses to the employees of broadcasting organisations effecting public television and radio broadcasting in Moscow Region for complying with the requirements and conditions to secure public television and radio broadcasting”. This means that only the employees, but not

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207. In it, the Committee of Ministers “Recommends to member governments, as a minimum, that the position of the individual in relation to media should be in accordance with the following principles:

1. In relation to information concerning individuals published in any medium, the individual concerned shall have an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.

2. In relation to information concerning individuals published in any medium, the individual concerned shall have an effective remedy against the publication of facts and opinions which constitute:

i. an interference with his privacy except where this is justified by an overriding, legitimate public interest, where the individual has expressly or tacitly consented to the publication or where publication is in the circumstances a generally accepted practice and not inconsistent with law;

ii. an attack upon his dignity, honour or reputation, unless the information is published with the express or tacit consent of the individual concerned or is justified by an overriding, legitimate public interest and is a fair criticism based on accurate facts”.

208. As explained in paragraph 169 of the explanatory report, “A right of reply within the meaning of the convention is a right exercised by a natural or legal person in order to correct inaccurate facts or information, in cases where such facts or information concern him/her or constitute an attack on his/her legitimate rights (especially in regards to his/her dignity, honour or reputation).”

the stations themselves, stand to gain financially from the proper performance of public service obligations. Whether this prospect will encourage stations (both public, but especially owners of private stations) to change their status to that of public broadcasters is somewhat doubtful.

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### ***Recommendation***

Once a station switches to the status of a public broadcaster, its level of funding should become secure and adequate to its tasks and obligations, and also compensate it for loss of advertising and sponsorship revenue (due both to advertising restrictions and to the changed nature of its programming). This means that the level of funding should be determined taking into account the terms of the contract concluded by the station and the council. As noted in Section 19, the contract is to cover also “the volume of financing”: that volume should be calculated by the council to cover the cost of meeting the public broadcasting obligations. The council should inform local government authorities of the required level of funding for each station, and that should help determine the level of budgetary allocation. As emphasised several times in Council of Europe documents, the system of funding should enable a PSB broadcaster to engage in long-term planning. For that purpose, the level of budgetary allocations, calculated by taking account also of a station’s other revenues, should be set for several years, and not just on an annual basis.

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Section 14.3 defines subscription fees as fees “for the rendered services of public television and radio broadcasting”. As noted above, this raises the danger of implying a contractual relationship between the audience and the stations and of the fact that in reality public stations will be perceived as offering pay services. Licence (broadcasting) fees should be seen as collective solidarity funding to cover the cost of providing a public service, and not as individual payment for services rendered.

### *Sections 15-17, 21*

Pursuant to Section 15, the Council on Public Television and Radio Broadcasting in the Moscow region is to “protect the rights and interests of Moscow Region population in obtaining diverse and objective information at public television and radio broadcasting”. Nothing is said about its independence and ways of safeguarding it. This omission must be rectified. The independence of a broadcasting regulatory body is a key prerequisite for its functioning.

Sections 16, 17 and 21 define its status and tasks in ways that do not differ substantially from those of other regulatory bodies of this nature<sup>209</sup> (except

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209. *An overview of the rules governing broadcasting regulatory authorities in Europe*, DH-MM(2003)007 Media Division, Directorate General of Human Rights, Council of Europe, Strasbourg, 2003.

for the appointment of governing bodies of public broadcasters and perhaps excessive powers to interfere with the programme policy of public broadcasters – see below). However, Section 21 says that it “realises the authority of an owner in respect of the organisations owned by Moscow Region or Moscow Region municipalities and effecting public television and radio broadcasting in Moscow Region and also in respect of shares (allotments, units) of the organisations owned by Moscow Region and effecting public television and radio broadcasting in Moscow Region”.

The intention is probably to sever the direct link between those stations and local government authorities. This intention is understandable and commendable. However, the idea cannot be supported for two reasons:

- A regulatory authority ought to be completely impartial in dealing with the entities it regulates, and detached from them. If the council were to become, legally speaking, the “owner” of these stations, it would assume a responsibility for them which could not be reconciled with impartiality and detachment – for example in imposing penalties. A regulatory body cannot “own” or “manage” the entities subject to its regulation;
- Local government authorities would lose “ownership” of these stations, but would have a crucial role to play in appointing members of the council, which would take over “ownership”. This would provide a powerful motivation for local government authorities to make sure, in the selection of council members, that they would serve as their extended arm. This would, therefore, irrevocably politicise the selection of council members and seriously reduce prospects for the council’s independence.

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### ***Recommendation***

A better way would be to revise the law so as to create guarantees of the independence of public broadcasters and at the same time clearly to limit the influence of local government as the owner on the station. This would require (i) removing any influence of local government authorities on the appointment of members of the governing bodies of public stations, (ii) clearly defining what decisions the owner may or may not take with regard to a public broadcaster;<sup>210</sup>

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210. For example, even though Polish public service broadcasters are joint stock companies wholly owned by the state, Article 22 of the Broadcasting Law says that “State authorities may take decisions concerning the functioning of public radio and television broadcasting organisations only in circumstances specified in the existing legislation”, and Article 29 says that (1) Directions and prohibitions imposed by the general meeting of shareholders in respect of the contents of a programme service shall not be binding upon the Board of Management, (2) Amendment of the company’s statutes shall require a prior consent of the National Council. In this way, the role of the state authorities vis-à-vis public service broadcasters is seriously limited, even though the state formally owns them.

and (iii) introducing rules on the incompatibility of membership in the Council with holding specified other posts or offices.<sup>211</sup>

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Section 17.2 states “Council takes part in developing laws and other legal acts of Moscow Region regulating relations in the sphere of public television and radio broadcasting in Moscow Region”. This does not guarantee that the council will really be involved in developing legislation. The law should state that local government authorities and the Moscow region Duma have an obligation to consult the council on such matters and involve it in the drafting of such legal acts.

Section 17.4 and 17.5 could be read as giving the council the power to dictate programme policy to public broadcasters. If so, this power is excessive. A regulatory body can only develop generally applicable standards (and react to their violation by particular stations) and can be given the power to issue secondary regulation in areas where it is clearly delegated by the law to do so. It cannot interfere in the day-to-day programme policy or performance of broadcasting stations.

Section 21 does not mention the chairperson of the council or who appoints him/her. It should be clear that the chairperson is elected by the members themselves.

Section 21 also fails to mention how often the council should meet at a minimum (for example, at least once a month, or once every two weeks), and who convenes its meetings (for example, the chairperson, or the chairperson at the request of at least three members). This should be rectified.

### *Section 18*

This section deals with the appointment and dismissal of directors and members of the boards of directors of public broadcasters.

In the first case, the council only appoints directors of public broadcasters wholly owned by the Moscow region or Moscow region municipalities. It is not clear if these stations are to have boards of directors and who would appoint them.

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211. For example, the draft new Macedonian broadcasting law says that the following cannot be appointed members of the Broadcasting Council: (i) Members of parliament, government members, senior officials in the public administration or local self-government, executives or management or supervisory board members in public enterprises; persons performing duties in the bodies of political parties and religious communities; persons who are owners/shareholders, members of governing bodies, or who have a direct or indirect interest in a legal person performing broadcasting activities or in a company performing related activities (advertising, electronic telecommunications, production and sales of broadcasting technical equipment, etc.); (ii) persons whose family members (parent, sibling, spouse, offspring) possess shares or are members of management bodies in the broadcasting organisations; (iii) persons lawfully sentenced to prison for a period longer than six months or to whom a security measure “Prohibition of undertaking activity” is applied to. For other rules on incompatibilities, see *An overview of the rules governing broadcasting regulatory authorities in Europe* (Note 4).



In the second case, the appointment proceeds as follows:

1. In the case of stations partly owned by the Moscow region, the council selects members of boards of directors and submits them to the governor of the Moscow region for approval;
2. In the case of stations partly owned by Moscow region municipalities, heads of those municipalities select members and submit them to the council for approval

It is not clear if stations partly owned by the Moscow region and Moscow region municipalities are to have directors and who would appoint them.

These provisions need to be entirely re-written. All public broadcasters should have both boards of directors and directors (managers). As noted above, their powers and areas of competence should be clearly defined, so as to ensure both effective management and effective oversight of management by boards of directors, acting in the name, and on behalf, of the public. Local government bodies should have no role in their appointment.

Recommendation No. R(96)10 of the Council of Europe Committee of Ministers on the guarantee of the independence of public service broadcasting, contains the following standards on the supervisory bodies (for example, boards of directors) of public broadcasters:

- they should be appointed in an open and pluralistic manner;
- they should represent collectively the interests of society in general;
- they may not receive any mandate or take any instructions from any person or body other than the one which appointed them, subject to any contrary provisions prescribed by law in exceptional cases;
- they may not be dismissed, suspended or replaced during their term of office by any person or body other than the one which appointed them, except where the supervisory body has duly certified that they are incapable of or have been prevented from exercising their functions;
- they may not, directly or indirectly, exercise functions, receive payment or hold interests in enterprises or other organisations in media or media-related sectors where this would lead to a conflict of interest with their functions within the supervisory body.

The draft law should incorporate all these standards. It would be best if members of boards of directors could be designated directly by civil society and professional organisations. An alternative solution could be to apply the procedure of Section 23 also to members of boards of directors, whereby these civil society and professional organisations could nominate candidates, from among whom the council would select and appoint members of the boards of directors. Clear rules on incompatibility should rule out individuals who might endanger the independence of the public broadcaster or who might have a conflict of interest.

Members of the boards of directors should be appointed for fixed terms of office and should have the same security as members of the council itself under Section 24 (see below for comments on Section 24), meaning they could not be dismissed for any but objective reasons.

Directors of public broadcasters should be appointed by the board of directors, without any involvement of local government authorities, on the basis of a public competition, based on transparent procedures and clear criteria. They should have a fixed term of office. A qualified majority of members of the board of directors should be required both to appoint, and potentially to dismiss the director. Criteria for possible dismissal should be clearly defined.

### *Section 19*

This section regulates the contracts for the delivery of public broadcasting. The procedures for doing so are not defined. It is not clear:

- how the contract relates to the original licence to broadcast and whether the licence should be changed upon the conclusion of a contract;
- who initiates the conclusion of a contract;
- whether a station can refuse if this is proposed by the council;
- whether the council must conclude a contract with every station owned by the Moscow region or Moscow region municipalities that wishes to do so;
- what are the criteria for determining whether a privately owned station meets the financial requirements;
- and what happens if no station wishes to conclude a contract.

Another key issue is the number of public broadcasters envisaged in the Moscow region. Theoretically, all stations owned by the Moscow region or Moscow region municipalities could gain the status of a public broadcaster. Is this the intention?

The terms of the contract as regards programming obligations of public broadcasters should be determined by taking into account: (i) the public service remit; (ii) funds available for the performance of that remit; (iii) the ability of the station to attract a significant audience.

### *Section 20*

This Section deals with the supervision of public broadcasters and penalties which may be imposed by the council in case of violations of the law.

Section 20.1 mentions the “Code of Ethics of the public television and radio broadcasting established by the Union of Journalists of the Russian Federation and which is mandatory for application by every organisation effecting public

television and radio broadcasting in Moscow Region” as one of the bodies of standards whose observance the council will supervise. Later, its violation is mentioned as one of the reasons for the council to impose penalties on a station.

The Code of Ethics is a self-regulatory instrument developed by the Union of Journalists. Self-regulation is by definition legally separate from statutory state regulation of broadcasting. These two areas should continue to be kept separate: the state should not encroach on journalistic ethics and should leave it to the Union of Journalists to react when the code is violated.

Therefore any mention of the Code of Ethics should be deleted from this section.

The section sets up a hierarchy of forms of council reaction and penalties to be imposed on public broadcasters, as shown in the table below.

<b>Rule</b>	<b>Action by broadcaster</b>	<b>Reaction by council</b>
20.2	“Violations”	Written warning
20.3	Multiple violations of law or contract	Reduce or cancel bonuses for employees
20.4	Multiple violations of law and Code of Ethics by stations wholly-owned by Moscow region	Dismiss station director
20.5	Multiple violations of law and Code of Ethics by stations partly-owned by Moscow region	Raise the issue of dismissing the director with the board of directors
20.6	Multiple violations of law and Code of Ethics by stations not owned by Moscow region	Request (oblige?) licensing body to act, including the withdrawal or refusal to extend licence to broadcast
20.7	Supervision of publicity (advertising?)	Implemented by another body, empowered to react in accordance with pertinent legislation

These provisions will have to be entirely re-written, for the following reasons:

- As mentioned above, the self-regulatory Code of Ethics should not be enforced by a state body;
- The nature of “violations” mentioned in each case and justifying different levels of punishment is not specified. This is a fundamental weakness because it leaves the council with a completely free hand to impose even the harshest penalties for extraneous, non-legal reasons, by exploiting for this purpose even insignificant irregularities which it will be free to define on a case-by-case basis;

- Forms of penalty are determined by the ownership of stations, and not by the nature of violations committed by them. For example, stations wholly or partly owned by the Moscow region (or Moscow region municipalities) do not face the prospect of loss of the licence to broadcast, whereas private stations do. That means they are not equal before the law. The same applies to the dismissal of directors. Where the station is wholly owned by the Moscow region (or Moscow region municipalities), the council has the power to dismiss the director immediately. Where the station is only partly owned, the council can only raise the issue of dismissal with the board of directors, but if the board of directors disagrees, the station will avoid punishment;
- Some penalties are imposed on the staff of public broadcasters (lowering or cancellation of bonuses). This must be changed, for two reasons: (i) any penalties should be imposed on the individuals or bodies legally responsible for observance of the law and a station's operation (director, board of directors); (ii) indiscriminate reduction or cancellation of bonuses for all the staff may mean that punishment may be imposed on people who had no involvement in committing the violation.

### *Section 22-23*

These sections deal with the composition, appointment procedure and terms of office for the members of the Council on Public Television and Radio Broadcasting in Moscow Region.

They could be improved in the following manner:

1. Council members should have staggered terms: every two years, half of the composition of the council should change. For this purpose, two of the members appointed to the first composition of the council by both the governor and the Duma should be appointed for two years, and two for four years;
2. The role of civil society organisations in designating candidates for the council (see Section 23) should be enhanced: (i) they should be the only bodies capable of designating candidates; (ii) the law should contain a list of civil society and professional organisations (or types of such organisations) representative for the whole Moscow region which are authorised to designate candidates, the law should regulate procedures by which the designation process should be implemented; (iii) the law should regulate which organisations designate candidates to be appointed by the governor and by the Duma; (iv) the number of candidates should be limited, so that the participating organisations have a real input into determining the composition of the council; (v) as mentioned above, there should be clear rules on incompatibility, to ensure that members of the council do represent the general public, and not the power elite, and do not face conflicts of interest; (vi) the rules and procedures adopted by the governor and the Duma (see Sections 22.2 and 22.3) should incorporate the role of civil society and professional organisations described above.

## Section 24

This section lists the circumstances in which a term of office of a council member may be terminated. This should be changed in two places:

Section 24.1(2) speaks of a “guilty” court verdict as cause for terminating a member’s term of office. It should be specified that this concerns either a prison sentence, or a sentence in a case for violating broadcasting or more generally media law. If a member is sentenced to a fine for a minor driving accident, this should not disqualify him/her from continued membership in the council.

Section 24.1(3) cites “systematic failure to participate in the meetings of the Council” as reason for dismissal. “Systematic failure” is not precise enough. The usual rule is at least six months’ absence. This should be changed.

## Sections 26-27

As noted above, transitional provisions should be extended to cover changes in a station’s status and legal framework, once it signs a contract with the council.

The gap between the entry of the law into force (10 days) and the appointment of the council (a year) is too long, since the appointment of council members will be only the first step in launching public (service) broadcasting in the Moscow region. This gap should be reduced, so the council would be appointed perhaps six months after the entry of the law into force.

## Appendix

### ***BBC Producers’ guidelines<sup>212</sup> on impartiality as a goal of programme and editorial policy***

#### *Impartiality in general*

Due impartiality lies at the heart of the BBC. It is a core value and no area of programming is exempt from it. All BBC programmes and services should show open-mindedness, fairness and a respect for truth.

The BBC is committed to providing programmes of great diversity which reflect the full range of audiences’ interests, beliefs and perspectives. Representing the whole spectrum is a requirement on all programme genres from arts to news and current affairs, from sport to drama, from comedy to documentaries, from entertainment to education and religion. No significant strand of thought should go unreflected or under represented on the BBC. In order to achieve that range, the BBC is free to make programmes about any subject it chooses, and to make programmes which explore, or are presented from, a particular point of view.

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212. This text comes from BBC *Producers’ guidelines* which have since been renamed *Editorial guidelines* and are available at: [www.bbc.co.uk/guidelines/editorialguidelines/edguide/](http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/).

The BBC applies due impartiality to all its broadcasting and services, both to domestic and international audiences. In achieving due impartiality the term “due” is to be interpreted as meaning adequate or appropriate to the nature of the subject and the type of programme. There are generally more than two sides to any issue and impartiality in factual programmes may not be achieved simply by mathematical balance in which each view is complemented by an equal and opposing one.

The agreement accompanying the BBC’s charter specifies that the corporation should treat controversial subjects with due accuracy and impartiality both in news programmes and other programmes that deal with matters of public policy or of political or industrial controversy. It states that due impartiality does not require absolute neutrality on every issue or detachment from fundamental democratic principles. The BBC is explicitly forbidden from broadcasting its own opinions on current affairs or matters of public policy, except broadcasting issues. Special considerations, both legal and editorial, may apply during the campaign periods for elections (see Chapter 34, *Broadcasting during elections*).

### *3. Factual programmes*

#### *3.1. Due impartiality within a programme*

A factual programme dealing with controversial public policy or matters of political or industrial controversy will meet its commitment to due impartiality if it is fair, accurate and maintains a proper respect for truth. A programme may choose to explore any subject, at any point on the spectrum of debate, as long as there are good editorial reasons for doing so. It may choose to test or report one side of a particular argument. However, it must do so with fairness and integrity. It should ensure that opposing views are not misrepresented.

There will be times where a wide range of views is appropriate, and times when a narrow range is acceptable. The key is for programme makers to be fair to their subject matter, and to ensure that right of reply obligations are met (see below). Sometimes it will be necessary to ensure that all main viewpoints are reflected in a programme or in linked programmes, for example, when the issues involved are highly controversial and a defining or decisive moment in the controversy is imminent.

#### *3.2. News programmes*

The agreement specifies that news should be presented with due accuracy and impartiality. Reporting should be dispassionate, wide-ranging and well informed. In reporting matters of industrial or political controversy the main differing views should be given due weight in the period during which the controversy is active. News judgements will take account of events as well as arguments, and editorial discretion must determine whether it is appropriate for a range of views to be included within a single programme or item.

News programmes should offer viewers and listeners an intelligent and informed account of issues that enables them to form their own views. A reporter may express a professional, journalistic judgement but not a personal opinion. Judgement must be recognised as perceptive and fair. Audiences should not be able to gauge from BBC programmes the personal views of presenters and reporters on controversial issues of public policy.

### *3.3. Presenters*

Presenters are the public face and voice of the BBC's journalism. The tone and approach that they take to stories has a significant impact on the perceptions of the BBC's impartiality. Their presentation needs at all time to embody the core editorial values of the BBC.

### *3.4. Where a BBC programme or the BBC is the story*

On occasions when a programme broadcast by the BBC, or the BBC itself, becomes the story, we need to ensure that we do not put ourselves in a position where our impartiality is put into question or presenters or reporters are placed in a potential conflict of interest. Our reporting must remain accurate, impartial and fair even where the BBC is the story. It will be inappropriate to refer to either the BBC or the programme as "we". There should also be clear editorial separation between those reporting the story and those responsible for presenting the BBC's case.

If the programme itself, or an interview by the programme's presenter or presenters is the centre of controversy, consideration should be given by senior editorial figures to whether any follow up interviews on that programme should be undertaken by different presenters. Editorial policy advice should be sought.

### *3.5. The series provision*

The agreement provides that in observing due impartiality a series of programmes may be considered as a whole. For this purpose there are two types of series:

- a number of programmes where each programme is clearly linked to the other(s) and which deal with the same or related issues. Programmes may achieve impartiality over an entire series, or over a number of programmes within a series. The intention to achieve impartiality across a number of programmes should be planned in advance and normally made clear to audiences;
- a number of programmes broadcast under the same title, where widely disparate issues are tackled from one edition to the next. In this type of series due impartiality should normally be exercised within each individual programme.

Special considerations apply to “personal view” and “authored” programmes (see below). Sometimes it may be appropriate, in order to achieve due impartiality, to link a programme or a series with a follow-up discussion programme which looks at the issues raised and allows other views to be put. Audiences should normally be informed of the follow-up programme when the first programme is broadcast. The follow-up programme should closely follow the original programme or be within a reasonable period of time after it having regard to the length of the series.

### *3.6. Personal view programmes*

The BBC has a long tradition of series which allow open access to the airwaves for a wide range of individuals or groups to offer a personal view or advance a contentious argument. These can add significantly to public understanding, especially when they bring forward unusual and rarely heard perspectives on topics that are well-known from orthodox viewpoints. They have a valuable position in the schedules. However, personal view programmes which deal with matters of public policy, or of political or industrial controversy entail special obligations:

- the nature of a personal view programme should be signalled clearly to audiences in advance;
- editors should ensure that these programmes do not seriously misrepresent opposing viewpoints. There should be proper respect for factual accuracy;
- it may be appropriate to provide an opportunity to respond to a programme, for example in a right to reply programme or in a pre-arranged discussion programme;
- it is not appropriate for BBC staff, or for regular BBC presenters or reporters normally associated with news or public policy related programmes, to present personal view programmes on controversial matters.

While a series of personal view programmes which is a long-running fixture in the schedules has no obligation to give equal time to every relevant point of view on each subject covered, there must be a sufficiently broad range of views from a wide variety of perspectives within a series.

For an occasional series of personal view programmes dealing with different aspects of the same subject matter it will normally be necessary to achieve impartiality within the series.

### *3.7. Series that present a particular perspective*

When a series is “authored” by an individual or a group representing a body of thought, it should maintain a proper respect for facts and truth and should not ignore opposing points of view. Special care is needed if a series takes a particular approach to a controversial issue. This might reflect an original body



of thought or research which may not be readily balanced, or the analysis of a respected specialist in a particular field. In the case of such “authored” series that take a particular approach to matters of political or industrial controversy, care should be taken to ensure that during the year preceding or the year following the series a sufficiently broad range of views and perspectives has been included in a similar type of series or in programming of similar weight.

### *3.8. “Major matters”*

Due impartiality is required in relation to all matters of public policy or industrial controversy. But due impartiality is of special importance in relation to what paragraph 5.4 of the agreement refers to as “major matters”. For networks these would be issues of significance for the whole of the United Kingdom, such as a UK-wide public sector strike, or highly contentious new legislation on the eve of a crucial Commons vote. In the nations and regions, major matters would be issues of comparative importance having considerable impact on the nation or region.

In dealing with major matters of controversy editors should ensure that a full range of significant views and perspectives are heard during the period in which the controversy is active.

### *3.10. Reporting in times of national emergency and military action*

In times of emergency or when a military action is under way, journalism may be constrained by questions of national security. Such times are particularly testing for journalists, as for others. Matters involving risk to, and loss of, life need handling with the utmost sensitivity to national mood and feeling. The public has, at the same time, a particular need for fast, trustworthy news and measured assessment. Good journalism will be based on all available facts. The concept of impartiality still applies. All views should be reflected in due proportion to mirror the depth and spread of opinion in the United Kingdom.

### *3.11. Factual programmes not dealing with matters of political or industrial controversy*

Documentaries, magazine and feature programmes of various kinds often properly concentrate on a narrow area or give an opportunity, for example in an interview, for a single view to be expressed. Overall, such output seeks to represent reality. There remains an obligation to ensure that a proper range of views and perspectives is aired over a reasonable time. This calls for systematic review and continuing discussion so that the output builds into a complete mosaic.

### *3.12. Sensitivity to offence and outrage*

In aiming to record all pertinent opinions programmes will sometimes need to report on or interview people whose views will cause serious offence to many. In such cases programme editors must be convinced, after referral where necessary, that there is a material public interest to be served which outweighs the offence.

Questioning should not be hectoring, but when we interview people whose behaviour or views cause real outrage we need to be sensitive to the opinions of the audience. Questioning must be unmistakably firm, and answers should be challenged robustly and repeatedly if necessary. It would be inappropriate for an interviewer to express personal offence or indignation, but the questioning should recognise the public mood.

On occasion, particular events will greatly raise the level of emotion and it will be harder for an audience to accept an impartial programme. Programme makers should not shy away from tackling difficult issues in such circumstances, but careful consideration should be given to the timing and the tone of the programme.



## **Full list of expertises and reports regarding media legislation written for the Council of Europe by Karol Jakubowicz<sup>213</sup>**

### ***Media legislation***

#### **1997**

Remarks on Draft Media Laws of the Republic of Lithuania, by Karol Jakubowicz

#### **1998**

An Evaluation of the Draft Federal Law of the Russian Federation on Television Broadcasting and Radio Broadcasting, by Karol Jakubowicz

#### **1999**

Report of the Council of Europe Expert Mission on the Draft Mass Media Law of Slovenia by Anthony Hewitt, Karol Jakubowicz, Thomas Kramler

#### **2000**

An Evaluation of Amendments to the Law on Croatian Radio and Television, by Karol Jakubowicz

Comments on Draft Broadcasting Legislation for Kosovo, referring to drafts of "Broadcasting Regulation for Kosovo", one prepared by an expert from the French CSA, the other by experts from the Open Society Institute and Article 19, by Karol Jakubowicz

#### **2001**

Analysis and Comments on the Final Proposal of the Law on the Croatian Radio-Television of the Government of the Republic of Croatia, by Karol Jakubowicz.

General Overview and Comparative Analysis of Drafts of "Law Na Radio-Television Of Republika Srpska", by Karol Jakubowicz

Review and Analysis of Laws of Ukraine on: 1. Television and Radio Broadcasting; 2. National Television and Broadcasting Council of Ukraine; 3. Public Television and Radio Broadcasting; 4. Creation of the System of Public TV and Radio Broadcasting, by Karol Jakubowicz

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213. Occasionally these expertises were co-authored with other experts. See particular items to identify those written solely by Karol Jakubowicz and those co-written with others.

## **2002**

Analysis and Comments on Law on the Functioning of the Public Broadcasting System and The Public Broadcasting Service of Bosnia and Herzegovina, by Karol Jakubowicz

Comparative Analysis and Comments on Two Draft Laws on Public Service Broadcasting in Moldova, by Karol Jakubowicz

Analysis and Comments on Three Draft Amendments to the Law on The Public Broadcasting Institution "Teleradio-Moldova", by Karol Jakubowicz

Analysis and Comments on Broadcasting Act (first draft), drafted by the Law Group of the Belgrade Media Centre, by Anthony Hewitt and Karol Jakubowicz

Analysis and Comments on the Draft Broadcasting Law Adopted by the Government of the Federal Republic of Serbia in April 2002, by Karol Jakubowicz

Analysis and Comments on Model Law on Public Information, drafted by a Working Group of the Belgrade Centre for Human Rights (May 1998), Concentrating on Articles 25-54 and 57-58, by Karol Jakubowicz

## **2003**

Comments on the Kosovo draft Law on the Independent Media Commission and Broadcasting, by Karol Jakubowicz

Comments on the draft Bulgarian radio and television act, by Dr Sandra Bašič-Hrvatini and Dr Karol Jakubowicz and the Directorate General Education and Culture (Audiovisual policy Unit) of the European Commission

Analysis and Comments on Draft Act to Amend and Supplement the Bulgarian Radio and Television Act, proposed by Emil Koshloukov, Borislav Tsekov, Miroslav Sevlievski, by Karol Jakubowicz

Comments on a draft Broadcasting Law of "the Former Yugoslav Republic of Macedonia", by Karol Jakubowicz

Remarks on the final draft of the Macedonian Law on Broadcasting Activity, by Karol Jakubowicz

Review and Analysis of Draft Laws of Ukraine 1. Amending the Law on Television and Radio Broadcasting; 2. Amending Article 13 of the Law on Television and Sound Broadcasting; 3. Amending the Law on The National Broadcasting Council of Ukraine 4. Amending Certain Laws on Television and Sound Broadcasting by Karol Jakubowicz

## **2004**

Analysis and Review of Law No 112 of 3 May 2004 "Principles governing the broadcasting system and RAI-Radiotelevisione italiana Spa, and the authority

delegated to the Government to issue the consolidated legislation on television broadcasting”, by Karol Jakubowicz and David Ward

Analysis and Review of “Rules For the Resolution of Conflicts of Interest” (“Frattini Law”), Adopted by the Chamber of Deputies on 13 July 2004, by Karol Jakubowicz and David Ward

Analysis and Review of Draft Strategy on Developing Digital Terrestrial Television Broadcasts in the Republic of Albania, by Karol Jakubowicz

Analysis and Comments on Law of Azerbaijan Republic on Public TV-Radio Broadcasting (February 2004), by Karol Jakubowicz

Analysis and Comments on Draft (Amended) Law of Azerbaijan Republic on Public TV-Radio Broadcasting (April 2004), by Karol Jakubowicz

Analysis and Review of Draft Law on Broadcasting Activity of the “Former Yugoslav Republic of Macedonia,” Working Version Prepared by a Working Group, by Dr Karol Jakubowicz

Analysis and Comments on Local Public Broadcasting Authority Act, Adopted by the Parliament of Moldova on 25 December 2003, by Karol Jakubowicz

Analysis and Comments on Broadcasting Development Strategy. Discussion paper developed by the Broadcasting Agency Council of Montenegro (Podgorica, March 2004), by Karol Jakubowicz

Analysis and Review of Draft Law on Public Television and Radio Broadcasting in Moscow Region, by Karol Jakubowicz

## **2005**

Analysis and Review of Draft Law on Radio Television Of Kosovo, by Eve Salomon, Independent media consultant, London, Karol Jakubowicz, Ph.D., Director, Strategy and Analysis Department National Broadcasting Council of Poland and Directorate General for Information Society and Media (Audiovisual and media policies; Digital rights; Task force on co-ordination on media affairs Unit) of the European Commission

Analysis and Review of Draft Law on Broadcasting Activity of the “former Yugoslav Republic of Macedonia”, prepared by the Ministry of Transport and Communications, by Dr Karol Jakubowicz and Directorate General for Information Society and Media (Audiovisual and Media Policies Unit) of the European Commission

Analysis and Comments on Draft Law on Public Broadcasting Institutions (Moldova), by Karol Jakubowicz

Additional Comments on Amendments to Moldovan Local Public Broadcasting Institution Draft Law No. 4153 OF 11.12.2003, by Karol Jakubowicz

**2006**

Analysis and Comments on Draft Audiovisual Code of the Republic Of Moldova, by Eve Salomon and Karol Jakubowicz

**2007**

Broadcasting Regulatory Bodies. Legal Framework and Its Implementation According to Council of Europe Standards, Prepared for delivery at a Seminar for Members of the Albanian Parliament on European standards in broadcasting regulation, organised by the Council of Europe in co-operation with the European Commission, by Karol Jakubowicz

Analysis and Comments on Amendments to the Law of the Republic of Armenia on Television and Radio, by Eve Salomon and Karol Jakubowicz

Analysis and Comments on Law of Ukraine Amending the Law of Ukraine on the National Television and Radio Broadcasting Council of Ukraine (The Vidomosti Verkhovnoi Rady [VVR], 1997, No. 48, p. 296) as amended), by Eve Salomon and Karol Jakubowicz

***Monitoring missions on compliance with member states' commitments.  
Freedom of expression and restrictions included in the penal code and other  
legal texts***

***Reports of visits to member states***

Report of visit to the Russian Federation. Experts: Mr K. Jakubowicz and Mr D. Anderson, Date of visit: 2-3 November 2000

Report of visit to Ukraine. Experts: Mr K. Jakubowicz and D. Anderson, Date of visit: 30 October-3 November 2000

Report of visit to Romania. Experts: Mr Denis Barrelet and Mr Karol Jakubowicz. Date of visit: 20-23 February 2002

Report of visit to Georgia. Experts: Mr David Anderson and Mr Karol Jakubowicz. Date of visit: 22-25 July 2002

Report of visit to Ukraine. Experts: Mr. David Anderson and Mr. Karol Jakubowicz. Date of visit: 18-20 November 2002



## **Karol Jakubowicz**

### *Chairman of the Steering Committee on the Media and New Communication Services 2004-6*

The “rags to riches” story of Karol Jakubowicz’s involvement in the work of the Council of Europe took him from the role of an awestruck newcomer from Poland in 1990 to that of the Chairman of the Steering Committee on the Media and New Communication Services in 2004-6. Along the way, he was elected, delegated by the Steering Committee, or invited by the Council of Europe Secretariat to serve in a number of other capacities. In all of them, he contributed an extensive range of papers, reports and studies to assist the steering committee and other bodies in collecting information and formulating ideas in the general field of freedom of expression, creation of free and democratic media systems (including the issue of public service media), regulation of trans-frontier television, the adjustment of Council of Europe human rights standards to the conditions of the information society, and the development of broadcasting legislation in Council of Europe member states.

The present collection of these papers and reports is published in the conviction that they retain their value and relevance. An additional benefit to be derived from reading this collection is that it offers a glimpse into the work that precedes the formulation of the recommendations and declarations of the Committee of Ministers or resolutions of the Council of Europe Parliamentary Assembly.



Dr Karol Jakubowicz worked as a journalist and executive in the Polish press, radio and television for many years. He has been Vice-President, Television, Polish Radio and Television; Chairman, Supervisory Board, Polish Television; Head of Strategic Planning and Development at Polish Television; Director, Strategy and Analysis Department, the National Broadcasting Council of Poland, the broadcasting regulatory authority. He has also taught at universities in Poland and abroad.

In 2008-10 he was Chairman of the Intergovernmental Council of the Information for All Programme, UNESCO. In 2007-8 he was a member of the Council of the Independent Media Commission of Kosovo.

He has been active in the Council of Europe, in part as former Chairman of the Committee of Experts on Media Concentrations and Pluralism (1995-6), Vice-Chairman and Chairman of the Standing Committee on Transfrontier Television (1995-2002), and as Chairman of the Steering Committee on the Media and New Communication Services (2005-6).

He has been involved in policy making and regulation in the field of broadcasting in Poland and internationally, through his contribution to writing Poland's Broadcasting Act of 1992, and its subsequent revisions, and to the revision of the European Convention on Transfrontier Television in 1998, as well as of the Television Without Frontiers directive.

As a Council of Europe, European Union and OSCE expert, he has taken part in many missions to advise on the development of broadcasting legislation in a number of countries and has written analyses of drafts or existing broadcasting laws in a number of post-communist countries. He has also been a member of a team of experts who performed monitoring missions for the Council of Europe Secretary General concerning compliance of Council of Europe member states with their commitments in the area of freedom of expression and information.

His scholarly and other publications have been published widely in Poland and internationally. They include the books *Rude awakening: social and media change in central and eastern Europe*, Hampton Press, Cresskill, NJ, 2007; *Public service broadcasting: the beginning of the end, or a new beginning?* (2007; in Polish); *Media policy and the electronic media* (2008; in Polish); and *The EU and the media: between culture and the economy* (2010; in Polish).



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