The Possible Effects of E.U. Competition Law on Media Plurality

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Abstract

States in Europe are the ultimate guarantors of media plurality.[1] With increasing media concentration both in Europe and worldwide media plurality and thus the proper functioning of democracy is threatened. Redress can be and is being sought at a national level by specific legislation; on the European Union level such legislation is lacking. Here only the competition authority is capable of dealing with media concentrations. It is competent in if concentrations are threatening the proper functioning of markets. Competition law is a second best tool in safeguarding media plurality, but some important arguments can be adduced for exploring the capability of the E.U. competition authority in addressing media plurality concerns. First, on a European level specific legislation to address media concentrations is missing; second, the E.U. competition authority is much better placed to address issues relating to pan-European media concentrations than national authorities; and third, an integrative approach by the E.U. competition authority to media plurality is simply much more efficient. After examination of theory, the identification of synergies and the examination of E.U. case law it can be stated that the E.U. competition authority is well placed to safeguard certain aspects of media plurality. However, it is to be made clear that competition law alone is not capable of addressing all media plurality concerns.

[1] ECtHR, *Informationsverein Lentia v. Austria*, Judgement of 24 November 1993, para. 38.

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Introduction

Media laws exist in most European countries and are targeted on the one hand at regulating the market through competition law and licensing systems and on the other hand they are targeted at achieving a balance in information itself. Article 10 ECHR codifies the freedom of expression and information. As the European Court of Human Rights (ECtHR) consistently held, governments are responsible for ensuring the existence of a plural media on their territory. Almost all European countries have created a media authority, which is to supervise content and conduct of media entities. Furthermore governments have created national competition authorities, which are to guard an economic equilibrium between all economic entities within a defined market. In cases of merger between two media entities, cooperation agreements, access to essential facilities like printing facilities or network providers, state aids to certain media companies, fixed minimum prices for e.g. books, cross-ownership… the competences of the media authority and the competition authority overlap.

The problem of dominance of certain media companies on a national or international level has become increasingly pertinent. Whereas traditionally print media companies and broadcasters were operating relatively separate from each other, the market structure in the media sector has begun to change over the past decennium. Starting with digitalisation, the creation of the Internet and a subsequent deregulation, a convergence of both the economic and technological structure of the media market took place. Now print media companies, broadcast companies and Internet providers are subject to forces of nationally and internationally liberalised markets. Attracted through the extremely high profit margins shortly after liberalisation many media companies and also non-media companies engaged in fierce competition in the media sector. After approximately eight years of liberalisation[2], competition is still fierce, but, contrary to the maxim of free competition, it are now mainly oligopolies that are dominating the media landscape. The dimension of these oligopolies is increasingly international and should therefore be best addressed on an international level. However, specific legislation to that effect is missing on the E.U. level. The sole instrument to address media concentrations is E.U. competition law. It has been argued that competition rules are of little help to ensure media plurality. This is due to the fact that firstly the

[2] Commission Directive *96/19/EC amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets* [1996] OJ L 74/13, implementing the political commitment to introduce full competition in the EU telecommunications markets by 1st January 1998

competences in these cases are not that clearly defined, that secondly EU competition rules only do take effect after a dominant position has been established, thus after the damage is done and that thirdly the definition of markets and market share are not related to the whole of the area of influence of a media company and are not related to audience-shares.[3] Contrary to this position the capabilities of the E.U. competition authority in addressing media plurality are explored here

A. Research question

Under Article 10 ECHR and the case law of the ECtHR states in Europe are held to be the ultimate guarantors of media plurality.[4] Increasing media concentration is a fact in both Europe and worldwide and the process of convergence furthers it. Through diminishing media plurality concentrations threaten the proper functioning of democracies as well as they can threaten the proper functioning of markets. In the era of globalisation media concentrations have international dimensions, which need to be addressed at an international level. From a strategic viewpoint the bargaining power of the concentration at stake and the authority dealing with it should be in favour of the authority. From a regulatory viewpoint clear division of competences are necessary in international cases to avoid conflicts of jurisdictions. Whereas under the E.U. framework clear mechanisms to address the competitiveness of markets exists, equal mechanisms to address the impact of media concentrations on plurality are lacking. While some argue that the competence to enact specific legislation to ensure media plurality exists and others deny such competences, this paper is focused on the possibilities to ensure media plurality within the present E.U. framework and in particular through competition law. This integrative approach, the author believes, is in line with the aim of the E.U.'s of mainstreaming human rights. The reasons to chose an integrative approach are that on a European level specific legislation to address media concentrations is missing, that the E.U. competition authority is much better placed to address all issues relating to pan-European media concentrations than national authorities and that an integrative approach by the E.U. competition authority to media plurality is simply more efficient. Furthermore it is hoped that by translating the aim of media pluralism into the economic sphere, more could be achieved than by a rhetorical 'violations approach'. Therefore the main research question is the following:

[3] Compare T. Gibbons, *Concentrations of Ownership and Control,* in C. Mardsen, S. Verhulst (eds.), *Convergence in European Digital TV Regulation*, London, Blackstone Press Ltd., 2000.
[4] *Informationsverein Lentia v. Austria*, Judgement of 24 November 1993, para. 38.

How far can the European Union competition authority help in safeguarding plurality of the media in Europe?

It will be demonstrated that more could be done under competition law to safeguard media pluralism. Still, this thesis does not in any way propose that competition law alone suffices to safeguard media pluralism.[5] It rather seeks to identify synergies and to demonstrate the limits of the integrative approach.

B. Methodology Note

Starting from Article 10 ECHR and the case law of the European Court of Human Rights (herein after "ECtHR") regarding media plurality, this thesis will examine the possibilities of safeguarding plurality in present and future E.U. competition cases. Chapter (I) will lay the theoretical basis. Main focus is the examination of the case law of the ECtHR, an examination of the functional theory underlying plurality and the opposition of this theory to the classical competition theory. The chapter will end with clarifying the contradictions and synergies between both media policy and competition policy.

Chapter (II) will first examine the status of media plurality within the E.U. framework and the competence and/or necessity of the E.U. competition authority to deal with media plurality. Secondly, the competition case law of the European Union in relation to plurality of the media will be analysed. Selected cases will be discussed in more detail. The aim within this chapter is to find a creative interpretation of the law and the jurisprudence which allows to safeguard plurality but which is neither contrary to competition theory nor to the limits of Article 10 ECHR.

Generally no empirical research was conducted for this thesis. The data used to support the arguments are taken from varying sources like E.U. documents, country specific reports and organisations such as IDATE (a research organisation of the electronic communications industry).

[5] The question whether specific European legislation should be enacted to safeguard media plurality is to be answered in the affirmative, but is outside the scope of this thesis.

Chapter I. Media plurality and competition law – theoretical aspects

A. Definitions

1. The 'media'

The media is to be understood as representing the public forum in a society. Traditionally the media was divided into separate sectors such as radio and television (the broadcasting media) and the print media. The media was a one-way communication of information and entertainment. Each sector had and still has certain characteristics that distinguish it from others. Traditionally also a vertical separation of functions existed. The content production as well as editorial and distribution functions were mainly separate from each other. Through the emergence of the Internet, a rather inexpensive medium with cross-border reach and the possibility of two-way communication, and through convergence of the traditional sectors, and vertical convergence between the production and distribution functions the media landscape has changed. Important for this thesis is the ability of the media to provide democratically relevant information. Therefore 'media' shall be defined as including broadcast, print and electronic media as well as production, distribution and technical infrastructure as long as they are influential on providing information to the citizen.[6]

2. 'Media plurality'

Plurality in the media mainly exists in three forms: plurality of content, plural sources of information and plurality of outlet, i.e. a variety of delivery services that select and present material directly to the audience.[7] This thesis deals with *plurality of content*. It is, in terms of democracy, the most important of these three forms of plurality. The existence of direct links

[6] The new EU electronic communications framework, which will enter into force in July 2003, has partly taken account of this development by making regulation technology neutral; see European Parliament and the Council, *Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services* [2002] OJ L 108/33, ("*Framework Directive*").
[7] T. Gibbons, cit.

between the different forms of plurality is disputed by some[8]. In particular it is disputed whether plurality of source or plurality of outlet by itself could produce plurality of content.[9] However it is obvious that there at least indirect relations exist between the different forms of plurality.

3. 'Media concentration'

Media concentration is the significant concentration of power within the hands of one media company or a conglomerate of media companies. The process of horizontal expansion within one sector or across several sectors (cross-ownership) and vertical convergence furthers the creation of media concentrations. Seen from a media pluralism viewpoint concentrations are dangerous because they potentially lead to dominance of opinion Thereby they can block the proper functioning of democracy, which requires a diverse public formum with access of all members of society. Seen from an economic viewpoint concentrations are dangerous because they might coincide with dominant market positions, which, in the case of abuse, distort the market mechanism of free competition.

B. Freedom of speech and Media Plurality

1. Article 10 ECHR and media plurality

In Europe the most important provision safeguarding freedom of speech can be found in Article 10 ECHR. It reads:

> *"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 authorities and regardless of frontiers. This article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.*
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

[8] See I. Nietsche, *Broadcasting in the European Union, The Role of Public Interest in Competition Analysis*, the Hague, T.M.C. Asser Press, 2001, p. 6.
[9] See T. Gibbons, cit.

This article, in most part, enshrines one of the classical freedoms, which is based on the abstention of the state. Paragraph (1) first sentence refers to individual freedom of expression. The second sentence refers to freedom of information, which is an important link to media pluralism. The last sentence of paragraph 1 already indicates that states are allowed to adopt laws to introduce a licensing system for broadcasting, thus it directly permits the state to have and influence on the number of channels available and on the number of operators. The licensing regime can also include regulations of conduct whereby misconduct can lead to the withdrawal of a licence.[10] Freedom of broadcasting was subsumed under Article 10 (1) as deriving from freedom of expression and freedom of enterprise, i.e. freedom to pursue private broadcasting activity.[11] An express duty of the state to adopt positive measures, which would favour media plurality as well as proper conduct of operators, cannot be found in Article 10. However, media plurality is an essential part of democracy and has been constructed by the ECtHR to fall within the ambit of Article 10. The link is made via the right to information. In the *Sunday Times case* for instance the Court held that the press has a duty to provide information and the public has a right to be informed by the press.[12] Furthermore the Court stated that the public has a right to be adequately informed.[13] In relation to this right to be informed *Cohen-Jonathan* states in the leading French commentary on the ECHR:

> *"On utilise plus souvent pour le désigner le terme « communication » qui postule une relation entre celui qui livre le message et celui qui le reçoit. C´est dire que la liberté de communication ne concerne pas seulement la liberté de diffusion mais prend aussi en considération le lecteur, l´auditeur, le public en général et son droit à recevoir librement l´information et une information pluraliste, ce qui postule non seulement une non ingérence de l´Etat mais des interventions actives."*[14]

Furthermore he states:

[10] For an interpretation see *Groppera Radio AG et al. v. Switzerland*, Judgement of 28 March 1990, para. 61.
[11] Council of Europe, Advisory Panel on Media Diversity, *Media Diversity in Europe*, H/APMD(2003)001, para. 6 ("Media Diversity in Europe").
[12] *Sunday Times v. United Kingdom*, Judgement of 26 April 1979, para. 69 ("Sunday Times"), here the Court held: *"Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them."*; see also J. Frowein, W. Peukert, *Europäische Menschenrechtskonvention, EMRK – Kommentar*, Kehl am Rhein, N.P.Engel Verlag, 1996, p. 393.
[13] *Sunday Times*, cit., para 66; note that Frowein doubts that there exists a duty under the ECHR for States to provide adequate information, Frowein, cit. p. 391.
[14] G. Cohen-Jonathan, *Article 10*, in L. E. Pettiti, E. Decaux, P. H. Imbert (eds.), *La Convention Européenne des Droits de l`Homme, Commentaire article par article,* 2nd ed., Paris, Economica, 1999, p. 368.

> *"Une obligation active de l´Etat de l´organiser à l´égard de tous médias, côntrolés ou non par lui, semble bien résulter de cette disposition, de même que l´obligation de saufgarder le pluralisme des différentes formes d'opinions et d´expressions, notamment par un règlement adaptée des concentrations [...] résort à l´évidence d´une lecture contemporaine de l´Aricle 10. "*[15]

Cohen-Jonathan speaks of a right to pluralistic information, which is one part of the right to communication. According to his commentary states are also under an obligation to take positive measures to ensure plurality of opinions in the media.[16]

In *Jersild* case the ECtHR emphasized the importance of the audiovisual media for a democratic society.[17] In the *Piermont* judgement the ECtHR clarified the link between pluralism tolerance and openness and referred to the important role of the media in a democracy.[18] In the *Observer and Guardian*[19], *Bladet Tromsø*[20], *Fressoz and Roire*[21], *Oberschlick*[22] and *Janowski*[23] cases, it stressed the special democratic role of the press as a 'public watchdog'.

Clearly, the limit of measures to ensure media plurality is set by article 10 ECHR itself. If such a measure were to restrict freedom of establishment of media companies, which is a likely case, it will have to meet the exception provided in Article 10 (2). The strict criterion of necessity will have to be examined. Here the role of media plurality as a functional part of freedom of expression has been applied by the Court.[24] The most important case in this respect is case of *Informationsverein Lentia v. Austria*[25], which had as its subject the constitutionally established broadcasting monopoly of the Austrian government. The court stressed:

> *" [...] the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest,*

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[15] *Idem*, p. 369.
[16] *Idem*, p. 383.
[17] *Jersild v. Denmark*, Judgement of 23 September 1994, para. 31.
[18] *Piermont v. France*, Judgement of 27 April 1995, para. 76, here the Court held: *"The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which here is no "democratic society"."*
[19] *Observer and Guardian v. United Kingdom*, Judgement, 26 November 1991, para 59.
[20] *Bladet Tromsø and Stensaas v. Norway*, Judgement of 20 May 1999, para 59.
[21] *Fressoz and Roire v. Fance*, Judgement of 21 Janaury 1999, paras. 51 and 52.
[22] *Oberschlick* v. *Austria*, Judgement of 1 July 1997, para. 29.
[23] *Janowski v. Poland*, Judgement, 21 January 1999, para. 33.
[24] See *Media Diversity in Europe*, cit., para. 7 and 8.
[25] *Informationsverein Lentia v. Austria*, Judgement of 24 November 1993.

which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the state is the ultimate guarantor."[26]

According to the ECtHR states enjoy a wide margin of appreciation regarding media policy. A state could even institute a public service broadcasting monopoly if this was *"its sole means of guaranteeing the objectivity and impartiality of news, the balanced reporting of all shades of opinion and independence of the persons and bodies responsible for programmes."*[27] The Austrian broadcasting monopoly was held to pursue a legitimate aim in that it *"is capable of contributing to the quality and balance of programmes"*[28]. However the Court considered the form of a monopoly too restrictive and thus not proportional in the light of the circumstances of the case.

The Advisory Panel on Media Diversity of the Council of Europe (AP-MD), constituted of various European media experts, issued a report on media diversity in Europe in December 2002.[29] It was of the opinion that:

"it can […] 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."[30]

And that:

"Article 10 of the Convention does not only enshrine 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 freedom of opinion and cultural diversity. Pluralism is thus a basic general rule of European media policy.[31] *"*

The panel concluded that *"States are under a duty to protect, and if need be, to take positive measures to safeguard and promote media pluralism"*[32]. Furthermore the panel is of the opinion that independent public service broadcasting should be strengthened, that sector specific rules should be designed to safeguard and ensure plurality in the media, that ownership and control should be measured by using the audience-share as an indicator, that a sanctions regime should be instituted to punish companies who do not respect the audience-share thresholds and that in order to counter the effect of trade policy on cultural diversity, particularly in the field of the media, member states should adopt a convention on cultural

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[26] *Idem*, para. 38.
[27] *Idem*, para. 30.
[28] *Idem*, para. 33.
[29] *Media Diversity in Europe*, cit.
[30] *Idem*, para. 10.
[31] *Idem*, p. 6, underline added by author.
[32] *Idem*, para. 90.

diversity.[33] In the view of this panel traditional competition regulation can only have a complementary role as regards concentration in the media sector.

2. Media Plurality in other Instruments

Since 1989 the Council of Europe (CoE) undertook a series of studies to monitor concentration in the media. In 1991 a *Committee of Experts on media concentrations and pluralism* (MM-CM) was established and in 1999 a Group of Specialists on media pluralism took up its work, which has now been replaced by an Advisory Panel on Media Diversity.[34]

At the Council of Europe ministerial conference for mass-media policy in Prague on 7-8 December 1994, the ministers agreed on a set of principles with regard to journalistic freedoms and human rights.[35] Principle 1 states that *"the maintenance and development of genuine democracy require the existence and strengthening of free, independent, pluralistic and responsible journalism"*. Principle 5 states that *"encouragement should be given to transparency with regard to ownership structures of the various media enterprises and in regard to the relationships with third parties who have influence on the editorial independence of the media. It has to be added however that this declaration emphasizes the value of self-regulation in regard to content and that it does not provide for specific guidelines on ownership regulation."*

In the 'Resolution on the Future of Public Service Broadcasting'[36] the Ministers agreed that *"...Participating states should endeavour to ensure that economic practices such as the concentration of media ownership, the acquisition of exclusive rights and the control over distribution systems such as conditional access techniques, do not prejudice the vital contribution public service broadcasters have to make to pluralism and the right of the public to receive information."*

Various other recommendations and declarations by the Committee of Ministers and Parliamentary Assembly of the Council of Europe stress the important role of media pluralism. The 'Recommendation on Measures to promote Media Pluralism'[37] states "*that States should promote political and cultural pluralism by developing their media policy in*

[33] *Idem.*
[34] http://www.humanrights.coe.int/ media/topics/pluralism, accessed on 27 May 2003.
[35] Council of Europe, DG Human Rights, *Journalistic Freedoms and Human Rights*, in "Texts adopted on European Ministerial Conferences on Mass media policy", DH-MM(2000)004, p. 35.
[36] *Idem,* Resolution No.1 on the Future of Public Service Broadcasting.
[37] Council of Europe, *Recommendation No. R (99)1 of the Committee of Ministers to Member States on Measures to promote Media Pluralism*, 19 January 1999.

line with Article 10 of the European Convention on Human Rights, which guarantees freedom of expression and information, and with due respect for the principle of independence of the media" and lists certain measures to promote media pluralism. The 'Recommendation on Measures to promote Media Transparency'[38] recalls that "*media pluralism and diversity are essential for the functioning of a democratic society".* The 'Declaration on the Freedom of Expression and Information'[39] states that "*the Member States of the Council of Europe [are] convinced that states have a duty to guard against infringements of the freedom of expression and information and should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions".* The 'Declaration on Cultural Diversity' recalls in its preamble *"the commitments of the member states of the Council of Europe to defend and promote media freedoms and media pluralism as a basic precondition for cultural exchange, and affirming that media pluralism is essential for democracy and cultural diversity".*[40] The latest development is the 'Recommendation on measures to promote the Democratic and Social Contribution of Digital Broadcasting'[41] which recommends Member States to "*a. 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…; b. protect and, if necessary, take positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in this sector".*

Some conventions of the Council of Europe also deal with the issue of pluralism. The Convention on Transfrontier Television[42] states in Article 10bis that *"[t]he 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 Framework Convention for the Protection of National Minorities states that *"[i]n the framework of their legal systems, the Parties shall 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".*[43] And lastly the European Charter for Regional or Minority Languages states that "*[t]he Parties undertake to*

[38] Council of Europe, *Recommendation No. R (94) 13 of the Committee of Ministers to Member States on Measure to promote Media Transparency*, 22 November 1994.
[39] Council of Europe, *Declaration on the Freedom of Expression and Information*, 29 April 1982.
[40] Council of Europe, *Declaration on Cultural Diversity*, 7 December 2000.
[41] Council of Europe, *Recommendation (2003) 9 of the Committee of Ministers to Member States on Measures to Promote the Democratic and Social Contribution on digital Broadcasting*.
[42] *European Convention on Transfrontier Television*, 5 May 1989.
[43] *Framework Convention on the Protection of National Minorities*, 1 February 1995, Article 9 (4).

ensure that the interests of the users of regional or minority languages are represented or taken into account within such bodies as may be established in accordance with the law with responsibility for guaranteeing the freedom and pluralism of the media".[44]

3. Conclusion

The ECtHR includes media plurality within Article 10 ECHR via the freedom to receive and impart information and via a systematic approach. The Court and the Advisory Panel on Media Diversity concur in the opinion that states are the ultimate guarantors of this plurality. The above-mentioned Resolutions, Recommendations and Declarations of the Council of Europe as well as the quoted conventions support this view. By dictate of logic it rests upon states to adopt positive and prohibitive measures in order to guarantee media plurality, such as to counter concentrations or further pluralism by subsidies. This is likewise advocated by the Advisory Panel and by Cohen-Jonathan.

C. Media and Theories of Democracy

1. General arguments underlying freedom of speech

There are various theories underlying freedom of speech. Most of them go back to three basic arguments, which have been summarised by *Eric Barendt*.[45] The first is Mill´s argument from truth, the second the argument from free speech as an aspect of self-fulfilment and the third the argument from citizen participation in a democracy.

(I) *John Stuart Mill* argued that freedom of expression is an essential need in that only the expression of diverging views can lead to the discovering of truth. This argument presupposes that there is ultimate truth, which can be discovered. According to Mill this truth and the way of discovering it merit protection. *Barendt* rightly states that it is doubtful whether there is an ultimate truth and that some truthful statements conceivably would not merit protection, because they could indeed be harmful for a society.[46]

[44] *European Charter for Regional or Minority Languages*, 5 November 1992, Article 11(3).
[45] E. Barendt, *Freedom of Speech*, Oxford, Calendron Press, 1985.
[46] *Idem*, p. 8f; Barendt presents here the example of a statement which refers to the superiority of one culture over another.

(II) The argument from free speech as an aspect of self-fulfilment is based on the assumption that personal autonomy implies that people must have the possibility to freely express themselves in order to fully develop as autonomous individuals. Restrictions on expression inhibit personal growth. This libertarian theory has been criticised by Barendt for not being convincing in particular because of the weak notion of personal autonomy at its core.[47] If one transfers this individualist claim to the realm of social groups e.g. minorities, this argument might correspond to a plain argument for cultural autonomy, diversity and self-fulfilment.

(III) The argument from citizens' participation in a democracy is the most relevant here. Barendt sees one of its best expressions in Brandeis J.´s judgement in the case of *Whitney v. California:*

> *"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary [...] They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; [...] that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.'*[48]

Throughout this thesis these basic types of arguments will be referred to various times. Below, the third argument will be further developed since it is of most importance for this thesis.

2. Conceptions of democracy

In the realm of public speech freedom of speech translates (partly) into the freedom of the media. Media has classically been seen as a 'virtual public market place'[49] for opinions and diverging views. In a modern democracy, where citizens do not assemble all together at once to exchange their views, a flourishing media is of paramount importance. It represents one of democracy's key functional elements by providing a public space for bargaining with opinions and values, which are to be realized in laws and policies that become imperative for the members of a society, until changed, replaced or abandoned.

[47] *Idem*, p. 19.
[48] 274 US 357, 375-8(1927).
[49] See e.g. E. Barendt, cit.

Different conceptions of democracy demand a somewhat different function of the public space and thus the mass media. On the one hand conceptions of democracy that emphasize citizen participation would underscore the need for media that "aid groups in pursuing their agendas and mobilizing for struggle and bargaining." On the other hand, more elitist conceptions of democracy require principally that the media provides sufficient information for those who participate in the public sphere to function rationally, and, that it performs a watchdog function. Sometimes a responsibility to assist in transmitting "proper values" is stressed.[50] For instance *Huntington et al.* argued for a more restrictive approach implying that media, which bolsters social conflict, is lethal to a stable democracy.[51]

There are various pluralist democracy models. One, linked to argument (I) above, is, that various groups should be able to express their views and claims in a society due to the fact of the impossibility of establishing political truth. A similar but slightly different view is that only by taking account of diverging opinions an optimum of societal justice can be reached.[52] The logical conclusion would be that this optimum could only be reached in perfectly symmetric circumstances, where equal opportunities for all groups to express their views and claims, as well as giving effect to them, exist. *Nuspliger* therefore argues that certain groups, like sick and workless, that cannot reinforce their will by threatening to withhold their contribution to society, risk to be overruled by strong majority groups.[53] In this context it has also been argued that pluralism is a model for the "*peaceful accommodation of the limited aims of principally saturated groups*".[54] Since access to the media of minorities and disadvantaged groups leads to more symmetric societal relations it becomes a crucial concern in a democratic society. Argument (II) above translates into the need for a pluralist media in order to provide the individual with all existing views and opinions in order to fully guarantee its personal growth. In the realm of groups a pluralist media is needed to strengthen these groups and their identity. *Cohen-Jonathan* combines argument (II) and (III). He states "*communiquer des pensées et des opinions suppose qu´on puisse élaborer en tous domaines une pensée personelle, une opinion librement choisie. En ce sens la liberté d´expression est la conditio sine qua non d´une véritable démocratie pluraliste.*"[55]

[50] See M. E. Price, P. Krug, *The Enabling environment for free and independent media*, Programme in Comparative Media Law & Policy, Oxford University, 2000.
[51] Crozier, Huntington, Watanuki, *Report on the Governability of Democracies*, as quoted in Nuspliger, p. 15.
[52] K. Nuspliger, *Pressefreiheit und Pressevielfalt*, Diessenhofen, Rüegger Verlag, 1980, p. 5.
[53] *Idem*, 6.
[54] *Idem*.
[55] G. Cohen-Jonathan, cit., p. 366.

3. Conceptions of the public

Participatory theories of democracy differ in their functional understanding of the public and the public space. *Habermas*, in a historical examination, states that the structure of the public has changed. Democratic theory of 18th and early 19th century presupposed people who are capable and ready to express public opinion.[56] The public of that time was composed of the bourgeoisie that was acting according to its own interests. Today democratically desired functioning of the public space is difficult since not everyone has access to it. The solution given by *Habermas* focuses on the removal of asymmetries and on the welfare state model.

Related to the public space is the existence of a 'public opinion'. The idea of a public opinion goes back to the 18th century when the bourgeoisie claimed equal political participation rights with the aristocracy. In the 19th century public opinion, expressed mainly through newspapers, was used as participation instrument of the bourgeoisie. *Habermas* states that the public opinion, through the structural change of the public sphere, has become almost meaningless in the 20th century. He argues that the public sphere in the welfare state is marked by two tendencies. On the one hand the public sphere is used for manipulative purposes; on the other hand the state of law is founded on the functioning of the public sphere in which the public conducts a process of critical communication. According to *Habermas* the grade of democratisation can be measured in the effectiveness of realising the latter.[57]

In sum, what is generally democratically needed is thus the free access of all groups of society to the public forum and a pluralist media, which adequately reflects the opinions and views of the society.

4. General functions of the media in a democratic society

Price and *Krug* quote a study of the 1940s Hutchins Commission, "A Free and Responsible Press," that identified "*three summary tasks that are central to the press's political role: to provide information, to enlighten the public so that it is capable of self-government, and to serve as a watchdog on government"*.[58] Some say that there often is an additional function of the press, namely to provide to various segments of society a sense that

[56] J. Habermas, *Strukturwandel der Öffentlichkeit, Untersuchungen zu einer Kategorie der bürgerlichen Geselschaft*, Berlin, Luchterhand Verlag, 1976.
[57] *Idem*, p. 274, adapted by author.
[58] M. E. Price, P. Krug, cit.

they are represented in the public sphere.[59] This might be particularly important for minorities and underrepresented social and cultural groups.

The identified functions and aims of the media demand a varied spectrum of opinions and possibility of access for various social groups.

Nuspliger gives one of the most extensive accounts of the functions of the media in a democratic society. He identifies, amongst others, the following democratically relevant functions of the media: a) the provision of information, b) control and comment, c) social integration, and d) entertainment.

a) <u>*Providing information*</u>

Gibbons states that *"the rationale for pluralism is '[that] individuals use the media as primary source for their knowledge about the world. Insofar as individuals use the media as principal sources of information that are external to their own experience, it is important to ensure that media sources do not exclude alternative possibilities'."*[60] Therefore the individual is thus forced to rely on secondary information, which it receives through the media. In order to be democratically significant, this information has to abide by three principles: Completeness, comprehensiveness and objectivity.[61] Especially objectivity is difficult to achieve since it presupposes a "common societal construction of reality". The more divergent a society, the less likely information will appear as objective. The provision of information is linked to most of the other functions discussed here.

b) <u>*Control and comment*</u>

In democracies, where the traditional functions of checks and balances are distorted through a system of party loyalty or through national and international economic pressures, the mass media fulfils an important control function in relation to government and non-government powers within the state.[62] The media has therefore been called "the fourth power within the state".[63] In the era of globalisation and privatisation states transfer power to private business but gain in responsibility towards the citizen. In this situation the control function through investigative journalism becomes increasingly important. Also the ECtHR stressed

[59] *Idem.*
[60] T. Gibbons, cit., p. 157.
[61] K. Nuspliger, cit., p. 38.
[62] Löffler, as quoted in Nuspliger, p. 40.
[63] *Idem*, p. 42.

the role of the press as a 'public watchdog' in the *Baldet Tromsø*, *Fressoz and Roire*, *Oberschlick* and *Janowski* cases. Paradoxically due to the economic exigencies underlying the media companies this control function might become the victim of recent liberalisation and privatisation.

Control can be exerted through (political) comment in the media. Furthermore comment takes an important function since it serves the articulation of political opinion and the stimulation of political discussion.[64] The commenting function is linked to the social integration function, in that it often portraits the link between the individual and the public sphere. Today newspapers are offering a forum to diverging views; the traditional political newspapers only propagating one view only rarely still existing; broadcasting is providing comment mainly through public service broadcasting; the Internet is however lacking quality comment in relation to the amount of information offered.

c) <u>*Social integration*</u>

Nietsche states that one aspect of social communication is with *"facilitating communication between different groups and individuals by ensuring equal access to broadcasting and fostering a sense of solidarity instead of conflict".*[65] The information received through the media should enable the individual to make a link between its primary social environment and the secondary social environment. With increased diversification of modern society, mass-communication gains importance with regard to social integration.[66] With the rise of the Internet to conviction came up that the Internet bears gigantic possibilities for social integration through the stimulation of public discourse of groups who had no access to the public forum before. Indeed the Internet has become a very important medium for civil society and the state. However, in the view of the present author, the virtuality of the medium, the anonymity of the users and the lack of quality comment make it at least doubtful whether this medium can bridge the gap between the primary and secondary social environment or whether it rather leads to an extension of the private sphere of individuals.

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[64] *Idem*, p. 39.
[65] I. Nietsche, cit., 2001, p. 30.
[66] K. Nuspliger, cit., p. 44.

d) *Entertainment*

In fact, entertainment takes up most space in today's media. *Nuspliger* argues that entertainment can be democratically relevant since it can be necessary for the individual to regenerate its capacity to work. Furthermore he indicates that other democratically relevant functions of the media could not be realised without presenting information with some kind of entertainment value. Already in 1980 however only a third of the content of the media included some kind of politically relevant information, between 30 and 40% consisted of commercials and around 30% of pure entertainment. These figures have changed in favour of entertainment. From an economic viewpoint entertainment is taking a very important role, since it helps media companies to reach bigger audience shares and thereby to increase profits.

5. Distortions of the functional model

The theoretical framework of the functional model of a pluralist media in a pluralist democracy has been outlined above. In practice this model suffers from some deficiencies and distortions or, formulated more accurately, this model does not correspond completely to reality. Three of the most relevant distortions are discussed here. The first exposes a general deficiency of the democratic model, which concerns the attitude of the individual towards the state; the second highlights the problem of cultural identity in an international setting and is linked to free speech argument (II); and the third concerns the structural problem of concentration of power and its possible consequences.

a) *Political apathy*

Through the provision of information, through political comment and through social integration, it is hoped that the individual is enabled to use the information for its own political purposes. It is a curious fact, however, that the easy accessibility of politically relevant information does not necessarily lead to politically active citizens. In western democracies more information then ever can be accessed by the individual, in theory enabling him/her to play its politically active part in society. In contrast to what could be expected from the basic democratic model, the trend is progressive privatism of individuals and progressive distrust towards the own political system. Some argue that people are not capable

of using mass-media information for their own benefit[67]. Others blame consumerism and bad journalism that is furthering individualism, for this effect.[68] On the other hand, more elitist conceptions of democracy would not necessarily see this trend as a negative indicator. Apathy could be read as social stability.

Causes for political apathy are varied. Modern technocratic governments are said to see their only *raison d'être* in the maintenance of the welfare state.[69] Important questions of societal interest are compartmentalized and dealt with by experts. The 'public space' loses its meaning and the place where members of society are supposed to discuss their aims becomes obsolete. *Müller-Doohm* sees causes in the growing distance between the individual and the state, in the welfare system, which attributes to the individual the role of a passive recipient; in the oligarchic structure of the political society; in a lack of transparency; and in the authoritarian constitution of the labour environment.[70]

b) *Cultural dominance*

Arguably the predominance of certain cultures in the media endangers media plurality and cultural diversity. In Europe especially it has been held that mainstream American culture is endangering European and national identity. Francois Miterrand spoke of *"the right of every country to create its own images. A society which abandons the means of depicting itself would soon be an enslaved society"*[71]. Article 151 of the EC Treaty gives the European Union competences in the field of culture, therefore culture and cultural expression play an important role in the E.U.'s media policies, however only to the extent of adopting positive measures.[72] These policies are aimed at countering cultural dominance and strengthening European identity. For example the Television without Frontiers Directive provides for a 'European works' quota and the Directorate General for the Information Society is furthering European productions through various programs like the MEDIA program. Free trade under

[67] See K. Nuspliger, cit., p.11.
[68] Compare e.g. H. Zimmermann, *Kommunikationsmedien und Öffentlichket*, in K. Neumann-Braun, S. Müller-Doohm (eds.), *Medien- und Kommunikationssoziologie. Eine Einführung in zentrale Begriffe und Theorien*, München, Juvenata, 2000, pp. 41-54.
[69] See. K. Nuspliger, cit., pp. 16 – 17.
[70] *Idem*.
[71] Quoted in I. Nietsche, cit. p. 9.
[72] Article 151 EC Treaty states: *"1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.*
2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action…"; note that according to paragraph 4 the adoption of measures is limited to "*incentive measures, excluding any harmonisation of the laws and regulations of the Member States*".

the WTO system is seen as a threat in this context.[73] *Nietsche* argues however that the cultural dominance argument has been abused for national and European industrial policy objectives and thus for not really aiming at promoting cultural diversity.[74]

c) Media concentration leading to dominance of opinion

As has been stated above and will be discussed in detail below, it is generally said that there is a tendency of media companies grouping together in order to concentrate their (economic) power. In many European countries specific media ownership laws have been designed to counter dominance of opinion caused by concentration. The underlying assumption is that there exist certain verifiable thresholds of ownership - determined through e.g. voting rights, audience shares, equity limits and turnover – that must not be exceeded. Otherwise, it is presumed, the relevant concentration would start to unduly dominate public opinion and thereby harm the proper functioning of democracy. Thresholds are set for example at 49% of the share capital or voting rights in a nationwide terrestrial television service in France; at 30% for annual average general television audience share of an operator in Germany coupled with 'must carry' provisions[75] for bigger broadcasters; or at 15% of the total market share, measured in terms of audience time, in the UK.[76]

The Council of Europe working definition is not as strict in its approach. It reads:

> *"In relation to media concentration, the notion of pluralism is understood to mean the scope for a wide range of social political and cultural opinions, information and interests to find expression through the media.*
> *Pluralism may be internal in nature, with a wide range of social, political and cultural values, opinions, information and interests finding expression within one media organisation, or external in nature, through a number of such organisations, each expressing a particular point of view."*[77]

[73] See e.g. *Media Diversity in Europe*, cit., para. 13.
[74] I. Nietsche, cit., p. 10.
[75] 'Must carry' provisions are obligations on network providers (mostly cable providers) to carry certain content or channels on their networks. Normally this would include at least the channels of public service broadcasters. For a more detailed description see below p. 64..
[76] For detailed description of the thresholds applied in France, United Kingdom, Germany, Spain, Italy, Norway and Croatia see *Media Diversity in Europe*, cit., pp. 10 – 13; note that Recommendation (99) 1 of the Council of Europe states that: *"Member States should consider the introduction of legislation designed to prevent or counteract concentrations that might endanger media pluralism at the national, regional or local levels"* and that *"Governments of Member states [should] evaluate on a regular basis the effectiveness of their existing measures to promote pluralism and/or anti-concentration mechanisms and examine the possible need to revise them in the light of economic and technological developments in the media field."*
[77] Quoted in J. Cavallin, *European Policies and Regulations on Media Concentration*, in "International Journal of Communications Law and Policy, 1998, www.ijclp.org.

In *Cavallin's* opinion this definition, which heavily relies on content as determining factor for concentration, is to be preferred to the static thresholds set by national regulators. *Cavallin* argues that regulations on media concentration are essentially risk assessment and risk management. He states that:

> *"The problem is one of potential and risk, not necessarily a problem of actual abuse. But this does* not *make the problem of abuse of power more theoretical or hypothetical. On the contrary, most discussions on constitutional matters, human rights and other principles for governing society deal with the construction of systems for distribution of power and the opening up of possibilities for individuals and groups to exert influence within society. It is clear, therefore, that it is the structure underlying the distribution of power that requires examination rather than the solely the allegations of abuses of such power."*[78]

There is very little empirical evidence to show which threshold or which kind of limit imposed by law would accurately prohibit a democratically harmful dominance of opinion. A study by *Kaase* conducted for the German media authority is an illustrative example for this. *Kaase* was asked to clarify whether the audience share indicator for television broadcasting would be a relevant criterion for determining dominance of opinion.[79] After analysing the (little) data available he concluded that the 30% audience share threshold, set by German law, by itself cannot be taken as a measurable indicator for media impact leading to dominance of opinion. One important conclusion of the study is that the effects of dominant broadcasters have to be matched with the behaviour of the recipients to attain adequate information. The study refers to the 'dynamic-transactional model' developed by *Früh and Schönbach*. This model shows that two factors complicate accurate determination of the effects of broadcasting dominance. First the recipient – given plural television – has a choice of programs and therefore is in an active role. Second, whatever is consumed meets with a powerful intra- and inter-individual environment, which in interaction with the media content forms the framework and ambit of possible media impact.[80] Furthermore the processes of mutual influences of different media types (consonance and accumulation effects) have to be adequately taken into consideration. *Kaase* states that the threshold of 30% yearly average can never be an adequate benchmark for dominance of opinion since it does not take account of the varying behaviour of recipients. In the absence of the necessary data analysis he

[78] *Idem*.
[79] M. Kaase, *Welche Aussagen erlauben die Zuschaueranteile über den Einfluß der Fernsehprogramme auf die Meinungsbildung?*, in "*Schriftenreihe der Landesmedienanstalten",* Berlin, Visitas media production, vol. 13,1999.
[80] W. Früh, *Medienwirkungen: Das dynamisch-transaktionelle Modell*, Opladen, Westdeutscher Verlag, 1991, quoted in M. Kaase, translated by author.

recommends to set the audience share at a lower criterion around 15%, thereby referring to the thresholds specified in the British Broadcasting Act 1996. It is worthwhile to note that *Kaase* sees media concentration as a real problem that can lead to dominance of opinion. The behavioural aspects of the recipients - using different types of media – which were discussed in *Kaase's* study make it clear that *cross-ownership* can become extremely problematic since it can develop an impact on public opinion which would never be covered by sector specific thresholds.

6. Conclusion

From a human rights point of view Article 10 ECHR has an intimate connection to media plurality. The European Court of Human Rights held in *Informationsverein Lentia* that "*the state is the ultimate guarantor of media plurality*". *Cohen-Jonathan*, in the leading French commentary on the ECHR, states that there exists a 'right to pluralistic information' and that states are under a positive duty to take measures to ensure media plurality. The Advisory Panel on Media Diversity of the Council of Europe shares this opinion. The presented arguments underlying freedom of speech as well as the discussed functions of the media in a democracy underscore the fact that the full realisation of freedom of speech in a democracy is dependent on a pluralist media. Media concentrations, which threaten plurality, have to be and are countered by laws and regulations on ownership. As *Cavallin* sees it this has to be done on a pre-emptive basis, since the issue for regulators is one of risk avoidance. What is though lacking on a bigger scale is empirical evidence to determine the threshold of ownership that could lead to dominance of opinion. Dynamic factors such as the behaviour of recipients/readers are significant obstacles in determining such a threshold. Still it is generally accepted that concentrations can harm the proper functioning of a democracy. Since specific ownership restrictions with a view on media plurality are an incursion on the freedom of certain media companies, they have to meet the exception provided in Article 10 (2) ECHR.[81] It is worthwhile to note here that on the European Union level it has been argued that a proposed community wide directive[82] providing for ownership limitations of media companies would violate Article 10 ECHR.[83]

[81] Compare e.g. *Groppera Radio AG et al. v. Switzerland*, Judgement of 28 March 1990.
[82] Proposal for a European Parliament and Council Directive on Media Ownership in the Internal Market 96 *COM*, p. 396; note that the proposed directive was never adopted.
[83] G. Ress, J. Bröhmer, *European Community and Media Pluralism*, Forschungsstelle für Medienrecht und Medienwirtschaft, University of Maburg, 1996, http://www.jura.uni-sb.de/projekte/Bibliothek/texte/BroehmerRess.html, accessed on 27 May 2003.

D. Economic parameters of the of the media environment

1. Economic particularities of the media industry

An analysis of media companies and their behaviour can never be successfully carried out without taking the economic particularities of the media landscape into account. Differences in economic structure exist in various media branches such as the newspaper industry, the broadcasting industry and the Internet. Significant structural differences also exist in different countries. Additionally the traditional sectors and their company structure are increasingly merging. Digitalisation and liberalisation of regulation has furthered this *convergence* process.

Private media companies are companies as any other, which are primarily focused on making profit and not on providing democratically relevant information. Broadcasting and publishing companies gain profits mainly through advertisements and increasingly through subscription, like in the news paper industry, pay-TV and the Internet. Production companies e.g. film companies make their profits through distribution. A very interesting fact about the media is that it deals with information in the technical sense as a value. The real costs of a media company lie in production and in infrastructure investments or licence costs. However, production usually only needs to happen once and reproduction hardly costs anything (except for the traditional newspaper/publishing industry). Although the product can be multiplied (repeated) at almost no cost, profits, which orient themselves on the audience-share that can be reached by the advertisements, increase with multiplication. In economic terms the media can thus represent an *economy of scale*. This phenomenon might explain, why (private) media companies try to expand their audience-share as far as possible and would naturally try to obtain a dominant market position in order to maximise profits. The biggest coverage is of course to be achieved through using mainstream content. This seems to be the reason why the content of many commercial media companies is very similar. Furthermore, in the desire to conclude long-term advertising contracts, media companies need to keep steady audience-shares.

Policy makers might counter these tendencies or tolerate them. Although, in most European countries rules exist to avoid dominance by media companies on the one hand through general competition regulation and on the other hand through more specific media regulation, sometimes ‘strategic alliances’ are tolerated to strengthen market positions.

Nietsche suggests that this is part of national *industrial policy*, which favours 'national champions'.[84]

2. Convergence

During the late 1980ies and the 1990ies a convergence of the media and telecom industries and their sectors took place. It is possible to distinguish between technical and economic convergence and the regulatory convergence that took place as a consequence. Technical convergence mainly concerns the possibilities offered by digital technology. This can be noticed in infrastructure developments, which offer a far greater capacity than the infrastructure of traditional media forms. Also *"digital technology allows for the convergence of traditionally separate forms of media into one product"*[85], which can be delivered by one platform. There is now a limitless spectrum of channels available to broadcasting that can no longer be regulated by frequency allocation, as in the analogue media. From the perspective of media plurality a limitless spectrum might be an evolution, which is to be highly welcomed, however the existence of technical bottlenecks remains an issue to be faced.

Economic convergence is connected to inflated production costs and increased costs for content rights, which can sometimes only be afforded by very big companies. This economic pressure has arguably led to horizontal, vertical and cross-sector concentrations.[86] Interestingly it has been said that the turbulent evolvements on the media markets since the 1990ies[87] with very high profit margins and fierce national and international competition have caused media companies to strengthen their market position by expansion purely in order to survive economically. Economic convergence was also furthered through expected efficiencies that would result from mergers and joint ventures. *Pereira* argues that media companies were looking for *economies of scope* during the past decennium: "*'Create once, place everywhere' seemed to be the motto of media companies during the Internet bubble illustrating the need for media producers to place their products in the largest possible number of different platforms*".[88] Especially the 'dotcom' industry demonstrated this trend. According to *Pereira*, however, vertically integrated groups are starting to sell off their previously acquired units because of financial reasons.

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[84] I. Nietsche, cit., p. 10.
[85] M. Pereira, *EU competition law, Convergence and the Media Industry*, speech delivered at the Law Society of England and Wales, 23 April 2002, http://europa.eu.int/commission/competition, accessed on 27 May 2003.
[86] *Idem*.
[87] For the latest evolvements in the information sector see IDATE, *DigiWorld Report*, http://www.idate.org.
[88] M. Pereira, *Vertical and Horizontal Integration in the Media Sector and EU Competition Law*, Brussels, 7 April 2003, http://europa.eu.int/comm/competition, accessed on 27 May 2003, p. 3.

In the aftermath of the information revolution existing regulation has been loosened. New regulatory frameworks for telecommunication have been enacted in order to allow the information industry to flourish. The European Commission stated in its Convergence Green Paper 1997 that: *"The danger is that if Europe fails to take advantage of the opportunities provided by convergence, it could be left behind as other trading blocks reap the benefits of a more positive approach."*[89] Liberalisation of telecommunication services took place in 1998.[90] The European Commission concluded in its eighth report on the implementation of this telecommunications regulatory package that *"licensing and interconnection regimes have permitted large-scale market entry* and that *overall, new entrants continued to increase their market share in terms of revenue"*.[91] In 2002 a new regulatory framework was adopted. As a consequence of technological and economic convergence it has been made technologically neutral. It applies to all electronic communication.[92]

3. The WTO regime

The GATT (Global Agreement on Tariffs in Trade) and the GATS (Global Agreement on Trade in Services) affects the global trade in media services and products. The specific rules will not be elaborated upon here; it suffices to note that the aim of free trade of media services and products, in particular in the broadcasting sector, triggered both industrial policy and national/European identity concerns.[93] When the E.U. for instance, discussed the draft for the Television without Frontiers Directive, which relies on a quota for European works to be broadcasted, strong opposition was voiced in the United States. Some argued that the aim of preserving and strengthening European culture, was covered by the 'cultural exception' of the GATT but that the means employed, a 50% quota, was not proportional. Heavy lobbying form the United States caused the quota to be dropped from 60% to a majority rule.[94]

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[89] European Commission, *Green Paper on the Convergence of Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation*, COM (1997) 623, p. 9.
[90] Commission Directive *96/19/EC amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets* [1996] OJ L 74/13, implementing the political commitment to introduce full competition in the EU telecommunications markets by 1st January 1998.
[91] European Commission, *Eighth Report on the Implementation of the Telecommunications Regulatory Package*, COM (2002) 695 final, p. 5.
[92] See in more detail below at p. 43.
[93] See the discussion on 'cultural dominance' mentioned above.
[94] See I. Nietsche, cit., p. 60.

E. Media and competition theory

1. Competition theory

Competition theory is general in nature, applying all sectors of economy. It is linked to the ideal of free competition. Competition law aims at offsetting market failure arising from scale economies and market power.[95] Competition law limits the economic freedom of certain market players in order to safeguard the material freedom of other companies and the consumer.[96] The ideal is to achieve a situation of an infinite number of suppliers who deliver according to the needs of the consumer. The suppliers compete for prices and quality. In this model it is expected that the lowest possible prices and differing products are the effects of competition.[97] In a situation of perfect competition market participants behave independently from each other and resources are used most efficiently. Perfect competition, however, almost never exists and it is certainly no reality in the media sector. Here monopolistic situations of public service broadcasters used to exist in Europe. Nowadays they have frequently have been transformed into oligopolies of relatively few entities. Newspaper and publishing companies are increasingly merging to concentrations that sometimes also span into the television market. This oligopolistic competition is characterised by the strategic behaviour of market participants. Every company takes its rivals into account when deciding on how to behave.[98] In an oligopolistic situation markets operate inefficiently since competition is significantly inhibited. Some argue that profit levels increase with the concentration ratio.[99]

Market definition is of paramount important to competition analysis. The size of the relevant market determines the competitive situation. Generally, a distinction is made between the *product market* and the *geographical market*. Within one *product market* goods are sufficiently interchangeable or substitutable. A distinction can be made between demand-side and supply-side substitutability. Demand-side substitutability is measured through the cross-price-elasticity of demand. If prices for one brand increase, consumers would switch to other brands of the same good. Therefore price fluctuations of one product will influence the

[95] D. Begg, S. Fischer, R. Dornbusch, *Economics*, 4th ed., London, MacGraw-Hill, 1994, quoted I. Nietsche, cit., p. 8.
[96] J. van den Beukel, A.J. Niewenhuis*, Pluriformieit in het mededingingsrecht,* in "Mediaforum", vol. 4, 2000, pp. 116-124.
[97] *Idem*.
[98] I. Nietsche, cit., p.23.
[99] *Idem*.

demand of another product. The European Commission defines the product market as follows:

> *"[T]he relevant product market comprises all those products and/or services, which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their price and intended use."* [100]

It can be seen here that the situation and behaviour of the consumer/buyer is one of the most important indicators to determine the market. The Commission considers demand-side substitutability to be *"the most immediate and effective disciplinary force on the supplier of a given product"*.[101]

Supply-side substitutability (i.e. *"the ability of suppliers to adjust their production capacity to produce the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices"*[102]) is usually taken into consideration at a later stage when assessing the impact of an agreement on market conduct.

The technical test that is used to determine the product market is the hypothetical monopolist test or SSNIP test (standing for "Small Significant Non-transitory Increase in Price"). *"For antitrust purposes, a relevant market is defined when a hypothetical monopolist (or hypothetical cartel) containing all the firms in the market could increase profit by imposing a small but significant and non-transitory increase in price. If the prices of other services effectively constrain the terms offered by the hypothetical monopolist, then the relevant market must be defined more broadly. If the products are sustainable then the market has to be extended to those other products."*[103] This test is carried out so long until a hypothetical monopolist or cartel is found. In relation to media cases, the ECJ has established a further criterion. It held that a broadcaster's audience-share is of paramount importance in establishing if a broadcaster is dominant.[104]

Within one *geographical market* the situation for suppliers and consumers must be the same or sufficiently similar. Transport costs, language barriers and consumer preferences will

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[100] Commission, *Notice on Definition of Relevant Market for the Purposes of Community Competition Law* [1997] OJ C372/5.
[101] *Idem,* para 7.
[102] L. Garzaniti, *Telecommunications, Broadcasting and the Internet, E.U. Competition Law and Regulation*, London, Sweet & Maxwell, 2001, p. 156.
[103] Europe Economics, *Report for the European Commission DG Competition*, *Market Definition in the Media Sector – Economic Issues*, Appendix I, http://europa.eu.int/comm/competition, accessed on 27 May 2003.
[104] Commission Decision 96/346/EC *RTL/Veronica/Endemol* [1996] OJ L 134/32; note though that here the existence of a market for viewers was disputed.

influence the definition of the geographical market.[105] Due to varying interpretations of national authorities and the European Commission there often exist quite differing views of the size of the geographical markets. The ECJ sometimes did not determine the geographical market embracing only one country, since it was of no influence to substance of the judgement.[106] In the newspaper industry for instance the geographical market can be highly localised, whereas in the broadcasting industry the geographical market might encompass several countries of e.g. one language area.[107] The process of liberalisation and convergence is leading to the progressive expansion of the relevant geographical market in the telecom sector to encompass, at least, the E.U. territory. As a result the media sector remains still segmented due to regulatory differences in Member states (e.g. ownership restrictions, local content, exclusive rights…), cultural and language differences and varying consumer preferences.[108]

2. Media plurality and competition theory

The classical fear of media policy makers is that, if regulation is left to market forces, concentrations of private media companies will emerge, which are hostile to media pluralism. This process is furthered through the economic exigencies of the media industry, which (partly) operate with economies of scale. While competition law tries to counter market distortions that arise through e.g. scale economies, it can have positive effects on media pluralism. In the words of E.U. Commissioner for competition Mario Monti the relationship is as follows:

> *" [I]t is important to bear in mind that free markets can only achieve what, in the jargon, is called productive and allocative efficiency… In some areas of economy, however, this efficiency of production and allocation is far from being the only public policy objective that we as a society will want to pursue.*
> *In the media sector, there will often be a valuable cultural aim of seeking to ensure a high quality of output… There will often also be a valuable political aim - to ensure media plurality and a diversity of opinion both within and across media. Such plurality and diversity – fundamental to the health of an open, democratic society – may not be assured by a simple free market approach."*[109]

[105] I. Nietsche, cit., p. 36.
[106] See e.g. Commission Decision 1999/153/EC *Bertelsmann/Kirch/Premiere* [1999] OJ L 53, paras. 22 and 101; see also I. Nietsche, cit., p 118.
[107] In *RTL/Veronica/Endemol* the Commission held for instance that Belgium and The Netherlands were not the same geographical market due to varying consumer prefernecees.
[108] L. Garzaniti, cit., p. 161.
[109] M. Monti, *Does EC competition policy help or hinder the European audiovisual industry?*, speech delivered at the Canvendish Conference Centre, London, 26 November 2001, http://europa.eu.int/comm/competition, accessed on 27 May 2003.

Since it is the aim of this thesis to find an integrative approach between media plurality and competition law, a simple reference to differing policy aims is not satisfactory. Moreover since competition theory is gaining importance, as is evidenced by the E.U.'s new electronic communications framework, it will be important to determine where the synergies between competition law and media plurality lie and where the limits can be found.

a) Theoretical differences and practical limitations

Media pluralism as encompassed in Article 10 ECHR and construed by the ECtHR is specific in character. The aim of media pluralism regulation is (partly) to balance content by countering potentially abusive behaviour. The means used are financial support and restriction of ownership, ensuring all parts of society to be adequately informed through e.g. 'must-carry' provisions and to have active and passive access to the media. This type of media regulation is criticised for being paternalist and elitist in character. It has been said that it imagines viewers as immature and 'telly-glued' recipients.[110]

The focus of competition regulation, on the other hand, is on combating anti-competitive and abusive behaviour once it occurs. The concept is general and content neutral in character, trusting on free competition to bring about the desired result. The means employed are restrictions on state-aid, anti merger regulation and infringement actions in cases of abuse of a dominant position. The system is hostile to protectionism. However, European competition regulation recognises public interest concerns such as media plurality if they are objectively justifiable. The critics of the competition approach argue that the belief in the positive effects of competition in the media field, without further measures taken, is dangerous since it leads to mainstream i.e. bad quality information, and that it encourages a tendency of consumerism.[111] The answer is often to strengthen public service broadcasting by defining its public service mission.[112]

In simplified terms the two theories are differing in the following points. Media pluralism theory is (partly) focused on plurality of content, which can also exist as internal plurality, while competition theory focuses on structural (content neutral) plurality. Media pluralism theory is aimed at providing people with what they need, while competition theory produces productive and allocative efficiency and is providing people with what they want. Media pluralism theory works with audience/reader shares as a main indicator, while

[110] See I. Nietsche, cit., p. 44.
[111] See H. Zimmermann, cit.
[112] *Media Plurality in Europe*, cit.

competition theory uses economic criteria such as turnover as a relevant indicator of dominance. Media pluralism theory can be pro state-aid and protectionism, competition theory is against them. Media pluralism theory is concerned with potential abuse, while competition theory focuses on actual abuse.

Practically, media plurality concerns every size of media, while competition law has enacted minimum thresholds.[113] This, taken together with all the theoretical differences, have for example in Germany led to the conclusion that the two concepts are to be dealt with separately.[114] Others are of the opinion that "*from a media pluralism viewpoint competition law will only deal with a minority of relevant cases, and decisions are often too restricted to meet the needs of the media and cultural concerns*".[115] Again others, like Commissioner Mario Monti, simply point out the fundamentally different aims of both theories.[116] Currently European competition law acknowledges a deficiency in protection and provides for an exception for national media plurality authorities to take more stringent measures in cases with community competence and to provide state-aids under certain conditions.[117]

b) Synergies

Until this point the overall impression could be that media plurality and competition law defy any integrative approach. In contrast, the position taken here is a positive and integrative one, exploring the possibilities of competition law in fostering media plurality, while keeping the limits in mind.

In order to adequately explain, where the possibilities lie for competition theory to contribute to media pluralism, it is useful to distinguish first and second order effects.[118] As explained, competition law is aimed at achieving productive and allocative efficiency through combating concentrations and behaviour that is economically harmful. Obviously thus media plurality is not a primary aim or effect of competition law but it can be a secondary effect.

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[113] See for example the threshold enacted by *Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings* [1989] OJ L 395 as amended by *Council Regulation (EC) No 1310/97* [1997] OJ L 180/1 ("*Merger Regulation*"), Art. 2.
[114] *Idem*.
[115] *Media Diversity in Europe*, cit., para. 23.
[116] See above p. 27.
[117] *Merger Regulation*, cit., Art. 21 (3); *Media Diversity in Europe*, cit., para. 24.
[118] See J. van den Beukel, A.J. Niewenhuis*,* cit.

The most obvious synergy between media plurality and competition law can be found in the regulation of active and passive access to the media. Access has always been a main concern in relation to media plurality. Increasingly it is becoming a concern for competition law. One of the most pressing problems that were furthered through the convergence process is the appearance of bottlenecks in digital services. Bottlenecks have become an economic and political concern alike. The existence of technical bottlenecks hinders the theoretical possibility of a limitless technical spectrum to emerge, which is and will be both detrimental to plurality of content and to competition.[119] Access is thus a first order effect of both.

Another synergy exists with regard to horizontal ownership concentrations and to cross-ownership concentrations of vertically integrated companies. If the competition authority concerns itself with such cases, issues of media plurality can, and often will be, at stake. Media plurality becomes a second order effect in such cases. The present author contends that the competition authority can and should explore and assess all second order effects with regard to media plurality. E.U. case law is supportive of this possibility, as will be demonstrated.

It has been stated above that media pluralism theory would in principle be in favour of state aids and competition law against them. If one looks closer, however, there is an obvious synergy with relation to state-aids. Under European Union competition regime states are allowed to provide aids to public service broadcasters, if these aids are utilised for the public service mission. Specific provision was made for this in the "Communication on the application of state aid rules to public service broadcasting".[120] Other state-aids are allowed if they are objectively justifiable and proportional. Media plurality is here neither a first or second order effect, but a public policy concern that is respected.

F. Conclusion

In the first part of this chapter it was pointed out that media pluralism is an integral part of Article 10 ECHR. Plurality of content in the media is essential for the proper functioning of a democracy and the ECtHR held states to be the ultimate guarantors of media plurality. The Council of Europe encourages states to adopt specific regulation on media plurality and in particular to counter media concentrations. These concentrations are increasing because of the particularities of the media industry and because of the process of

[119] See also *Framework Directive*, cit., Recital 31.
[120] Commission*, Communication on the Application of State Aid Rules to Public Service Broadcasting*, [2001] OJ C 320/5.

convergence. On a national level many media specific ownership thresholds have been enacted to counter media concentrations, but, through convergence and globalisation, some of the biggest challenges of media policy are increasingly represented by international concentrations. With regard to these international concentrations, national regulators might not be in a position or might, because of industrial policy reasons, not be willing to impose what is necessary to achieve pluralism. To date, however, a common European Union framework with media specific ownership limitations, which could deal with international concentrations, is missing. Because of this lack of regulation it is argued here, that European Union competition law (partly) can serve as a substitute to achieve media plurality.

The influence of competition law on media policy cannot be denied. Agreements between undertakings for fixed prices e.g. in the newspaper industry, restriction of competition and state-aids to media companies all have to be compatible with the public policy exceptions foreseen in competition law. Furthermore, the increased importance of competition law can also be seen in relation to the E.U.'s new electronic communications framework. It is meant to be an interim regulatory framework, which should be kept in place until markets can regulate themselves.[121] Through a comparison of media plurality theory and competition theory it has been demonstrated that, despite differences in aims and methods of assessment, synergies of both theories exist. For example the Dutch commission for media concentration concluded in 1999 that competition law is one of the most important tools in safeguarding plurality and that the Dutch competition authority should adequately take into account media plurality in its assessments.[122] In line with the aim of mainstreaming human rights in the European Union and with the goal of regulatory efficiency in mind, these synergies should be explored and used. To put it plain, even if specific E.U. legislation to counter media concentration existed, co-ordination and integration with competition law would be necessary.

The identified synergies can be split in first and second order effects. Access to media markets is a first order effect of both; restriction of a dominant position on a media market is a first order effect of competition law and, in most cases, it will carry media plurality as a second order effect. Lastly, co-ordination is necessary with regard to exemptions from the competition law framework, which are granted for safeguarding media plurality.

[121] See below at p. 43
[122] Commissie Mediaconcentratie, *Profijt van Pluriformiteit*, *Over Concentraties in de Mediasector en de Vraag naar bijzondere Regelgeving*, the Hague, 1999.

Again, it is stressed here that competition law alone is not capable of safeguarding media plurality in Europe. Those lobbying for liberalisation for example sometimes do their best to confuse plurality of companies, which is an aim of competition law, with plurality of content, arguing that media pluralism regulation is unnecessary.[123] The position taken here is that, there should be specific media plurality legislation on the E.U. level, but, absent of it, the E.U. competition authority, as being the sole authority to deal with concentrations, can and should explore all its capabilities to contribute to media plurality.

[123] See as an example News International Plc, *Supplementary Memorandum to the UK Parliament Select committee on Culture, Media and Sport*, www.parliament.the-stationery-office.co.uk, accessed on 9 June 2003, where it has been argued: *"The Government's role is to serve the best interest of the UK consumer. Truly competitive markets are plural markets. The new competition laws should be allowed to do their job. There is no need for further regulation, extra bureaucracy and more institutions. Issues of content regulation and ownership restrictions must be dealt with separately. Arbitrary thresholds should be removed to allow relevant authorities to take account of the true market for information, news, entertainment and opinion.",*

Chapter II. The E.U. Competition regime and media plurality

In this chapter as a first step the E.U. framework with regard to the media will be addressed. This will include the position of Article 10 ECHR (positive or negative integration) in the framework and policies related to the media. As a second and main step, the E.U. competition regime will be analysed. It will be examined whether in primary and secondary law and case law adequate provision is made for the protection of media plurality. It follows from the analysis of Chapter (I) that market definition takes a particularly important role in matching concerns of media plurality with the concept of economic dominance. This issue will be particularly elaborated upon.

A. The E.U. regulatory framework and media plurality

Before dealing with the more specific area of competition law it is necessary to shortly examine the general relationship between media plurality and European Union. The main questions are: Is the E.U. obliged to respect and promote media plurality? What are the policies with regard to media plurality? And what are the regulatory tendencies, which can be recognised from recent legislatory acts?

1. E.U. obligations to respect and promote media plurality?

This question, of course, forms part of the wider question whether the E.U. is bound by the human rights enshrined by ECHR as such. An important distinction can be drawn between the question whether, in the application its law, the E.U. has to respect human rights including media plurality (negative integration) and the question whether the E.U. is obliged to enact legislation to ensure and promote human rights (positive integration).

The foundations of human rights within the E.U. framework will only be touched upon here shortly. The interpretation given to these provisions, especially by the ECJ, is more important. Article 6 (2) of the EC Treaty states that the Union is bound to respect *"fundamental rights, as guaranteed by the (...) Convention [of the Council of Europe] for the Protection of Human Rights and Fundamental Freedoms (...), and as they result from the*

constitutional conditions common to the Member States, as general principles of Community law". According to settled case law of the European Court of Justice "*general principles of EC law include protection for fundamental rights which are part of the common constitutional traditions of the Member States and contained in international human rights treaties*".[124] As will be examined in more detail below, media plurality as part of Article 10 ECHR is accepted as being a fundamental principle of EC law and it respect of it is ensured by the ECJ. Therefore at least the question of negative integration can be answered in the affirmative.

However, apart from respecting human rights as fundamental principles in the application of E.U. law, there is no provision, which would oblige the E.U. to actively promote human rights internally. Article 11 (2) of the Charter of Fundamental Rights[125] states that *"The freedom and pluralism of the media shall be respected"*, but the restriction in Article 51 (2) disqualifies this instrument as basis for such obligation, if it did not exist before. Moreover the ECJ opined that the E.U. lacked competence to accede to the ECHR since this would have far-reaching institutional consequences for the Union.[126] Some argue that within the same opinion the ECJ confirmed that there rests a positive duty upon the E.U. to promote human rights if this falls within the existing areas of competence and if it has less far-reaching consequences. Such positive competence could be construed from Article 308 EC Treaty.[127]

Alston and *Weiler* state that *"the need for human rights measures to go beyond the principle of non-violation has been understood"* in particular *"where human rights and the objectives of creating a common or single market happen to coincide".*[128] This can be seen below for example with regard the new regulatory framework for electronic communications. Same authors however regretted that measures to promote human rights are not concerted. Therefore they advocate for a comprehensive E.U. human rights policy.

Recently the E.U. started a policy of mainstreaming human rights.[129] Specific legislation to guide E.U. institutions is yet to be enacted. Generally though, before accession

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[124] See P. Craig, G. De Burca, *EU law: Text, Cases, and Materials*, 3rd ed, Oxford, Oxford University Press, 2002, p. 317.
[125] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.
[126] Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759.
[127] See e.g. P. Alston, J.H.H. Weiler, *An 'Ever Closer Union' in need of a Human Rights Policy: The European Union and Human Rights*, Harvard, Jean Monnet Working Paper 1/99; J.H.H. Weiler, S.C. Fries, *A Human Rights Policy for the European Community and Union: The question of Competences*, Harvard, Jean Monnet Working Paper 4/99, http://www.jeanmonnetprogram.org, accessed on 9 July 2003.
[128] P. Alston, J.H.H. Weiler, cit., p. 7.
[129] Compare, Council, Annual Report on Human Rights, Brussels, Office for Official Publications of the European Communities, 2002.

to the ECHR is a reality, the adoption of positive legislative duties to promote human rights, including media plurality is doubtful.

a) *Attempts for positive integration of media plurality*

In the past extensive discussion within the European Union has been devoted to the issue of media plurality and concentrations. With the 1992 green paper 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action'[130] a consultation process was started, which put to the question the adoption of specific legislation to promote media plurality and counter media concentrations. The green paper recognised that competition law in itself might not be sufficient to achieve this aim. The European Parliament[131], the Economic Social and Committee[132] and the Committee of Regions[133] each expressed their opinion in favour of the adoption of specific legislation. When directives to that effect were put to the vote in 1996[134] and in 1997[135], however, the proposals were rejected because it was considered that the community did not have the competence to deal with the matter.[136] Still the European Parliament and the Economic Social and Committee have not given up on the issue and advocate repeatedly for the adoption of legislation that should complement competition law.[137]

b) *Negative integration - media plurality as a public policy exception*

In general the provisions on free movements of goods (Articles 23 and 24 of the Treaty) and free movement of services (Articles 49 to 55 of the Treaty) and freedom of establishment (Article 43 to 48 of the Treaty) are applicable to the media. In case these economic freedoms are in contradiction with the aims of media plurality regulation the Treaty provides for exceptions to the economic freedoms on grounds of public policy, public security

[130] COM (1992) 480 final (not published).
[131] European Parliament, *Resolution on pluralism and media concentration* [1995] C 166/133.
[132] Economic and Social Committee, *Opinion on the Communication from the Commission to the Council and the European Parliament Follow-up to the consultation process relating to the Green Paper on Pluralism and Media Concentration in the Internal Market - An assessment of the need for Community action* [1995] OJ C 110/53.
[133] Committee of Regions, *Opinion on the communication from the Commission on the follow-up to the consultation process relating to the Green Paper on Pluralism and media concentration in the internal market - An assessment of the need for Community action* [1996] OJ C 100/48.
[134] COM (1996) 369 final (not published).
[135] COM (1997) 86 final (not published).
[136] See in particular G. Ress, J. Bröhmer, cit.
[137] See, Economic and Social Committee, *Opinion of the on 'Pluralism and concentration in the media'* [2000] OJ C 140/19; European Parliament, *Resolution on Media Concentration*, P5_TA-PROV(2002)0554.

and public health. For example Article 55 taken together with Article 46 of the Treaty state that:

> *"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment […] on grounds of public policy, public security or public health."*

Since these exceptions are rather unspecific, their meaning had to be determined by the European Court of Justice in its case law. In one of the most prominent cases, *Cassis de Dijon*, the ECJ set the 'mandatory requirements' rule in relation to Article 30 (now Article 28). It stated that:

> *"Obstacles […] resulting from disparities between the national laws […] may be necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transaction and the defence of the consumer"*[138]

A more elaborate formula on requirements of a restriction of the freedoms set out under the Treaty, can be found in the *Gebhard* case, where the Court held:

> *"It follows, however, from the Court' s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it"*[139]

It follows thus that mandatory or imperative requirements in the general interest can justify measures, which would otherwise not be in accordance with the provisions of the Treaty, if they are not discriminatory, suitable and proportionate to the aim sought.

In quite a number of cases Member States tried to justify national regulations, which were restricting the freedoms set out in the Treaty, by invoking the aim of securing media plurality. Below some of the most relevant cases are discussed in which the ECJ clarified the relation between Article 10, media pluralism and the economic freedoms under the Treaty.

In the case *Bond van Adverteerders*[140] the Court examined the Dutch '*Kabelregleing*', the law regulating cable television, which provided for a total prohibition on advertising in programs originating abroad and restricted the use of sub-titling for foreign programs. The

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[138] Case 120/78 *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ("Cassis de Dijon"), para 8.

[139] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

[140] Case 352/85 *Bond van Adverteerders and others v. The Netherlands State* [1988] ECR 2085.

aim of the Dutch legislator was to prevent the indirect establishment of commercial television in the Netherlands by broadcasting emanating from abroad, which would, according to the Dutch government, unfairly compete with the national broadcaster. The Dutch '*Omroepwet 1967*' (media law) provided that the two Dutch public service television channels should provide for pluralist programming, representing the main schools of thought in Dutch society. Article 35 of that law required the Dutch broadcaster "*to produce a comprehensive service, including reasonable proportions of cultural, educational, entertainment and informative broadcasts".*[141] All advertising time on television was allocated to the STER (Stichting Etherreclame), a public body paying its revenues to the state. The applicants, some 14 advertising companies, argued the infringement of Article 59 (now Article 49) of the Treaty and also mentioned that in their view the '*Kabelregeling*' was contrary to Article 10 ECHR. The Court found that there was a discrimination in the fact that broadcasters established outside the Netherlands were prohibited from broadcasting advertising specifically aiming at the Dutch audience, whereas Dutch broadcasters could. In relation to a possible justification on grounds of public policy i.e. media plurality, the Court held that economic aims such as securing all advertising revenues to a public body as the STER cannot constitute a ground of justification.[142] Additionally the Court held that *"Article 56 (now Article 46) must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard",* thus that the public policy exception is supplemented by a proportionality test.[143] It found that the Dutch law was discriminatory and not proportionate. At the end of the judgement the court reiterated its judgement in *Debauve*[144], stating that *"in the absence of harmonisation of the national rules applicable to broadcasting and television, each member state has the power to regulate, restrict or even totally prohibit television advertising on its territory on grounds of the public interest, provided that it treats all services in that field identically whatever their origin or the nationality or place of establishment of the persons providing them"*. As already a violation of Article 59 was found, the Court refused to address the last question *"whether generally accepted principles of community law [...] and the fundamental rights enshrined in community law (in particular the freedom of expression and freedom to receive information) impose directly applicable obligations on the member states in the light of which national*

[141] *Idem*, para.6.
[142] *Idem*, para.34.
[143] *Idem,* para.36.
[144] Case 52/79 *Debauve* [1980] ECR 833.

rules such as those concerned here must be assessed, regardless of whether or not any written provisions of community law are applicable".[145]

In *ERT*[146] the Court was dealing with exclusive rights granted to the Greek broadcasting monopoly. Issues of infringement of the rules on free movement of services and goods, competition and the question of the position of general principles of law and fundamental rights within the E.U. framework were at stake. In relation to the freedom to provide services and the rules on competition the Court found a violation since ERT was granted the exclusive right to transmit its own national broadcasts and re-transmit foreign broadcasts and would thus be likely to implement a discriminatory broadcasting policy in favour of its own programmes.[147] More importantly, however, one of the questions was "*whether the freedom secured by Article 10 ECHR imposes per se an obligation on the Member States, independently of the written provisions of Community law in force"*. The Court answered that:

> *"Where a Member State relies on the combined provisions of Articles 56 and 66 [now 46 and 56] in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.*
> *It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court".*[148]

In *Gouda*[149] the Dutch *Mediawet*, which had replaced the *Kabelregeling,* allowed advertising on cable television, but bound it to certain strict criteria. It provided amongst others for foreign broadcasters the necessity of the structural separation of the entity producing advertising and the entity transmitting it. The justification given was related to the

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[145] *Bond van Adverteerders...*, cit., paras 9 and 41.
[146] Case C-260/89 *Ellinki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925.
[147] *Idem*, para. 38.
[148] *Idem*, para. 43.
[149] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007.

protection of pluralism. Again the Court found that the objective of the law was to protect the revenues of the STER, thus of an economic nature and therefore the infringement of the freedom to provide services could not be justified.[150] Specifically the structural requirement of separation was seen as not being objectively justifiable. The Court held:

> ***"****In order to ensure pluralism in the audio-visual sector it is not indispensable for the national legislation to require broadcasting bodies established in other Member States to align themselves on the Dutch model should they intend to broadcast programmes containing advertisements intended for the Dutch public. In order to secure the pluralism which it wishes to maintain the Netherlands Government may very well confine itself to formulating the statutes of its own bodies in an appropriate manner.*
> *Conditions affecting the structure of foreign broadcasting bodies cannot therefore be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism."*[151]

In *Commission v. Belgium (1991)*[152] Belgian law prohibited the transmission of television broadcasts, which were not in the official language of the country of origin. The Belgian Government relied upon cultural policy objectives to justify the legislation in question, namely (1) the maintenance of pluralism in the printed press, which benefits directly from the advertising revenue of the national television broadcasting stations, (2) the preservation and development of the artistic heritage and (3) the viability of the national broadcasting stations. The Court rejected these arguments by stating:

> *"The first and third cultural policy objectives adduced by the Belgian Government reveal that in reality the purpose of the measure complained of is to restrict genuine competition with the national broadcasting stations in order to maintain their advertising revenue. As regards the objective of preserving and developing the artistic heritage, suffice it to note, as does the Commission, that the measure complained of is in reality likely to reduce demand for television productions in Dutch."*[153]

The Court here thus did not believe that an exception was sought on grounds of public policy. Rather it held them to be protectionism in disguise.

In a subsequent case, *Commission v. Belgium 1995*[154], the Court dealt with a case involving the Television without Frontiers Directive. Belgian law made foreign broadcasts subject to prior authorisation contrary to the country of origin principle of the directive. The

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[150] *Idem*, para. 29.
[151] *Idem*, para. 25.
[152] Case C-211/91 *Commission of the European Communities v Kingdom of Belgium* [1992] ECR I-6757.
[153] *Idem*, para. 9.
[154] Case C-11/95 *Commission of the European Communities v Kingdom of Belgium* [1995] ECR I-4114.

Belgian government maintained that this was, amongst others, necessary to further pluralism and that Article 10 (1) second sentence ECHR expressly provided for the possible establishment of a compulsory authorisation system.[155] The Court held that *"... the fact that a compulsory authorization system applying to the television sector is not contrary to Article 10 of the Convention does not prevent such a system from being contrary to Community law"*[156], that Article 10 ECHR in connection with Article 128 (now Article 151) did not authorise a government to institute additional controls[157] and that in any case the Belgian Government had failed to show how the measure under discussion would be proportionate.[158]

In *Vlaamse Televisie Maatschapij* (herein after 'VTM')[159] the Court of First Instance (herein after 'CFI') dealt with a Belgian law which stipulated that a private broadcaster wanting to operate in Belgium must have its head office on Flemish territory, must broadcast to the Flemish community as a whole and that 51% of its shares must be held by Dutch-language newspapers and magazines. According to the Belgian government the measures were intended to secure in particular the diversity of the press sector, which would lose advertising revenues through the establishment of private broadcasting.[160] In fact, the regulation resulted in one entity, the VTM, being granted an exclusive right to broadcast advertisements. The CFI opined that the measures were a violation of the freedom of establishment[161] and were not justified under the public policy exception, i.e. protection of the plurality of the press. It recognised that *"a cultural policy and the preservation of pluralism in the press, which is an aspect of the freedom of expression, may constitute imperative requirements in the public interest such as to justify the restriction of the freedom of establishment"*[162] but found that measure was neither appropriate nor proportionate since the law would not prohibit that a single Dutch-language publisher could hold all 51% of the shares. Furthermore upon distribution of shares, some publishers did not react and publishers newly entering the market could not benefit from the shares.[163]

[155] *Idem*, para. 43
[156] *Idem*, para. 45.
[157] *Idem*, para. 50.
[158] *Idem*, para. 55.
[159] Case T-266/97 *Vlaamse Televisie Maatschapij NV v Commission of the European Communities* [1999] ECR II-2329.
[160] *Idem*, para. 86.
[161] *Idem*, para. 114, where the Court held: *"In the present case the Flemish rules granting the exclusive right to VTM make it impossible for a competing company from another Member State which wishes to broadcast, from Belgium, television advertising intended for the Flemish community as a whole to establish itself in Belgium."*
[162] *Idem*, para. 105.
[163] *Idem*, paras. 114 to 122.

Familiapress[164] is of particular relevance, since here freedom of the media was at issue from two sides. The Austrian publisher Familiapress sought an order against the German publisher Heinrich Bauer for cessation of the distribution of a weekly, which offered prizes to its readers. Austrian law contains a general prohibition on offering consumers free gifts linked to the sale of goods or the supply of services. Even the exception for small prizes granted by the same law does not apply to the press sector. This prohibition was made necessary by previous fierce competition in the press sector using prize games as a tool. On the one hand Austrian readers were deprived of the right to information i.e. the weekly, on the other hand the protection of media pluralism was at stake. The ECJ dealt here with Article 10 ECHR at length. It confirmed that:

> *"the maintenance of press diversity may constitute an overriding requirement, justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order."*[165]

It furthermore held that:

> *"A prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society (see the judgment of the European Court of Human Rights of 24 November 1993 in Informationsverein Lentia and Others v Austria Series A No 276).*
>
> *In the light of the considerations set out in [...] this judgment, it must therefore be determined whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression."*[166]

As *Bribosia* points out the Court here unified the method under Article 10 (2) ECHR with its own method in determining the validity of public policy exceptions.[167]

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[164] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.
[165] *Idem*, para. 18.
[166] *Idem*, para. 26 and 27.
[167] E. Bribosia, *La Protection des Droits Fondamenteaux dans l`Ordre Juridique Communautaire: Le Poids Respectif des Logiques Fonctionelle et Autonome dans le Cadre Normatif et Jurisprudentiel*, Thèse présentée en vue de l´obtention du grade de docteur en droit, Université Libre de Bruxelles, 2001, p. 484.

Negative integration of media plurality in the E.U. framework is thus quite developed. The Court expressly accepts media plurality as an imperative requirement, which can justify an exception from the provisions of the Treaty. However the measures taken must also meet the requirements of appropriateness/suitability and necessity/proportionality. If a measure openly or in effect serves economic/protectionist purposes, it will not be accepted as falling within the public policy exception. In *Familiapress* the Court with its integrative approach has made an important step towards fully incorporating Article 10 ECHR within the E.U. framework. From here it seems only a small step for the positive integration of media plurality into E.U. law.

2. Promotion of media plurality – E.U. media policies

Next to the economic aims *"[E.U.] audiovisual policy and content regulation are undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors."*[168] Audiovisual policy within the E.U. started with the Television without Frontiers Directive.[169] The objective of this directive is to create the necessary conditions for the free movement of European television programmes within the internal market and to encourage the production and distribution of European works.[170] The directive is operating on the country of origin principle, which states that Member States shall not, unless in cases of severe infringements, restrict the retransmission on their territory of television programmes from other member states.[171] This means that they are prohibited from exercising secondary control over these transmissions. Furthermore the directive specifies a quota of a majority proportion of the transmission time for European works.[172] 'European works' are defined in Article 6 quite broadly. The preamble of the directive makes an interesting connection between the freedom to provide services and freedom of speech as enshrined in Article 10 ECHR. It speaks of a the fact that the former is a specific manifestation of the latter in community law, being subject only to limitations under Article 10 (2) ECHR and Article 56 (1) of the Treaty. The European Parliament states that *"[t]his*

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[168] *Framework Directive*, Recital 6.

[169] Council*, Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities* [1989] OJ L 298/23 as amended by Directive 97/36/EC [1997] OJ L 202/60 ("Television without Frontiers directive"); see also European Parliament, *Comment on the Charter of Fundamental Rights*, *Article 11*, http://www.europarl.eu.int/comparl/libe/elsj/charter/art11, accessed on 8 June 2003.

[170] *Television without Frontiers directive*, cit.

[171] *Idem*, Article 2a.

[172] *Idem*, Article 4.

directive and the regulation adopted subsequently are based on common principles already in use by national public audiovisual services. They establish freedom of expression and pluralism, the right of response linked to freedom of opinion, but also the protection of minors and human dignity."[173]

The E.U. also furthers audiovisual policy through initiatives such as the Media, Media II and Media+ programmes, which are providing technical and financial support to European productions.

Since 1996 the second big wing of policy measures connected to the media is the 'Information Society'. Under this heading various projects connected to the new technologies have been initiated. The latest two projects are the "*e*Content" and the "SaferInternet action plan" followed up by the "*e*Safe" programme. The *e*Content program is quite representative of the attitude taken towards regulation of the new technologies. It is aimed at "*stimulating the access to and the use of Internet and promoting cultural and linguistic diversity in digital content to favour exploitation of the potential of the worldwide web, notably for economic activity, export and marketing, and employment possibilities*".[174]

3. A recent development: regulatory convergence

In 2002 the EU adopted a new regulatory framework for electronic communication ("NRF").[175] It consists of a Framework Directive and five specific directives. Following technical and economic convergence it is marked by regulatory convergence. Recital 5 of the Framework Directive states that:

> *"The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework."*[176]

The NRF *"is based on the principle that, in increasingly competitive and technologically convergent markets, national regulators should be able to assess levels of competition and apply ex ante regulatory obligations only where competition is not effective"*[177]. It *"has been designed as an <u>intermediate phase between the current framework</u>*

[173] European Parliament, *Comment on the Charter of Fundamental Rights*, Article 11, cit.
[174] European Parliament, *Comment on the Charter of Fundamental Rights*, Article 11, cit.
[175] The framework was adopted in March 2002 and is in force from July 2003.
[176] *Framework Directive*, cit.
[177] Commission, *Eighth Report...,* cit., p. 8.

and an anticipated future situation where the telecommunications market will be sufficiently mature to allow it to be governed solely by general competition law." [178] *(emphasis added)*

The relationship with media plurality is explained in Recital 5 of the framework directive:

> *"It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism […] The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection."* [179]

In fact the only operative provision, which is aimed at both regulating (competition of) transmission *per se* and promoting pluralism, concerns open access systems for digital television services.[180] Apart from this access related issue, being a first order effect of both competition policy and media plurality, the relationship of the NRF to plurality is mainly marked by negative integration. It acknowledges parallel policy concerns of national regulatory authorities for pluralism[181] and respects 'must carry' provisions.[182] Lastly, it makes reference to the importance of pluralism with regard to the distribution of radio frequencies.[183]

According to the present author with this framework, which relies on the principle of free competition, an important possibility to explore more than obvious (first order) synergies between competition law and media pluralism has been missed. With the stated prospect of 'future fully competitive markets' that would regulate themselves, it will be all the more important to integrate media plurality directly into general competition law.

4. Conclusion

Negative integration of media plurality seems quite developed and there is a readiness by the ECJ to incorporate the system of the ECHR into E.U. law. The question of positive

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[178] Council, *Statement of reasons* [2001] OJ C 337/15; see also S. Farr, V. Oakley, *EC Communications Law*, London, Palladian Law Publishing, 2002, underline added by author.
[179] *Framework Directive*, cit., Recital 5, underline added byauthor.
[180] *Idem*, Art. 18.
[181] *Idem*, Art. 8.
[182] European Parliament and the Council, *Directive on Universal Service and Users' Rights relating to Electronic Communications Networks and Services*, 2002/22/EC, [2002] OJ L 108/51, Art. 31.
[183] *Framework Directive*, cit., Recital 19.

integration and the controversy around specific legislation to protect media plurality at the E.U. level is yet to be resolved. In the mean time however the trend within the E.U. is, as the NRF shows, to strongly rely on competition as a regulative factor for the electronic communication. With the decline of the publishing industry, this gains even more importance. Therefore, in order to adequately ensure media plurality within the E.U. framework, the possibilities of E.U. competition law in addressing plurality concerns should be fully explored and utilised. The remainder of this thesis will be devoted to the exploration of the possibilities of the E.U. competition authority in safeguarding media plurality.

B. The E.U. Competition regime

As a main policy of market integration, the E.U. prohibits unfair competition. Under the Treaty unfair competition is dealt with in Articles 81 (agreements and practices restricting competition) Article 82 (abuse of a dominant position) and Article 87 (state aids). Under secondary law, unfair competition is dealt with by Cartels Regulation 17/62[184] and Concentrations Control Regulation 4064/89/EEC[185] ("Merger Regulation"). Below these provisions and their application by the E.U. competition authority in most prominent media cases will be examined with a view to identifying the possibilities of incorporating protection of media plurality into E.U. competition law.

1. Agreements and undertakings

Article 81 states that all agreements between undertakings. Decisions by associations of undertakings and concerted practices which may affect the trade between Member States and which have as their object or effect the prevention or distortion of competition within the common market, shall be prohibited. In particular fixing prices, the control of production, markets or investment, the sharing of sources of supply, discriminatory practices and making contracts subject to the agreement of unrelated parties are prohibited. Under paragraph (3) they can however be declared admissible, if they contribute to the improvement of production or promote technical or economic progress and allow consumers a fair share of the benefits in case they are not indispensable or restrict competition on a substantial part of the products in question. Paragraph (3) provides for individual and block excemptions.[186] 'Undertakings' in

[184] Council, *Regulation No 17 implementing Articles 85 and 86 of the Treaty* [1962] OJ 13.
[185] *Merger Regulation*, cit.
[186] Because of the overload in cases relating to Article 81 (3) amendments have been suggested; see below p. 65.

the sense of Article 81 means "*...any entity engaged in an economic activity*"[187]. The fact that an undertaking is of a non-profit nature does not change its character as an undertaking.[188] 'Agreements, decisions and concerted practices' is understood rather broadly. What matters is collusive or non-collusive behaviour of the undertakings in question.[189] *"If traders engage in parallel conduct because of market circumstances, for example in an oligopoly, the competition authority might be tempted to interpret this as proof of collusion".*[190] Also the requirement of affecting trade between Member States has been defined broadly. In the *Société Technique Minière case* the ECJ stated that *"In order that an agreement may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States."*[191]

The boundary between Article 81 and the merger regulation is related to the degree of autonomy of the joint venture in question. If a joint venture *"perform[s] on a lasting basis all the functions of an autonomous economic entity"*[192], it is dealt with under the merger regulation. Anything short of this definition falls within the scope of Article 81.

a) <u>Cases related to the EBU</u>

Some of the important cases relating to Article 81 are dealing with the dominant position of the European Broadcasting Union (herein after 'EBU'), a cooperative body of (originally) European public service broadcasters based in Geneva.

Commission Decision 93/403/EEC, EBU/Eurovision System[193], had as its subject the dominant position of the EBU and its members in relation to collectively obtained broadcasting rights, in particular for sports programmes. The EBU members were in fact privileged with access to these rights on the basis of a system operating on reciprocity and solidarity. This restricted competition both between the members inter se and between the members and private broadcasters.[194] However this restriction resulting from the Eurovision system was justified under Article 81 (3), since "*as a result of reciprocity and solidarity any EBU member will feel obliged to produce the television signal for events taking place on its*

[187] Commission Decision 86/398/EEC *Polypropylene* OJ [1986] L 230/1, para 99.
[188] I. Nietsche, cit p. 88.
[189] I. Nietsche, cit p. 89.
[190] *Idem*.
[191] Case 56/65 *Société Technique Minière (S.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 234, at 249.
[192] *Merger Regulation*, cit., Art 3 (2).
[193] Commission Decision 93/403/EEC *EBU/Eurovision System* [1993] OJ L 179/23.
[194] *Idem*, para 49.

territory, even if it is itself not interested in the event".[195] The access rights granted to third parties were held to be sufficient since others, it was assumed, were not be in a position to bear the costs to produce the transmission themselves anyway.[196] Consumers received their fair share of the benefits through improved quality and choice and competition was only distorted with regard to international events.[197] It is highly questionable if the Commission would conclude the same in the present situation where powerful private conglomerates would be in apposition to broadcast the events live.

Subsequently the Commission took a decision in 2000[198] on the access to EBU's sporting rights. The EBU had issued new rules on sub-licensing Eurovision rights to pay-TV channels. The Commission accepted EBU's argument under Article 81 (3) that the system would reduce transaction costs, would benefit smaller members and would lead to extended coverage of sporting events and increased diversity of the programme.[199] It was held that individual negotiations would jeopardise these aims and that in the light of the market structure and EBU's difficult position *vis-à-vis* its competitors, there was no danger that competition would be eliminated.[200]

In *Screensport/EBU*[201] the Commission decided on the infringement of Article 81 thought the establishment of EBU's own sports channel *Eurosport*. Eurosport, a consortium consisting of 17 public service broadcasters, could directly benefit from EBU's content rights, whereas Screensport, a private British broadcaster, had to buy the rights off the EBU, thereby being disadvantaged in access to these rights. The establishment of Eurosport was seen as pursuing essentially economic aims. An exemption under Article 81 (3) was not granted since, it was held, the same benefit to consumers could be granted through a multiplicity of

[195] *Idem*, para 63.
[196] *Idem*, para 66.
[197] *Idem*, para 70.
[198] Commission Decision 2000/400/EC *Eurovision* [2000] OJ L 151/18.
[199] *Idem*, para. 82 where the Commission held: *"Many of the international sporting events addressed by the Eurovision system, such as the Olympic Games, are of such widespread appeal and of such economic importance, that any restriction on the acquisition, sharing or exchange of the Eurovision signal of the corresponding television rights among the European broadcasters is appreciable for the purposes of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.*
(83) The best example of the economic importance and therefore the appreciability of the joint acquisition of rights by the EBU is the last bid for the rights for the Olympic Games between 2000 and 2008 which were bought by the EBU for a total of USD 1,44 billion. News Corporation had bid USD 2 billion for the same rights. There is no question as to the appeal for European viewers of such a sporting event."
[200] *Idem,* para. 94, where the Commission held: *"The Eurovision rules governing the joint acquisition, the sharing of the rights and the exchange of the signal are, technically and economically, interdependent matters which are based on the principle of solidarity between the Eurovision participants. Therefore, if EBU members were forced to negotiate separately for television rights, were not to agree on the sharing of the rights or were not to offer the signal free of charge, the solidarity system would be jeopardised and with it all the objectives in terms of improvement of distribution and benefits to consumers."*
[201] Commission Decision 91/130/EEC *Screensport/EBU* [1991] OJ L 63/32.

channels. A defence under Article 86 (2) was not available. The Commission held that public service broadcasters can be entrusted with providing a service of a general economic nature on their national territory, but it doubted the possibility of extending this mission to transnational activities.[202]

b) *Cases related to digital television platforms*

In a French case, *Télévision par satellite* (TPS)[203] a joint venture of French public service broadcasters, French private TV stations, France telecom and Suez Lyonaise des Eaux established a digital television platform. It provided a range of special interest channels and other channels thereby using a digital access platform. TPS was granted exclusive access to special interest channels of is members and the agreement included a non-competition clause for the pay-TV market. Here the Commission was satisfied that the conditions of Article 81 (3) were met since the transmission of special interest channels and the production of special interest content was improved. The exclusive access to the channels was held to be economically needed. Furthermore the introduction of TPS lead to competition with Canal+, the market leader in these services, which ultimately benefited the consumer through lowered prices and increased choice. Notably the Commission had defined the relevant market here as the pay-TV market in France, possibly also including other French speaking countries in Europe. Competition was increased in this market through shifting special interest channels from regular TV to pay-TV. The arguable worsening of plurality was, according to the commission, outweighed by the innovations that resulted from the agreement.

A further case concerning pay-TV is *BiB/Open*[204], a British case, where a joint venture of BSkyB, BT Holdings, the Midland Bank and Matsushita Electric Europe introduced digital interactive television in the UK. The defined market was the product market for the provision of technical services for pay-TV. Competition was impaired through the access system, which was the BSkyB set top boxes and through BSkyB's strong position in relation to the content rights it owned. However the Commission concluded that Article 81 (3) was applicable since the introduction of a new service was beneficial to consumers no less restrictive means were available, and the access system could be developed so that third parties could use it as well, thereby reducing the dominant position of BSkyB.

[202] *Idem*, para 69.
[203] Commission Decision 1999/242/EC *TPS* [1999] OJ L 90/6.
[204] Commission Decision 1999/781/EC *British Interactive Broadcasting/Open* [1999] OJ L 312/1.

c) *Conclusion*

The application of Article 81 is rather straightforward. If significant technical developments are at stake and a fair share of the benefits fall to the consumer and the agreement meets the proportionality test, the exception under paragraph (3) is readily accepted. With a view on media pluralism it is though worrying that the Commission sees no problem in the shifting of content to the pay-TV area. This media plurality concern falls outside the scope of competition law.

2. Abuse of a dominant position and mergers

a) *Article 82 of the Treaty*

Article 82 of the Treaty prohibits the abuse of a dominant position. It is only applicable where a dominant position already exists and the concentration enjoying dominance engages in abusive practices. Such practices are for instance refusal to supply an existing customer, discriminatory practices, predatory pricing, cross-subsidisation, excessive pricing, price squeeze, bundling and abuses of dominant purchasing positions. Since its introduction most cases relating to dominance in the media sector have been dealt with under the Merger Regulation. Article 82 will therefore not be elaborated upon here. Nevertheless specific issues relating to dominance and the case of access to essential facilities will be dealt with below.

b) *The Merger Regulation*

The Merger Regulation[205] provides the Commission with exclusive competence for mergers with a 'community dimension'.[206] A strict timetable for review of the intended mergers is set by the regulation. Article 3 states that "*a concentration shall be deemed to arise where two or more previously independent undertakings merge, or – one or more persons already controlling at least one undertaking, or – one ore more undertakings acquire, whether by purchase or securities or assets, by contract or by any other means, direct or*

[205] *Merger Regulation*, cit.
[206] The *Merger Regulation* defines the community dimension in Article 1 (2) as: (a) a combined aggregate turnover of all undertakings concerned with more than ECU 5.000 million; (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Article 1 (3) sets criteria where a community dimension is not met.

indirect control of the whole or parts of one or more undertakings". A merger requires the establishment of a genuine common economic unit with a common economic management. Mergers meeting the threshold have to be appraised by the Commission. *"A concentration, which does not create a dominant, position or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it, shall be declared compatible with the common market"*. A 'dominant position' has been defined by the ECJ in the case law under Article 82 as *"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers"*[207]. Notably, under Article 21 (3) of the Merger Regulation the Member States can prohibit a merger that has been cleared by the Commission if it serves a legitimate interest. Media plurality is specifically mentioned as a legitimate interest. The notes on Council Regulation 4086/89 state "*that The Member States' right to plead the `plurality of the media' recognizes the legitimate concern to maintain diversified sources of information for the sake of plurality of opinion and multiplicity of views*."[208] However the general principles regarding public policy exceptions as stated above are still applicable in this case.[209]

Not surprisingly much of the case law relating to the media under the merger regulation is connected to pay-TV in Europe. The reason is that the development and the setting up of pay-TV requires substantial investments which are usually only borne by mergers of big (media) companies. Therefore the community dimension is easier met in pay-TV cases than in other media mergers. What is important to note is how the Commission defines the relevant product market and the position of dominance. As has been established in *Endemol*[210] and confirmed in later cases, the relevant product market is the market for pay-TV and possibly the market for technical services relating to it. The market for free to air TV is seen to be separate.

In *Bertelsmann/Kirch/Premiere*[211] it was proposed was that CLT-UFA, Bertelsmann and Taurus of Leo Kirch's enterprise were to merge in one concentration to take a hold of

[207] Case 22/76 *United Brands* [1978] ECR 207, para. 38.
[208] Notes on Council Regulation (EEC) 4064/89, in "Merger Control law in the European Union", European Commission, Brussels-Luxembourg, 1998, http://europa.eu.int/comm/competition/mergers/legislation, accessed on 16 March 2003.
[209] Compare I. Nietsche, cit p. 126.
[210] Case T-221/95 *Endemol* [1999] ECR II-1299.
[211] Commission Decision 1999/153/EC *Bertelsmann/Kirch/Premiere* [1999] OJ L 53/1.

Premiere, an existing pay-TV channel. Secondly a concentration would be formed around Beta Reseach, previously owned by Kirch, CLT-UFA and Deutsche Telecom to provide technical services and infrastructure. Relating to the market definition the Commission explained that:

> *"Pay-TV constitutes a relevant product market separate from that for free-access television (free TV), i.e. advertising-financed private television and public television financed through fees and partly through advertising (5). While, in the case of fee- and advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay-TV there is a trade relationship only between the programme supplier and the viewer as subscriber. The conditions of competition are accordingly different for the two types of television. Whereas in the case of fee- and advertising-financed television the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriptions."*[212]

In deciding on the position of dominance of the concentration the Commission took into account Leo Kirch's connection to free TV, which could lead to highly demanded content being shifted from free TV to pay-TV and would leave free TV with less varied content. From an economic viewpoint this was accepted as being an acceptable approach however. The issue of pluralism was not discussed in this case; it concerned almost exclusively the economic dominance that the merger would produce. The Commission opined that the resulting dominance would be of such a nature that it would bar any prospective competitors from entering the pay-TV market, most importantly, since Kirch and Bertelsmann owned most of the content rights available and Deutsche Telecom had almost a monopoly position on the cable infrastructure market. The merger was thus prohibited.

Again it is made clear here that the shifting of content rights to the pay-TV area is no concern for the competition authority. Indeed it is accepted that *"in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriptions"*.[213]

MSG Media Service[214] concerned a proposed merger involving Bertelsmann, Taurus, belonging to the Kirch group, and Deutsche Telecom. MSG should provide services for pay-TV in Germany. Bertelsmann already owned the biggest pay-TV channel in Germany, Premiere, and Kirch operated the second biggest, DF1. Deutsche Telecom possessed a virtual

[212] *Idem*, para. 18.
[213] *Idem.*
[214] Commission Decision 94/922/EC *MSG Media Service* [1994] OJ L 364/1.

monopoly position on the cable TV market. With relation to a potential competitor, Selco, which was owned to 50,1% by PRO 7 –a commercial broadcaster - and to 49,9% by News Corporation – belonging to the Murdoch group, the Commission took into account that PRO 7, was to 47, 7% owned by Kirch's son. Consequently it attributed PRO 7 to Kirch's sphere and doubted the competitive role of Selco. Here the Commission clearly found that the horizontal integration between Bertelsmann and Kirch and the vertical integration between Bertelsmann, Kirch and Deutsche Telecom would foreclose the market for prospective competitors. Through the closed access system households would be 'locked in' and unable to easily switch,[215] but even an open access system that was proposed by the parties was not seen as remedying the situation.[216] Therefore the Commission found the merger to be incompatible with the common market.

In *Hollandia Media Group* ("HMG")[217] the commission decided due to a referral by the Dutch government under Article 22 (3) of the Merger Regulation (the merger did not meet the community threshold requirement). The proposed merger involved RTL 4, Veronica Omroeporganisatie and Endemol Entertainment Holding that wanted to set up HMG, a corporation that should reinforce the positions of the participants. The concentration was held to be incompatible with the common market since it would *"lead to the creation of a dominant position in the TV advertising market in the Netherlands and to the strengthening of a dominant position for Endemol in the market for independent Dutch-language TV production in the Netherlands through which effective competition in the Netherlands will be significantly hindered".*[218] Specifically Endemol's position in respect to ownership rights of transmission of sports events and output-deals with major Hollywood studios were found to strengthen his dominance and hinder competition. HMG is of particular interest with regard to market definition in the broadcasting sector. Again the Commission identified three relevant markets namely the market for TV broadcasting, the market for TV advertising and the market for independently produced Dutch TV programmes, i.e. TV productions excluding in-house productions. [219] With regard to the market for TV broadcasting the Commission stated that:

[215] *Idem*, para. 41.
[216] *Idem*, para. 94.
[217] Commission Decision 96/346/EC *RTL/Veronica/Endemol* [1996] OJ L 134/32 ("*HMG Decision*").
[218] *Idem*, para. 115.
[219] *Idem*, para. 17-24.

> *"In TV broadcasting, also commonly described as the viewers' market, broadcasters compete for audience shares. This is true, in particular, for commercial TV financed through advertising and for public broadcasters at least partially financed through advertising, since the audience shares in the broadcasting market are a determinant factor for their success in the TV advertising markets. There may also be competition for audience shares between, on the one hand, broadcasters financed through advertising and, on the other hand, public broadcasters financed only through licence fees or pay-TV suppliers financed through subscription fees. Even in the case of those broadcasters which do not carry TV advertising, audience share remains an important indicator of the attractiveness and acceptance of the broadcasting channels by the general public.*
> *On the basis of the above, the viewers market may include all TV broadcasters. However, in terms of trade relationships between broadcasters on the supply side and viewers on the demand side a distinction has to be drawn between on the one hand the market for TV advertising, where broadcasters compete for advertising revenue and, on the other hand, the market of pay-TV, where pay-TV suppliers compete for subscriptions."*[220]

Furthermore the geographical market was held to be a separate one in the Netherlands and in the Dutch speaking part of Belgium. The Commission was of the opinion that *"the differences in verbal expressions, in national taste, and in preferences for certain TV personalities over others are such that, according to the parties and all other broadcasters and producers contacted by the Commission, the TV markets in the Netherlands and the Flanders region of Belgium are to be considered as different geographic markets".*[221]

In the *Nordic Satellite Distribution case*[222] ("NSD") a consortium of Norsk Telecom, Tele Danmark and Kinnevik, a Swedish company, aimed at providing transponder capacity and distributing satellite TV in the Nordic market. Both the Norwegian and the Danish companies were state owned, Norsk Telecom completely and Tele Danmark to 51%. The commission identified three relevant markets namely a market for the transmission of encrypted TV channels, a market for the provision of transponder capacity and a market for the operation of cable TV networks.[223] NSD would carry especially attractive channels and it was to be expected that other broadcasters would change to transmit via the NSD system. Although the decoder system to be used was open to potential competitors, thus did not itself create access restrictions, the Commission held the concentration to be incompatible with the

[220] *Idem*, para. 20.
[221] *Idem*, para. 26.
[222] Commission Decision 96/177/EC *Nordic Satellite Distribution* [1996] OJ L 53/20 ("NSD decision").
[223] *Idem*, para. 55.

common market since it would effectively foreclose the market.[224] The Commission also rejected an argument relating to the overall technical improvements that would be achieved through the establishment of NSD.[225]

3. Interpretation of the case law

In Chapter (I) a synergy has been defined with regard to countering dominant positions of media concentrations. Here the notion of dominance in competition law *per se* is closer examined and the ability of competition law to address media plurality as a second order effect is explored.

a) Dominance in convergent markets

Dominance in competition law is related to all markets in question in a given case and thus to market definition. It shall here only shortly be recalled that markets have a product market and a geographical market dimension and that the scope of these markets is determined by demand side substitutability and supply side substitutability. From the above case law it is rather clear that markets are, in fact, defined quite narrowly. In the audiovisual sector, separate markets for pay-TV, pay-TV services, free-TV and advertising have been defined. On the one hand this narrow market definition leads much easier to the finding of dominance on the relevant market, on the other hand it does not adequately take into account the real dominance of a media company or spill over effects to other markets in the vertical chain of production and distribution. Further problems relate to the definition of the geographic market. In HMG[226] markets in different Member States have been seen as geographically separate due to preferences of the viewers. Sometimes the scope of the geographical market has not been defined at all, since it did not seem to matter for the case in question. Again this fragmentation of markets does not take account of spill over effects. Indeed it makes the adequate assessment of pan-European dominance of media conglomerates quite impossible. Under the new regulatory framework for electronic communications, which

[224] *Idem*, para. 164, where the Commission found: *"The vertical integration of NSD means that the positions of the parties in various markets reinforce each other. Particularly it should be noted that the positions of the parties in the downstream markets (cable TV networks and distribution) reinforce the dominant position on transponders by deterring potential competitors from broadcasting from other transponders to the Nordic area."*
[225] *Idem*, para. 146.
[226] Commission Decision 96/346/EC *RTL/Veronica/Endemol* [1996] OJ L 134/32 ("*HMG*").

relies heavily on competition law, it has been stressed that it will be important to find more uniform interpretation criteria of the geographical market.[227]

Dominance, it should be recalled, is the ability to behave independently from competitors in a market. The Commission indicated in its 1997 Notice on market definition[228] that the existence of a dominant position *"would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.)".* *Garzaniti* identifies the following factors in determining broadcasting specific dominance (1) the control of a large portfolio of programmes; (2) the control of conditional access technology; (3) the control of electronic programme guides; (4) know-how in subscriber management services; (5) The control of broadcasting capacity satellite (i.e. transport capacity, radio frequency spectrum, cable bandwidth); (6) a large customer base; (7) Control of a number of existing channels; and vertical integration (i.e. at content and carrier level).[229]

With regard to horizontal and vertical integration spill over effects into markets gain importance in Europe. The case law already partly captures spill over effects between product markets. It has been taken into consideration with regard to most cases above to some extent. Specifically ownership of content rights is held to have possible influence on dominance in the downstream (distribution) market. For instance a structural link between Endemol and Veronica was taken into account in the HMG case in demonstrating the dominance of the concentration on the viewer market.[230] The dominance concept has also been expanded in a horizontal manner in the *MSG Media Services case.* Here Kirch's connection to his son, owning a private TV station was attributed to his position of dominance. However these approaches do not seem consistent and are always subject to the scope of the market definition.

Bird&Bird argue in their study for the European Commission[231] that the lack of clear market definitions causes a lack of forseeability, which would place companies in a difficult position. For an adequate assessment of the markets in the media sector they propose to take the value chain into account. Already in the 1997 Commission notice on market definition

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[227] Bird &Bird, cit., p. 18.
[228] Commission*, Notice on the definition of relevant market for the purposes of Community competition law* [1997] OJ C 372/5.
[229] L. Garzaniti, cit., p. 197.
[230] Commission Decision 96/346/EC, cit., para. 45.
[231] Bird & Bird, *Report for the European Commission DG Competition, Market Definition in the media sector, a comparative legal analysis*, Brussels, 2002, http://europa.eu.int/comm/competition, accessed on 11 April 2003.

reference was made to the value chain.[232] This approach has the advantage of taking account of the full range of activities of a media concentration, especially when it is vertically integrated. Effects coming from one market and spreading to another would be captured.

The value chain approach argued by *Bird&Bird* has significant advantages over the, until now, fragmented and inconsistent approach with regard to market definition and dominance. Dominance could be effectively assessed from an economic viewpoint, but also from a media pluralism viewpoint the value chain approach could more adequately take account of the entirety of the dominance of a concentration. Spill over effects into other markets, whether product or geographical, would not so easily fall outside the scope of assessment. This slight modification of the product market definition would make competition law, and especially European competition law with its international reach, a much more reliable tool to safeguard media plurality.

b) *Dominance on the viewers market*

A specific problem with regard to media plurality in a democratic context is, that the economic test of demand side substitutability is hard to apply for democratically relevant information provided free of charge. In terms of competition law it is the trade relationship between producer and consumer that matters. It is thus the question whether a trade relationship exists between the broadcaster and the audience if information is provided free of charge. The most important case in that respect is *HMG*. In *HMG* the Commission established the relationship between audience shares and broadcasting by establishing the indirect relationship via advertising. Furthermore it held that even in cases where there is no advertising, *"audience share remains an important indicator of the attractiveness and acceptance of the broadcasting channels by the general public"*. On the basis of this a 'viewers market' was established which "*may include all broadcasters"*. The market for advertising was held to be distinct for the viewers market and so was the pay-TV market. The Commission went as far as clearly demonstrating that HMG would gain a dominant market position of around 42 to 43%, but hesitated in finding an abuse. It concluded its examination of the viewers market by stating that "*[h]owever, it is not necessary to determine the precise audience share since, for the competitive assessment in this case, the prime significance of the audience share is that it is the most important parameter for determining market power in the*

[232] Commission, *Notice on Definition of Relevant Market for the Purposes of Community Competition Law* [1997] OJ C372/5.

TV advertising market".[233] Although the Commission clearly identified a second order effect here, it hesitated to connect any consequences to it. The present author sees no reason why the Commission should not apply this approach of assessing audience-shares on a standard basis.

c) *The relationship with democratically relevant content*

Whereas the E.U. recognises the democratic value of certain information in many of its documents and media plurality is seen as culturally important and even as a general principle of E.U. law, it can be seen from the cases above that E.U. competition law does not concern itself with the plurality of content as a primary aim. Therefore the ability of competition law to address media plurality as a second order effect is disputed since, according to the theory, competition law is content neutral and concerns purely the structure of markets. It does not take too much attention however, to note that in its case law the ECJ and the Commission cannot avoid to deal with issues related to content. Categories of content are insofar of importance to competition law as they represent different economic values. For instance exclusive rights to specific content, like rights relating to sporting events or rights to Hollywood films. These rights, though maybe not directly relevant from a pluralism and democracy point of view, will form the backbone of any major broadcaster. In the EBU decisions it has been shown that a pan-European system of exclusive rights based on reciprocity and solidarity is acceptable, but that third parties should be granted access to these rights nevertheless.

Rights to economically relevant content will also be a significant factor in determining the position of dominance. So-called 'prime content' is of great value in expanding the audience-share of a company. Indeed in most of the merger cases discussed above one or more of the parties was holding rights, sometimes even exclusive rights, to prime content. This was taken as a major factor in determining that a potential new incumbent would face significant barriers to market entry and thus in prohibiting the respective concentration.

In relation to the emergence of pay-TV it has been seen that the Commission and the Court see no problem in the fact that an undertaking or concentration owning free TV and pay-TV stations, shifts its more valuable content to the pay-TV area or designs its channels to be complementary. This would be seen being as economically sensitive. From a democratic viewpoint this does not seem to be a big concern, since it is not to be expected that this prime content would contain democratically relevant information. Form a pure diversity viewpoint it

[233] *Idem*, para. 64.

though matters, as was even accepted by the Commission in the MSG decision. Indeed, when major football events were started to be broadcast on pay-TV exclusively in e.g. Italy, it has caused major outrage. It seems thus as long that there (luckily) is no price tag on democratically relevant information it will not form a first order concern of competition law. However, the author contends, that, since the E.U. competition authority already is taking content into account in various ways, issues of democratically relevant content can be assessed as second order effects.

4. E.U. competition law and market structure: access

a) Access to essential facilities

Apart form concerns relating to horizontal mergers between publishers in the newspaper industry there may arise problems with regard to access to infrastructure, such as distribution facilities. The ECJ applies rather strict criteria here, which are known as the 'essential facilities doctrine'. The most renowned case in this area is the *Oscar Bronner case*[234].

Oscar Bronner concerned a case under Article 82 EC Treaty involving the publisher of the Austrian newspaper 'Der Standard'. Der Standard, a high quality newspaper with a rather low market share of 3,6%, was refused access to the distribution scheme of Media Print, the biggest newspaper publisher in Austria with a remarkably high market concentration reaching 53% of the population and 73% of all newspaper readers with its papers 'Neue Kronen Zeitung' and 'Kurier'. Media Print had established a nation-wide home delivery system but barred Oscar Bronner, who had offered to pay reasonable remuneration, to participate in it. The court referred to the *Magill case*[235], stating that:

> *"for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of the Treaty in a situation such as that which forms the subject-matter [...] not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's*

[234] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I-7791.

[235] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743.

> *business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme."*[236]

The ECJ found that there were other means for Oscar Bronner to distribute his paper, for instance through mail or at Kiosks, and that therefore "*it [was] not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed"*.[237] The Court concluded that:

> *"...the answer [...] must be that the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty."*[238]

From an economic and competition law perspective this assessment might be the correct one, from a media plurality viewpoint it is clear however that the result of a small, high quality newspaper being effectively disadvantaged in an extremely concentrated market is not desirable.

b) <u>Access to networks: Local loop access</u>

A second kind of access that is important for media companies working in the electronic communications sector is access to technical delivery platforms and through this facilities access to the consumer/individual. In two way communications media such as the Internet and digital interactive television the access of the individual/consumer to the network is of high importance as well (especially from a media plurality perspective). The building up of the infrastructure networks is connected to high expenses and it is especially in this sector that public and former public undertakings continue to hold dominant positions. In order to decrease the level of dominance and to introduce competition in the market during the past decennium it was aimed at liberalising the respective markets for telephone services and cable services and it was important to achieve interconnection between the respective networks. From an economic viewpoint it is important that the consumer is given a choice between different providers for the same service, where he/she was bound to a monopoly service

[236] Case C-7/97 *Oscar Bronner...*, para. 41.
[237] *Idem*, para. 45.
[238] *Idem*, para. 47.

before, so that the consumer could have e.g. access to the Internet via a telephone line (unbundling of the local loop).

The Regulation on unbundled access to the local loop states that unbundling the local loop and introducing greater competition in local access networks should help to bring about a substantial reduction in the costs of using the Internet[239]. *"Local loop unbundling should complement the existing provisions in Community law guaranteeing universal service and affordable access for all citizens by enhancing competition, ensuring economic efficiency and bringing maximum benefit to users".*[240] It is mandated for *"the competitive provision of an inexpensive, world-class communications infrastructure and a wide range of services for all businesses and citizens in the Community"*.[241] The technical facility concerned is the 'twisted copper pair' telephone line. The problem, as stated by the regulation, was that *"the local access network remained one of the least competitive segments of the liberalised telecommunications market"*.[242] The regulation determines that operators with significant market power ("SMP") are obliged to provide access to their networks to other operators under transparent, fair and non-discriminatory conditions. The concept of significant market power is taken directly from the concept of dominance developed in competition law[243].

Under the Directive on access and interconnection, of electronic communications networks and related facilities[244] these principles are upheld and elaborated upon. The supervisory mechanism is shifted to national regulatory authorities.

The aim of this regulation was and is to stimulate growth and development in the *e*-commerce sector. Insofar as it leads to the abolition of dominance of traditional incumbents and insofar as it improves the access of the individual to the facilities of the Internet this development is to be welcomed from a media pluralism point of view. The regulation is however purely infra-structural and does therefore not take account of possible dominance created by cross-media ownership of companies which profit from the liberalisation.

[239] European Parliament and the Council, *Regulation on unbundled access to the local loop*, 2000/0185 (COD).
[240] *Idem*, para. 2.
[241] *Idem*, para. 14.
[242] *Idem*, para. 3.
[243] For further elaboration on SMP see Commission, *Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services* [2000] OJ C 165/6.
[244] European Parliament and the Council, *Directive on Access, and Interconnection, of Electronic Communications Networks and Related Facilities*, 2002/19/EC, [2002] OJ L 108/7.

5. Negative integration: the state aid regime and 'must carry' provisions

a) *The state aid regime*

State aid to media companies is an important tool to further plurality of the media. It is used by most Member states of the E.U. in relation to the press and to the audio-visual sector. Aid can however very easily distort competition in that it favours one company over another. Therefore the E.U. applies a rather strict regime with regard to aid that is compatible with the common market. The provisions of the Treaty applicable to aid are Article 86, dealing with public undertakings, Article 87, dealing directly with state aid and Article 16, dealing with services of a general economic interest. Furthermore the Amsterdam Treaty added a protocol relating to public broadcasting and since November 2001 there exists a Commission Communication on the application of state aid rules to public service broadcasting[245]. The total aid given to the media/culture sector by states in 2001 in the EU is about 1% of the overall aid. A striking exception is Portugal, which gives 39% of its aid to the media/culture sector.[246]

Article 87 (1) of the Treaty prohibits state aid or aid by state resources in whichever form, which threatens to distort competition by favouring certain undertakings insofar as it affects trade between Member States. The ECJ has clarified that it is not the intention but the *effect* of the aid that matters.[247] Distortion of competition is based on a qualitative rather than a quantitative test.[248] For aid to affect trade between member states it is sufficient, that the company is active on the international market.[249] Aid is illegal if capital was provided in circumstances in which no ordinary investor would be prepared to invest.[250]

b) *Services of a general economic interest and public service broadcasting*

Article 86 (2) provides for derogation of fundamental Treaty rules and must therefore be interpreted restrictively. According to the text of Article 86 (2) and the case law of the ECJ three criteria must be fulfilled for this derogation to apply:

> *"(i) the service in question must be a service of a general economic interest and clearly defined as such by the Member State;*

[245] Commission, *Communication on the Application of State aid Rules...,* cit.
[246] Commission, DG Competition, *Key indicators: State Aid by Sector*, http://europa.eu.int/comm/competition/state_aid/scoreboard/indicators/ , accessed on 13. June 2003.
[247] Case 173/73 *Commission v. Italy* [1974] ECR 709.
[248] I. Nietsche, cit., p. 144.
[249] I. Nietsche, cit., p. 153.
[250] Case 234/84 *Belgium v. Commission* [1986] ECR 2263.

> *(ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service;*
> *(iii) the application of the competition rules of the Treaty must obstruct the performance of the particular task assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community."*

Initially it was not clear whether this provision would apply to services of a non-economic nature, however in the *EBU Decision*[251] the ECJ applied Article 86 (2) to non-economic general interests. Indeed in *Sacchi*[252] and *Screensport*[253] the Court clarified that it was a non-economic objective that had to be achieved. In VTM[254] the Court held that a cultural policy and the maintenance of pluralism in the press would constitute a legitimate objective. However a proportionality test must be strictly applied.

Since public service is of particular national interest some governments tried to argue that it would be fully covered by the exception relating to "*aid to promote culture and heritage conservation*" provided for in Article 87 (3) (d) in conjunction with Article 151 of the Treaty and that therefore the E.U. would have no competency to regulate it. Furthermore Protocol 9 of the Amsterdam Treaty did not in itself serve to clarify what position the rules of the Treaty take with regard to public service broadcasting. It reads:

> *"The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and compensation in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."*[255]

With its communication of 15 November 2001[256] the Commission clarified the application of State aid rules to public service broadcasting. Already an earlier communication on services of general economic interests stressed that:

> *"The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the*

[251] Commission Decision 93/403/EEC, cit.
[252] Case 155/73 *Guiseppe Sacchi* [1974] ECR 409.
[253] Commission Decision 91/130/EEC, cit.
[254] Case T-266/97 *VTM v. Commission* [1999] ECR II-2329, para 108.
[255] *Treaty of Amsterdam, Protocol on the system of public broadcasting in the Member States* [1997] OJ C 340/109.
[256] Commission, *Communication on the application of State aid rules to public service broadcasting* [2001] OJ C 320/5.

> *broadcasting sector has, since its inception, been subject to specific regulation in the general interest. This regulation has been based on common values, such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection."*[257]

In paragraph 2 the of the Communication the Commission states that:

> *"Whilst opening the market to competition, Member States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs that private operators would not fulfil to the optimal extent." (underline added)*

The communication also stresses that public service broadcasters are not comparable to any other service in that they have at the same time access to a wide sector of the population, provide so much information and content and convey and influence both individual and public opinion.[258] Furthermore it states that: "*broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately that all citizens to a fair degree in public life".*[259]

The operational part of the communication states that public service broadcasting is a service of general economic interest and confirms the competence of the Commission in dealing with public service broadcasting. The public service remit is confined to the *"fulfilment of the democratic, social and cultural needs of each society"*[260]. The aid given to a public service broadcaster is qualified as state aid under Article 87 (1), even when it just covers the net costs of the public service obligations.[261] If aid is given for clearly cultural purposes only, it will be covered by the exemption under Article 87 (3) (d), otherwise Article 82 (2) is applicable and the three criteria stated above have to be met. Importantly the communication sets out that states have to clearly define the public service remit but are left relatively free in the scope of the definition[262]; that an appropriate authority or body should monitor the application of the rules enacted by the state; that public service broadcasters have

[257] Commission, *Communication on services of general economic interest*, COM (2000) 580 final.
[258] Commission, *Communication on the application of State aid rules…*, para. 6.
[259] *Idem*, Recital 8.
[260] *Idem*, Recital 13.
[261] *Idem*, para. 19; See also Case T-106/95 *FFSA v. Commission* [1997] ECR II-229.
[262] *Idem*, para. 33 which states: *"However, given the specific nature of the broadcasting sector, a 'wide' definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity."*

to meet transparency requirements as set out by the Directive 80/723/EEC[263]; and that the aid supplied has to be strictly proportional. *"In carrying out the proportionality test, the Commission will consider whether any distortion of competition arising from the aid can or cannot be justified with the need to perform the public service as defined by the Member State and to provide for its funding. When necessary the Commission will also take action in the light of other Treaty provisions."*[264]

Lastly it is to mention that the Commission also regards this communication applicable to private broadcasters inasmuch they are entrusted with duties of a public service character.[265]

c) *Must carry provisions*

In most Member States of the European Union must carry provision in regard of, almost exclusively, cable networks exist. Cable network operators have to share their capacity with designated channels. These obligations mainly apply to public service broadcasting. Techniques that are employed range from designating specific criteria over designating types of channels to setting lists of criteria. Must carry obligations are distorting competition in that they disadvantage cable operators, but they are of high importance to media pluralism since they, in many cases, oblige operators to provide content, which they would otherwise not provide. Article 31 of the Universal Service directive[266] now expressly recognises must carry obligations. It sets out that:

> *"Member States may impose reasonable 'must carry' obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review." (underline added)*

It is thus made clear that the same obligations of clear definition, transparency and proportionality as with regard to local loop access apply. In general in the Member States the

[263] *Idem*, para. 51.
[264] *Idem*, para. 60.
[265] *Idem*, para. 14.
[266] European Parliament and the Council, *Directive on Universal Service and Users' Rights relating to Electronic Communications Networks and Services*, 2002/22/EC, [2002] OJ L 108/51.

obligations occupy less than 50% of the capacity, in Germany however the quota can even reach 100%.[267] The remuneration systems for the cable operators are extremely varied and range from full compensation in e.g. Germany, over no compensation in e.g. the Netherlands, to payment to the broadcasters for carrying their content in France. In order not to unfairly influence the positions of the network operators, the report by *Eurostrategies* argues for a harmonisation of these provisions and for appropriate remuneration to be provided to network operators.[268]

6. The reform of E.U. competition law

Starting in 1999 the E.U. is in the process of adapting its competition regime. It was considered that the current system became unworkable since already too many cases under Article 81 (3) and Article 82 had to be dealt with by the Commission. With the prospect of enlargement it was considered that the present regime urgently had to be amended. The first step of this process was the modernisation of Regulation 17 with a shifting of competences to national authorities with regard to Articles 81 and 82 EC Treaty.[269] In the planned decentralised system the Commission will retain a coordinating, keeping the sole right to propose legislative texts, adopt regulations and issue notices and guidelines and by continuing to issue decisions which will serve as precedents.[270] *Jones* and *Sufrin* see risks in the effective implementation of this co-ordination.[271]

In a second step the Merger Regulation is being renewed.[272] Here it is not so much competences that are shifted but the issues of allocation of cases and definition of concentrations and dominance, which are clarified. The union seeks to institute a system whereby the allocation of cases can take place at an earlier stage of proceedings. The Commission should also be allowed to invite Member States to refer cases to it.

One of the main advantages of European Competition law in addressing pan-European media concentrations is that it works on a pan-European level and that the E.U. competition

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[267] Eurostrategies, *Assessment of the Member States Measures aimed at Fulfilling Certain General Intreest Objectives linked to Broadcasting, Imposed on Providers of Electronic Communication Networks and Services in the Context of the New Regulatory Framework*, Final Report, part 1, 2003, http://europa.eu.int/comm/information_society, accessed on 8 April 2003, p. 38.

[268] *Idem*, p. 109.

[269] Commission, *White Paper on Modernization of the Rules implementing Articles 85 and 86 [now Article 81 and 82] of the EC Treaty* [1999] OJ C 132/1.

[270] *Idem*, paras. 83 – 90, see also Commission, *Proposal for a Council Regulation implementing Articles 81 and 82 of the Treaty*, COM (2000) 582 final.

[271] A. Jones, B. Sufrin, *EC Competition Law: Text, Cases, and Materials,* Oxford, Oxford University Press, 2001, p. 1028.

[272] Commission, Proposal for a Council Regulationon the control of concentrations between undertakings COM (2002) 711 final, [2002] OJ C 20/4.

authority has, in political terms, greater bargaining power than national authorities vis a vis major concentrations. Therefore the shifting of competences downwards to national authorities is to be viewed in a critical light. The shifting of competences regarding Article 81 and 82 might raise fewer concerns, but it can only be hoped that the E.U. sticks to the stipulated provision that merger cases will be handled by the authority, which is best placed to deal with them. It is also hoped that with budgetary constraints and increased case load resulting from enlargement the Commission will not try to resolve the lack of capacity by a strategy of delegation to national authorities who have too little bargaining power vis a vis the merging companies.

C. Conclusion

From the first part of this chapter it could be seen that European Union law respects media pluralism and attributes special importance to it in relation to public policy exceptions under the Treaty. Certain policies of the E.U. are also directed at ensuring media plurality in Europe through the stimulation of European productions and the dissemination of European works. However a specific competence to deal with plurality concerns related to media concentrations is missing. Due to the lack of this specific media ownership regulation only the E.U. competition authority deals with structural problems of the media market. Within the E.U. also a tendency of giving an increased role to competition law can be noticed. The new regulatory framework for electronic communication specifically expresses this. It has therefore been tried to assess the possibilities for the E.U. competition authority to safeguard media plurality.

It has been set out in Chapter (I) that market definition is of key importance in addressing the issue of dominance in any given market. Since, through the process of horizontal and vertical integration, certain media companies or concentrations have become very powerful and are possibly threatening media plurality, it has been the question whether competition law, with its present market definitions, could possibly address the problem of this dominance. E.U. law works with rather narrow market definitions in the media sector, defining separate markets for e.g. free-TV broadcasting, pay-TV, pay-TV services and advertising. This narrow market definition has its roots in the basic concept of demand side substitutability. In its case law the Commission and the Courts have however shown that they accept that dominance on one of these markets could lead to dominance on a related market (spill over effects). They also have accepted that in relation to free-TV the audience share is

an important factor in showing the dominance of a company/concentration. Still, the present market definition does not take account of convergence in a way that it would resolve problems of media pluralism *per se*. In a study for the Commission on the market definition in the media sector it has been argued to take account of the value chain of the relevant products and services in defining the markets. Although this argument was presented purely from an economic perspective, it seems to hold the possibility of more adequately assessing dominance from a media plurality viewpoint in taking account of both a cross-ownership dimension and a more international dimension.

With regard to content plurality, competition law allows for regulation by member states if they meet the criteria of clarity, transparency, appropriateness and proportionality. The same holds true for state aids.

With regard to competition law and its ability to address access restrictions it is to mention that in principle access is facilitated, however on issues such as access to certain essential facilities the case law is rather strict.

Concluding Remarks

Freedom of speech under Article 10 ECHR, as a functional element of a democratic society does not only consist of the freedom of the individual to voice its opinion, but also, necessarily consists of the possibility of all individuals and groups in a society to voice their opinions and concerns in a public forum. Active access to the public forum, however, is not the only concern of free speech. Equally important is freedom of information, meaning freedom of passive access the public forum in order to receive information, which is relevant to the citizen. Theories of democracy are based on the idea that the provision of information should enable all individuals or groups in a society to become active on their own behalf and to become active in defending their interests. The importance of the media is best demonstrated by looking at the media as equalling the public forum in a society. Not only is this public forum entrusted with providing equal access to all and providing sufficient information for all citizens about events which influence their personal lives, but also it is hoped that by receiving information and by having the opportunity of access, individuals will be enabled or educated to become politically active citizens. Clearly here the media is attributed a role of influencing public behaviour for the benefit of democracy. Non-discriminatory access to the media and balanced information in the media for all diverse groups of society is thus a *conditio sine qua non* for a veritable democracy. Other democratically relevant functions of the media are the function of control over the government and the private sector and also a function of representation of groups, which is very important in diverse societies.

In order for the media to fulfil all democratically relevant functions it must be plural in content, meaning it must be reflecting society and its interests. The ECtHR confirmed that under Article 10 states are the ultimate grantors of pluralism. What is not desirable is a powerful media which itself creates subjects and objects of public interests rather then that it reflects and analyses them. (This tactic is all too common and can be linked to the business interest of media companies, whose revenues are linked to the seize of their audience and reader shares.)

Structurally the public forum or the overall media environment consists of various channels of communication such as newspapers, broadcasting and nowadays the Internet. These channels are partly interchangeable, but overall they are marked by characteristics, which distinguish them from each other. Content passes through these channels of

communication of the public forum in a sometimes complex manner. The value chain of content can be split into three main stages: production, editing and distribution. All structural levels of content and all channels of communication consist of mostly privately owned companies. Most of these media companies compete with each other for the attention of the audience or audience shares. Those companies, which are private businesses generate their income through either direct payments of the audience for products/information or through advertisements or both. In fact, advertisements are the main revenue for most media companies. Advertisers, on their part, are interested in targeting a relatively large audience, witch fits the description of their prospective buyers, over a relatively long period of time. Therefore a media company wanting to attract advertisers will try to attract an overall large audience on a stable basis or to attract a specialised audience on a stable basis. The battle for audience shares is increased in intensity by the fact that product costs, especially in the broadcasting sector, are only the production and transmission costs; multiplication of the product itself is almost for free. The effect of this is that revenues can be increased by reaching a bigger audience, whereas the costs for the companies stay almost the same. This economic particularity in the media sector together with the process of convergence and the liberalisation of regulation has lead to media markets which are characterised by an oligopolistic structure with a few entities dominating each market or several markets at the same time.

Dominant positions of media companies are seen to be dangerous on the one hand for a democracy, since they can lead to monopolisation of public discourse and to a non-public discourse when media companies are using sensationalist tactics in the competition for the attention of the audience; on the other hand dominant positions can be dangerous for free competition on markets, if they are coupled with anti competitive behaviour. Dominance is thus countered by both, general competition law and specific media law.

Even though a differing notion of dominance is at stake in both fields sufficient overlaps exist to justify an integrative approach of the specific features of media law into more general competition law. Firstly, on a European level specific legislation to address media concentrations is missing. Secondly the E.U. competition authority is much better placed to address all issues relating to pan-European media concentrations. And thirdly an integrative approach by the E.U. competition authority to media plurality is simply more efficient.

In general, media laws are targeted at achieving a balance of information and overall content, by restricting the audience share of big companies and by furthering the diversity of

structure and content through positive measures; they are content focused. Competition law is aimed at achieving a structural balance between companies in general. It is applied equally to the structure of the transport industry and the structure of the media industry. It works by firstly defining a relevant product and geographical market and then by countering abusive behaviour on this market by dominant companies. The overall aim of competition law is to achieve allocative and productive efficiency of the defined markets. In discussions about media ownership regulations, the argument that competition law on its own can address all media pluralism concerns, is raised with increasing frequency. Since regulators have already been convinced by such argumentation on several occasions, lenient thresholds have been adopted or previously existing thresholds have been abandoned. For example the USA recently lowered their already low thresholds of ownership significantly and the UK is contemplating to lower its respective thresholds. Such argumentation is not adhered to here. The present author clearly acknowledges that competition law can only partly protect media pluralism. In the absence of specific legislation the protection of media plurality by the E.U. competition authority is a second best. The capabilities of the E.U. competition authority should however not be neglected. It also seems that the E.U. competition authority itself not fully exploring its capabilities to contribute to media plurality. Therefore central research question of this thesis was: ***How far can the European Union competition authority help in safeguarding plurality of the media in Europe?***

At the end of Chapter I, a set of synergies between the two different fields of regulation has been identified. Firstly a synergy was found in relation to dominance and ownership regulation and secondly in relation to access to the media. Furthermore there exists an overlap, characterised by negative integration, in regulating state aids, which are given in order to further media plurality.

European Community law, which is of a mainly economic nature, recognises human rights as its principles and the European Court of Justice has various times expressly recognised Article 10 ECHR including media plurality as being of fundamental importance in interpreting public policy exceptions. Still the obligation of ensuring media plurality is seen as task and competence of the Member States.

In competition cases in the media sector concerns of media plurality are reflected as concerns of dominance and as concerns of access to the market and access to the consumer. In looking for the maximum approximation between competition law and media pluralism, the crucial question relates to the definition of markets and the definition of dominance under competition law and to the question of the importance of second order effects.

A first finding is that European competition law defines markets rather narrowly. This results from the cross-price elasticity test that is used as a tool to identify the size of the relevant product market. This test, examining substitutability of demand, is based mainly on the Commission's perception of consumer preferences in accepting one product as being interchangeable with another. By using this test different economic activities of one company are separated into distinct markets with separate levels of competition. For example separate product markets for free-TV, pay-TV, pay-TV services, advertising, cable infrastructure and so on exist. In principle, this bars the Commission form examining the overall dominance of a media company or conglomerate. Still, factors such as dominance in other upstream or downstream markets, such as ownership over a major part of important content rights and ownership of infrastructures are taken into consideration in finding dominance of a company or a conglomerate on a related market. Also, the geographical market is defined narrowly or sometimes not at all. Culturally based differences in preferences, as between the Flemish part of Belgium and the Netherlands have lead to the establishment of separate television markets for both territories for the purposes of competition law. The consequence of this narrow definition is that dominance in those narrowly defined markets will arise more easily, but that also the global picture of the situation of a dominant media company is not adequately analysed from a media plurality viewpoint. It has been suggested by a group of consultants that, in order to make competition law more accurate and more predictable in the media sector, market definition should be linked to the value chain of production. Adequate attention should be given to factors in upstream and downstream markets, which influence the size and the position of dominance of the market in question. In the view of the present author, such an approach equally could be of use in putting a stronger focus on the implications of dominance for media plurality.

A second finding concerns audience shares to be considered as second order effects. Dominance as seen from a media pluralist viewpoint relates to the total reach of a media company or conglomerate and more specifically to the total audience share of a concentration. The audience share is seen to equal a concentration's potential influence on the public forum and on public discussions. European Competition law does not primarily concern itself with audience shares as an indicator for dominance. This is especially true for free broadcasting, where no trade relationship exists between the viewer and the broadcaster and therefore abuse cannot be measured in economic terms. Audience shares are only taken as relevant indicators in determining a situation of dominance on advertising. Usually price increases, locking in of consumers, barriers to market entry and many other economically measurable factors are

more important in determining dominance. The Advisory Panel on Media Diversity of the Council of Europe, advocates for using the audience share as a standard tool for identifying dominance. This would be the necessary complement for approximating the aim of media pluralism with competition law. In the HMG case the Commission assessed the audience shares at stake gave them special importance. There is thus a readiness and capability to assess audience shares. Absent a trade relationship they can be taken into account as second order effects. For more coherence a clear mandate for the competition authority to take the audience shares as second order effects into account would be useful.

Access has become a main aim of competition law in particular in the field of the new electronic media. Access to content rights, openness of the broadcasting and publishing markets and access to infrastructure are now a declared key aim of competition law. The rationale is that where there is access there is no economically harmful dominance because (potential) competition is secured for the future. Still a claim for access to (distribution facilities) is only permitted if this access represents an economic necessity and if it would be impossible for the company in question to survive otherwise. In trying to achieve openness of markets, the Commission recently started to negotiate with companies and conglomerates in order to change the conditions of proposed mergers rather then prohibiting mergers. For instance the AOL Time Warner merger was cleared, once Bertelsmann ceased to be part of the merger and once there was an assurance by AOL that its Internet music player would remain open for paying of music origination from other companies.[273]

In relation to state aids, competition law is clear. Aids are justified, if they are given for a clearly defined aim on a non-discriminatory, transparent and proportionate basis. Where there is any suspicion of protectionism, the European institutions will find that the aids violate competition rules. From a media pluralist view this seems fair, but it can be expected that some well intended measures to secure pluralism will be incompatible with competition law and that therefore the tools of media regulators could be progressively eroded.

In sum the E.U. competition authority seems well placed to safeguard media plurality. Firstly, with its position at a European Union level it represents a greater bargaining power than national authorities. Secondly, through slight modification of the market definition in cases of vertically integrated concentrations, many of the concerns of both competition law and media plurality can be addressed simultaneously. And thirdly, the Commission has

[273] See M. Pereira, *Vertical and Horizontal Integration in the Media Sector and EU Competition Law*, Brussels, 7 April 2003, http://europa.eu.int/comm/competition, accessed on 27 May 2003.

demonstrated that it is capable of dealing with second order effects by assessing content and audience shares. If these synergies would be utilised on a more streamlined basis, the E.U. competition authority could indeed become a guarantor of pluralism. A mandate for the competition authority to do so would significantly help. Arguably it could be based on Article 308 of the Treaty.

Since I do not want to appear overly enthusiastic here, I want to repeat that the E.U. competition authority will never be capable of addressing all media plurality concerns. It specifically will not address the issue of the shifting of content to pay-TV and it is also quite stringent in its provision of access to essential (distribution) facilities.

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