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DICHIARA

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0. – Introduction and methodology

The aim of this work is to discuss the appropriate regulative approach capable of providing the highest possible degree of pluralist information in the media sphere.

Trying to achieve this demanding goal, a double approach has been taken. The analysis of the regulative instruments currently adopted in the European Countries has been combined with an analysis of the inner structures of the market in which any sector of the information industry (press, broadcasting, Internet) operates. In contemporary times, information is a business and business follows its own rules. Nevertheless, information is also a necessary ingredient of democracy and a fundamental value of contemporary society. Any regulative tool cannot disregard any of these two layers – the economic threshold and the democratic principle. Trying to implement the latter at the detriment of the economic implications would mean disregarding the mechanisms of free market and affecting the position of the enterprises operating in the market. In the other way round, if only the economic interests at the stake were considered, the role of pluralism in the democratic debate would not receive a sufficient protection. The survey had thus to be conducted on these two parallel pathways, analysing both regulation and its economic implications.

Chapter 1 will discuss the legal and constitutional threshold, identifying the role of pluralistic information in contemporary societies (par. 1.1), the constitutional guarantees in the European Countries (par. 1.2) and the European level of regulation (1.3).

Chapter 2 will discuss the economic threshold, defining what kind of efficiency is intended to be optimised in this survey (par. 2.1), explaining why the sole market mechanisms are not likely to provide the desired degree of pluralism, due to the nature of “public good” as a characteristic feature of information (2.2) and why competition has nevertheless to be implemented by the regulators (2.3).

Chapter 3 will eventually combine the two approaches, providing a reconnaissance of the pieces of regulation currently in force in each European Country for any market sector and discussing their pros and cons also from an economic perspective.

Chapter 4 will summarise the results of this survey, trying to identify the best possible regulative policy for “pluralism within the market” (which is not “pluralism out of the market”, nor “market without pluralism”) by using the figures provided by the Freedom of the Press Index (FPI).

At the end of this work, a significant consistency between theoretical assumptions and practical verification will be demonstrated, as well as the possibility for legislators to provide a regulative toolkit which is likely to succeed in enhancing a high level of pluralism in any Country.

1. – Law & Information

1.1 Media and democracy: the political role of information

Freedom of speech is commonly understood to be a founding value in every Western Country as one of the foremost means through which democracy operates, allowing free and open debate within the society. Democracy, as a model of social organisation, is basically founded on the concept of the rule of majority. "Consensus democracy" is a definition which reflects the idea that the formation of majorities must pass through citizen participation in discussing and comparing broad ranges of opinions, a process that is all the more democratic as many more points of view – including minority ones – are taken into account. It is obvious that, in order to participate in this debate, citizens must know what they are discussing – information is thus necessarily the basis of democracy.

The notion itself of information, as for its role within any society, might even abstract from a pluralistic characterisation: given that the interaction between information and democracy implies that the former influences the processes of forming and aggregating citizen preferences and orienting their political choices, for this purpose 'information need not stand in opposition to opinions, stories, rhetoric, or signals about values structures. Information might be a "fact"'[1].

The link between information and democracy, as commonly understood, is that the former allows the people to perform a role of scrutiny on the activities of public institutions: it is the so-called "Fourth Estate", or "watchdog" role of the press, referring to the capability of balancing the power of public bodies (Parliaments, Governments, politicians in general and so on) by holding them publicly

[1] B. Bimber, 'How Information Shapes Political Institutions', in D.A. Graber (ed.), *Media Power in Politics*, Washington, D.C., CQ Press, 5th ed., 2007, p. 9.

accountable[2]. While doing so, not only information makes the political process transparent, but also spreads knowledge about norms within the public[3], in a two-layered mechanism (when a journalist claims that something happened in breach of a certain rule, in the meanwhile obviously they inform those who did not know that such a rule existed about the rule itself).

Furthermore, the press has also played, since its early days, a fundamental role in shaping a common sense of national identity not only within the citizens but, more important, even within the Parliament members, creating a sense of interdependence between the society and its representative institutions, and some sort of additional legitimacy, which had never existed before and, furthermore, has been the real rationale for the ultimate establishing of majority rule[4].

In contemporary times, information is spread via mass media. Through the centuries, the information landscape has changed its features several times and has developed according to the changing features of society. The concept itself of "mass" media dates back to the 1820s, when in the U.S. the first printing technologies made it technically feasible to spread information to large shares of the national population; at the beginning of the following century, as the industry become more complex and decentralised, interest groups went involved in influencing the flow of information which eventually become more specialised. In the second half of the past century, with the advent of broadcasting devices, the industry turned back to a centralised organisation and, moreover, developed market-driven tendencies;

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[2] See W.L. Bennett, W. Serrin, 'The Watchdog Role of the Press', in D.A. Graber, *Media Power in Politics*, cit., p. 327, where "watchdog journalism" is defined as: '(1) independent scrutiny by the press of the activities of government, business, and other public institutions, with an aim toward (2) documenting, questioning, and investigating other activities, in order to (3) provide publics and officials with timely information on issues of public concern'.

[3] Y. Ezrahi, *The Descent of Icarus: Science and the Transformation of Contemporary Democracy*, Cambridge, Harvard U.P., 1990.

[4] G. Tarde, 'Opinion and Conversation', in T.N. Clark (ed.), *Gabriel Tarde on Communication and Social Influence*, Chicago, The University of Chicago Press, 1969 (originally published in French in 1898), p. 297 ff.

television, as a new medium reaching large shares of mass audience as never before, become capable of commanding the attention of national-scale audience and hence of influencing policy-making[5]. In contemporary times, from the 1990s on, the advent of digital technologies, like the Internet, has lead to a condition of information abundance, as there have never been so many contents available to the public as nowadays. Moreover, these contents are more complex, more specialised and less costly than before, and are available to those who have access to information technology and motivation enough to seek them, as in times of abundance customers have to dig for what they really want rather than just "running into" the few available pieces of news[6].

A collateral effect of the current new landscape involves untold forms of political organisation: it has been stated that 'technological change in the contemporary period should contribute toward information abundance, which in turn contributes toward postbureaucratic forms of politics'[7]. "Postbureaucratic politics" refers to the shift in the relationship between the whole society and the politicians, especially intended as the Government in charge at any time. The influence of news coverage of certain topics on policy-makers has been largely demonstrated: a large coverage and intensive exposure on media create a feeling of urgency within the public; therefore this feeling of urgency raises from the masses to the policy-makers and modifies their agendas, pushing them to provide responses and eventually pass legislation capable of satisfying these needs. This process could be considered as a

[5] See. J. Zaller, *The Nature and Origins of Mass Opinion*, Cambridge, Cambridge U.P., 1991, p. 13 ff.
[6] According to a model developed in the 1990s (M.X. Delli Carpini, S. Keeter, *What Americans Know about Politics and Why It Matters*, New Haven, CT, Yale U.P., 1997) people can learn more or less from news depending on three variables: opportunity (the availability of information), ability (their comprehension skills and education), and motivation (their interest and the willingness to seek for information). Motivation not only comes from a personal interest, but also from a sense of efficacy, the perception that being involved in politics and social matters is "fair" and "good". Moreover, both motivation and ability are influenced by the media environment, thus opportunity has a role in defining the other two variables.
[7] B. Bimber, 'How Information Shapes Political Institutions', cit., p. 14.

further marker of the importance of pluralism, as the more issues can be brought into the political agenda, the more legislative responses will be provided to the needs of the whole society. This inference is anyway affected by the way this mechanism works, that is far more emotional and less pondered than traditional "internal" legislative processes: evidence shows that audience attention is higher at the beginning of the exposure of a topic in the media (and the responses from the policy-makers tend to be short-term oriented, trying to cope with the feeling of urgency) and then lower and lower as time goes by (and in change the political responses turn to long-time ones)[8].

The "postbureaucratic politics" effect mainly relies on the friction between "media time" and "politics time". The latter has traditionally consisted of a slow-paced, pondered weighting of different possible solutions to any social issue, in search for a broad agreement among the different parties and groups within the society. "Media time", on the opposite, calls for fast or even immediate responses. Political parties have to cope with this new trend by modifying their internal organisation and procedures. The role itself of parties as a political machinery is shifting nowadays to the periphery of social and institutional processes. Political parties, rather than being forums for internal debates, can better handle with "media time" by relying on the strong personality of a leader, who must not waste time in collective deliberations with their party fellows and possibly has a strong enough charisma to "catch" the audience (that is, the electors) through the media. Parties thus modify not only their organisation but their ultimate mission as well, having a stronger incentive to achieve short-term (and audience-appealing) results rather than pursuing long-term, pondered policies. The need for a light, non-bureaucratic machinery capable of providing fast responses, which finds its apex in the emergence of leadership-oriented trends, involves, at different ranges, all the traditional

[8] See I. Yanovitzky, 'Effects of News Coverage on Policy Attention and Actions: A Closer Look Into the Media-Policy Connection', (2002) 29 *Communication Research* 422, 440 ff.

collective bodies of public life: not only parties, but also parliaments, government teams and so on, are seeing their roles, if not completely devaluated, certainly diminished and pushed aside. This trend has been considered as the result of 'the dictatorship of the present moment' and brilliantly defined as 'the mediocrity of mediacracy'[9]. The mediocrity is due to the pursue of short-time solutions that weaken the role itself of public debate leading towards the emergence of forms of populism: 'there is no time or space for public deliberation that would allow a well-founded public opinion to emerge, and, as a result, the public sphere relinquishes two of its previously constitutive functions in a democracy: validating opinions and providing political orientation'[10].

The ability of the media to drive changes in public opinion, by altering the perception of a controversy, the strength of any argument, the impact on everyday life and so on, has been also widely documented and demonstrated[11]. It has been concluded, in paradoxical but not wrong terms, that 'the media are more than a mirror on which public policy players illuminate their messages; rather, the media are the uncredited directors of policy dramas'[12].

It may be considered if nowadays the whole role of information is being considered far too overvalued. On the hand, 'on the whole, the quality of the news about modern society is an index of its social organisation. The better the institutions, the more all in interests concerned are formally represented, the more issues are disentangled, the more objective criteria are introduced, the more perfectly an affair can be presented at news. At its best the press is servant and

[9] T. Meyer, *Media Democracy. How the Media Colonize Politics*, Cambridge, Polity, 2002, respectively p. 106 and 104.
[10] T. Meyer, *Media Democracy*, cit., p. 126.
[11] See for instance R. Cobb, C.D. Elder, *Participation in American Politics: The Dynamic of Agenda Building*, Baltimore, MD, John Hopkins U.P., 1983.
[12] N. Terkildsen, F.I. Schnell, C. Ling, 'Interest Groups, The Media, and Policy Debate Formation: An Analysis of Message Structure, Rhetoric, and Source Cues', in D.A. Graber, *Media Power in Politics*, cit., p. 359.

guardian of institutions; at its worst it is a mean by which a few exploit social disorganisation to their own ends'[13]. On the other hand, it should be assessed first if the media can really play this role. Lippmann suggestively names this role 'the Court of Public Opinion'[14]. The author stresses how information outlets are sometimes seen as an organ of direct democracy and demanded to fulfil a role once attributed to legal institutes like, for instance, the referendum; but information cannot play this role.

Could the media be thought as a mean for a new sort of direct democracy? On the one hand, political parties are loosing their traditional role; the new pathways of the political debate directly flow from charismatic leaders to the masses, and on the other way round the masses can influence the political agenda through the media as noted above. Could this mechanism really work, little could be said about anti-democratic drifts; on the other way round, it would be perfectly consistent with the subsidiarity principle[15] to allot any function to the lightest possible bodies and the easiest possible procedures. If the citizenry and its leaders could communicate each other (and the former could legitimate the latter) via mass-media, parties and other intermediate bodies could be considered unnecessary sovrastructures. The issue at the stake here is that this system, irrespectively of its possible feasibility, severely lacks legitimation. Founding charters of contemporary democracies provide different forms of interrelation between those who govern and those who are governed, namely parliamentary representation. Parliaments by definition represent the whole citizenry, both those who contributed to elect the parliament and/or the government in charge, and those who did not, according to the hobbesian *pactum subjectionis* principle. Legitimating leaders and policies via media does not imply the same degree of full representation; it could work only and only if the whole society had the chance

[13] W. Lippmann, 'Newspapers', in D.A. Graber, *Media Power in Politics*, cit., p. 54.
[14] Ibidem.
[15] See T. Meyer, *Media Democracy*, cit. p. 126-128.

to participate in the "broadcasted debate" and express their opinions, that is completely different from the agenda-setting function played by the media.

It is anyway true that the media inform the citizens, shape the opinion within the society and by doing so eventually shape the politic agenda. An outstanding summary of this mechanism and a significance about it sounds like these words: 'by reflecting the distribution of opinion, the media exercise influence and control on the establishment in the name of the citizenry. This implies that participatory democracy at the very least requires not only an informed citizenry but and interactive one'[16]. Direct democracy via media would thus require two prerequisites as an informed *plus* an interactive citizenry. Contemporary mass communication could provide the first, but it is not enhancing the second.

Despite their potential in changing the traditional balance between the society and its formal institutions to advantage of the former, the news media also have a disruptive potential of undermining the traditional democratic institutions. Since the first days of radio broadcasting, the mass media were told to possibly increase interest and knowledge about different current affairs, but they do not increase active political participation, rather they appear to make the public apathetic and superficial about the issues of society. Lazarsfeld and Merton offer significant evidence of this detrimental process and name this mechanism the 'narcotizing dysfunction' of the media[17].

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[16] E. Katz, 'Mass Media and Participatory Democracy', in T. Inoguchi, E. Newman, J. Keane (eds.), *The Changing Nature of Democracy*, Tokyo, New York, Paris, United Nations U.P., 1998, p. 97.

[17] P.F. Lazarsfeld, R.K. Merton, 'Mass Communication, Popular Taste and Organized Social Action', in P. Marris, S. Thornham (eds.), *Media Studies*, New York, New York U.P., 2nd ed., 2002, p. 18 ff. (originally published in W. Schramm (ed.), *Mass Communication*, Urbana, University of Illinois Press, 1948). There is nevertheless a difference in contemporary media landscape if compared with the one from the times when the theory was developed: the chances for interactive citizenry mostly come nowadays from the Internet. In some studies it has been considered that, while increasing the power of masses, the Internet contextually reduces the power of State institutions to govern (see R. Rosencrance, *The Rise of the Virtual State*, New York, Basic Books, 1999; D.W. Drezner, 'The Global Governance of the Internet: Bringing the State Back In', (2004) 119 *Political Science Quarterly* 477). The Internet certainly allows networks of particular interests to aggregate, thus permitting these non-

A narcotized citizenry is the opposite of an interactive one: the role of the media thus cannot be substituting the classic means of democracy, rather sitting aside and strengthening them. According to the specificities and the features of each different medium, they should rather perform a complementary role in public deliberation[18].

The way in which the media could fulfil this role is creating a public sphere for discussion, independent from political power and representative of the full range of political and economic interests expressed within the society[19]. It is exactly at this point that pluralism turns important: once stated that the role of information is to constitute a public sphere for debate, providing the necessary instruments for political participation, it cannot be "a fact" as proposed above. It must be, on the contrary, a set of different points of view competing to create public opinion[20].

Despite their strong influence, it is often considered that mass media fail to provide truly pluralist information. On the one hand, some claims exist that news reporting are often shallow, lack deep and critical analysis and do not provide the citizenry the needed kind of information to fulfil the media's role in public debate[21].

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state actors to increase their voices, but as for now, mostly due to the technological divide that does not allow an access to digital technologies as wide as for other, traditional media, it is still not possible to depict the Internet as a mean for a wholly interactive citizenry; it is indeed disputable if it will ever be.

[18] H. Wessler, T. Schultz, 'Can the Mass Media Deliberate? Insights from Print Media and Political Talk Shows', in R. Butsch (ed.), *Media and Public Spheres*, London, Palgrave-MacMillan, 2007, p. 26. The authors also note that each medium is likely to offer a specific contribution to public debate: while the press is likely to deal with specific topics more in depth, TV talk shows can offer a quicker and more comprehensive understanding of different challenging views.

[19] See J. Curran, 'Rethinking the Media as a Public Sphere', in P. Dahlgren, C. Sparks (eds.), *Communication and Citizenship: Journalism and the Public Sphere in the New Media Age*, London, Routledge, 1991, p. 47-52.

[20] See J. Habermas, 'Civil Society and the Political Public Sphere', in C. Calhoun, J. Gerteis, J. Moody, S. Pfaff, I. Virk (eds.), *Contemporary Sociology Theory*, Malden, MA, Blackwell, 2002, p. 357-359. See also N. Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', in C. Calhoun (ed.), *Habermas and the Public Sphere*, Cambridge, Mass., MIT Press, 1992, p. 123, underlining that Habermas strongly stresses that the public sphere necessarily must consist of 'multiple, competing and alternative publics in which participants negotiate differences about policy that concern them all'.

[21] See W.L. Bennett, *News: The Politics of Illusion*, New York, Longman, 4th ed., 2001, p. 5.

According to some criticisms, an ongoing tendency towards alignment and decrease in quality ("tabloidization") is undermining the effectiveness of information, and this trend could eventually be interpreted as a distortive effect of competition. The underlying assumption of this argument is that media outlets, in a competitive landscape, finally compete lowering the level of their service in order to make their product appealing for larger shares of the audience.

A quite amusing anecdote about this supposed drift was once told by the well-respected then commentator for *CBS Evening News* Bill Moyer: 'the line between entertainment and news was steadily blurred. Our center of gravity shifted from the standards and practices of the news business to the show business. In meeting after meeting, "Entertainment Tonight" was touted as the model – breezy, entertaining, undemanding. Tax policy had to compete with stories about three-legged sheep, and the three-legged sheep won. ... Once you decide to titillate instead of illuminate, you're on a slippery slope'[22]. If this sight from inside is correct, competition is likely to have a bad effect on the quality of information. It is even perceived in common-sense experience that the three-legged sheep is not an isolated case. Standardisation of stories and the merge of information and entertainment (the word "infotainment" has been created to indicate this drift) are the current trends that any individual from the audience can directly experience. It should be asked now if they depend on random journalistic misbehaving or there is a deeper rationale for them – and market mechanisms are strongly under suspicion.

From the 1990s on, the whole amount of available information in the Western Countries; nevertheless, it seems that 'the availability of increasing amounts of information in a variety of public settings has not contributed to the "public interest". Those who mediate information are themselves caught in a web of competitive

[22] Quoted in 'Bill Moyers Interview Creates a Controversy', in *The Free Lance-Star*, 10-9-1986, p. 46; the original interview in which Moyer first told the three-legged sheep anecdote was released to *Newsweek*, probably a week before.

media'[23]. This suspicion is confirmed by analysing how the market for news works. The pursuit of profit can be seen indeed as an incentive to provide 'to an ever expanding audience' a product that 'must be homogeneous for *Homo* genus in the mass'[24]. Five ways in which political communication is affected by the business of the news have been identified[25]. First, the effect of advertising, which possibly exercise a sort of veto over those contents undesirable for advertisers. Second, the raise of market journalism, that is the pursuit of audience by increasing the offer of "soft-news" stories, more appealing for a wide public (the "infotainment" drift seen above). Third, cost cutting, which is particularly affecting the provision of the most expensive contents as foreign news (in the form of closing foreign bureaus). Fourth, the threat of libel (which technically is not an output of market mechanisms) and, fifth, the increasing link between media companies and politicians, the former having the power to orient the success of campaigns and the latter having the power to pass legislation in favour or against the media companies. A pronounced assessment of the whole effects of these market forces is thus that 'a close look at the economics of the news dispels the popular myth that there is a free market of newspapers, newsmagazines, and television channels in which news organizations thrive because they meet the demands of their readers and viewers – and would go out of business if they did not. The truth is that the audience does *not* get what it wants'[26].

This is not only an issue that involves only the inner quality of news, obviously: it is a far deeper issue, as it involves the role itself of information in the

[23] R. Negrine, 'The Media and the Public Interest: Question of Access and Control', in M. Aldridge, N. Hewitt (eds.), *Controlling Broadcasting. Access Policy and Practice in North America and Europe*, Manchester, Manchester U.P., 1994, p. 67.
[24] D. Cater, *The Fourth Branch of the Government*, Boston, Houghton-Mifflin, 1959, p. 2-3.
[25] See B.H. Sparrow, *Uncertain Guardians. The News Media as a Political Institution*, Baltimore and London, The John Hopkins U.P., 1999, p. 76-94.
[26] B.H. Sparrow, *Uncertain Guardians*, cit., p. 101.

public sphere and in consensus democracy, since poorly informed citizens are citizens unable to make pondered choices[27].

Even if access to differentiated information has a remarkable value for the democratic life of a society, pluralism is nothing that can be directly provided by the State itself. In every democratic Constitution, freedom of speech is established in order to prevent the State from limiting the possibility to speak freely; imposing on anyone the duty to say something – even if the most significant information – would obviously be a severe breach of this principle. The legislator cannot directly provide pluralism, but can regulate the market in order to provide the best conditions for the largest possible spread of diversified contents and points of view. An agreeable formula states that 'the role for the regulator in this context is to avoid a battle for audience maximisation resulting in lowest-common-denominator programming which drives down programme standards and diversity'[28]. The challenge of this survey is thus trying to combine market forces with democratic interests, analysing what regulation is more likely to strive the right balance among the economic interests of the media companies, the role of competition and the degree of diversity in the information landscape which allows the citizenry to enjoy a true participatory democracy.

1.2 Constitutional guarantees for information within the European Countries

Theory and constitutional provisions in the European States do not appear to walk together. It has been noted above the basic role of pluralism within any democratic society; despite it, an explicit reference to the value of pluralism is difficult to find in any constitutional charter. Furthermore, even a statement of a right

[27] As stressed by J.H. McManus, *Market-Driven Journalism: Let the Citizen Beware?*, London, Sage, 1994, p. 64-69.
[28] M. Feintuck, M. Varney, *Media Regulation, Public Interest and the Law*, Edinburgh, Edinburgh U.P., 2006, p. 83.

to receive information is sometimes missing. The typical provision for free speech in any Constitution is limited to grant that public powers will not interfere with the freedom of expressing individual opinions, which is intuitively significantly different from a right to receive pluralistic information. Despite its fundamental contribution to democracy, pluralism is not commonly acknowledged in democratic Constitutions.

This discrepancy can be explained by the historic and philosophic raise of the common understanding of freedom of speech[29]. The first, and most historically and politically relevant, claims for freedom of speech are those from John Milton[30] and, later, from John Stuart Mill[31].

When Milton writes his outstanding work, England, as well as the whole continent, is going through a religious, political, social and economic crisis. The Lutheran Reformation, the Catholic Counter-Reformation and the Inquisition have seriously affected the possibilities for free press. The situation in England, if possible, is even worse, due to the political instability resulting from the enduring contrasts between the King and the Parliament under Elisabeth I, James I and Charles I. Furthermore, since when the House of Stuarts has become Monarchs of the Kingdom of Great Britain and Ireland, disputes have arisen between the Crown and the Church. In this context of unstable balance among different powers, a trend towards the control of the press arises: in 1529 King Henry VIII publishes a comprehensive list of forbidden books and established a system of licences for printing. The system of controls develops and then reaches its apex with the Decree of the Star Chamber in 1586, prohibiting the publication of any book contrary to statute, injunction, ordinance and letters patents, as well as any ordinance set down by the Company of Stationers[32]. This is the context in which *Aeropagitica* was authored. Milton's first

[29] See J.B. Bury, *A History of Freedom of Thought*, Oxford, Oxford U.P., 1951.
[30] *Aeropagitica. A Speech For the Unlicenc'd Printing to the Parliament of England*, London, 1644.
[31] *On Liberty*, London, Longman, Green, Longman, Roberts & Green, 4th ed., 1869.
[32] For a more comprehensive depiction of freedom of the press and censorship in those years see *ex multis*: F.S. Siebert, *Freedom of the Press in England, 1476-1776*, Urbana, University of Illinois Press,

thought is obviously that printing should be let free from any governmental authoritative power to ban it from circulation: freedom of the press consists basically of freedom from censorship.

The political rationale for this approach is lately translated in a legal approach for limited government and from there it is transferred to constitutional charters: at the time when the first modern Constitutions were written, freedom of speech is commonly encompassed in the catalogues for civil liberties, those that require the Government and public bodies to "keep their hands off" individual freedoms.

In the earlier stages of positivisation of rights, the dominant approach is a conception of rights as the pledge that the sovereign authorities will renounce certain privileges and respect legal procedures, according to the earliest doctrines of limited government. In England, the doctrine of limited government (founded on the sovereignty of the King in Parliament, meaning two sovereign but separate authorities that can only jointly exercise the full power) was the background context in which important documents in the history of rights were released: the Petition of Rights of 1610, the Petition of Rights of 1628 (which also encompasses religious freedoms, Art. 7-8, a concept close to freedom of speech, especially in those years), the Bill of Rights of 1689. All these documents enshrine a negative conception of rights as grants of "non-interference" in individual activities entitled by public authorities: these two characteristic of rights (their individual and negative nature) were further developed in the works authored by Thomas Hobbes[33] and John Locke[34] and transferred into the Bills of Rights of the American colonies. The French Declaration of the rights of the man and of the citizen (1789) does not go far as it

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1965; C.S. Clegg, *Press Censorship in Elizabethan England*, Cambridge, Cambridge U.P., 1997; M. Mendle, 'De Facto Freedom, De Facto Authority: Press and Parliament, 1640-1643', (1995) 2 *The Historical Journal* 307.

[33] *Elements of Law Natural and Politic*, 1640.

[34] *Essays on Natural Law*, 1660-64; *Two Treaties on Government*, 1689.

acknowledges four basic 'natural and imprescriptible rights of man' as liberty, property, security and resistance to oppression.

All the earlier Constitutions of the European States[35], passed in the following years, share this underlying assumptions: examples can be taken from the Spanish Constitution of 1812 (Art. 371, providing that the press will not require any endorsement or licence), the French Constitution of 1814 (Art. 6, granting freedom of the press, although some legal restrictions on misuse are provided), the French Constitution of 1830 (Art. 7, prohibiting censorship), the Italian Albertine Statute of 1848 (Art. 28, granting freedom of the press, although penalties for misuse are provided), the German Constitution of 1849 (Art. 143-148, granting freedom of thought and religion and prohibiting *ex ante* repressive measures on the press). The apex of this approach was, in those years, reached when Georg Jellinek[36] developed his theory about 'subjective public rights', where public authorities are seen as the original addressees of fundamental rights and allow the individuals to be holders of the same rights; individual rights are hence the result of individual demands limiting the power of public authorities.

In the early years of the XX century the theory of subjective public rights will be disavowed by the Weimar Constitution, but the classic approach to freedom of speech will not be challenged by any mean. It seems that the negative and individualistic conception of freedom of speech is so deep-seated that, through the centuries, the constitutional legislators have not significantly shifted from it[37].

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[35] See G.F. Ferrari, 'Le libertà e i diritti: categorie concettuali e strumenti di garanzia', in P. Carrozza, A. Di Giovine, G.F. Ferrari (eds.), *Diritto costituzionale comparato*, Roma-Bari, Laterza, 2009, p. 1027-1037.

[36] *La dichiarazione dei diritti dell'uomo e del cittadino*, originally 1895, Italian translation Roma-Bari, Laterza, 2002.

[37] About the influence of society changes on the fruition of rights, see N. Bobbio, *L'età dei diritti*, Torino, Einaudi, 3rd ed., 1997, p. 66-85. More in general, see also C. Grewe, H. Ruiz Fabri, *Droits constitutionnels europeens,* Paris, PUF, 1995; P. Häberle, *Le libertà fondamentali nello Stato costituzionale*, Roma, Carocci, 2005.

On the contrary, the original argument from Milton and Mill was broader than the strict statement of it lately flown into constitutional charters. It has been noted that 'free speech is best constructed as a generic or "umbrella" short-hand term for a number of distinct freedoms'[38]. Milton himself, while is commonly acknowledged as the author of the first masterpiece of political thought about freedom of speech, explicitly titles his work to the freedom of the press, that technically is a different activity as it involves another action than speaking and, furthermore, is a bit less individualistic as for its scope (it is not just a one-to-one communication, but much more "social" in its purposes: Milton is the first, *ante litteram*, supporter of "freedom of the media"). Mill, writing what is a broader work (in its scope) about the relationships among individuals and public authorities, titles a chapter 'Of the liberty of thought and discussion', which are again not exactly the same activity as just speaking – they require an intellectual (and not visible nor material) activity as the developing of a personal opinion and then the possibility to communicate it by different means, as "discussion" is something that necessarily involves two or more people, but not necessarily the act of speaking: a written discussion could be imagined as well.

The term "free speech" should necessarily be considered as a short expression to indicate much more than just the possibility to speak freely: even intuitively, for instance, such a freedom makes some sense only if it involves to possibility to speak to someone else – it would be pointless otherwise – and it is hence a *political* freedom in this sense. Freedom of speech means the guarantee of being entitled to speak freely and listened by someone else; the reverse side of it is thus what would be called, by using the same oversimplification, "free hearing" and it is commonly referred to as "freedom of receiving information". It is quite uncanny that, while freedom of speech has been widely protected all over the Western societies in

[38] A. Haworth, *Free Speech. The Problems of Philosophy*, London, Routledge, 1998, p. 8.

modern times, freedom of receiving information – without which freedom of speech would be no more than the possibility of speaking alone – has received much less acknowledgement.

It is already evident from the start – as even Milton thinks about "freedom of speech" and writes about "freedom of the press" – that what matters is not the act itself but the underlying rationale. The most pregnant definition would be "freedom of expression" as it indicates the aim rather than the mean. The same rationale for "freedom of expression" can be applied to a wide range of acts, all of them theoretically worth of legal protection (freedom of the press, freedom to participate in political demonstrations and public meeting, freedom of teaching, freedom of arts, and so on); in the end, all these rights are *political* in their nature and could be placed under a more comprehensive (but much less easy than "freedom of speech") "umbrella" definition as the "right to give 'a significant contribution to the debate'[39]". The political layer of freedom of speech and its contribution to democracy has been further highlighted stressing that the protection granted to individual expression has a specific role as a safeguard for the collective decision-making process, especially in discussing and deciding policy objectives and procedures[40]

As for philosophy, one can agree that 'the liberty of thought and discussion [has been treated] as the model – the "paradigm" or pattern – to which any freedom one might well want to characterise as an exercise of free speech must correspond'[41], but as for legal and constitutional interpretation different pathways are followed and the boundaries of the possibility to apply such a paradigm to analogous, but not explicitly stated, situations are stricter. It was not by chance if, in contemporary Constitutions, many of the correlated situations that could be encompassed under the paradigm (as, for instance, freedom of religion and freedom

[39] T. Scanlon, 'A Theory of Freedom of Expression', (1972) 1 *Philosophy and Public Affairs* 204.
[40] See A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, New York, Harper&Bros., 1946; Id., *Political Freedom: The Constitutional Powers of the People*, New York, Greenwood, 1965.
[41] A. Haworth, *Free Speech. The Problems of Philosophy*, cit., 24.

of teaching) are explicitly acknowledged, in some cases in different articles than the ones provided for freedom speech, while others are not.

Among those that are not stated in Constitutions, but theoretically encompassed in the paradigm, the value of pluralism can be found. Nevertheless, even in the earliest works about "freedom of speech" a seed of the value of pluralism can be found, when Mill states that 'one of the principal causes which make diversity of opinion advantageous [...] [is] when the conflicting doctrines, instead of being one true and the other false, share the truth between them [...]. Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners. On any of the great open questions [...], if either of the two opinions has a better claim than the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority'[42]. In these words by Mill an outstanding summary of the value of pluralism – even if the word itself was unknown by the author – can be read: the contribution to democratic life of comparing different opinions; the necessity that this comparison is made through a public debate – that is through the media in contemporary times – as the individuals are unlikely to successfully engage in such a tough task by themselves; and even the necessity to offer some sort of support to the weakest opinions – by setting up specific policies and regulation, one would say nowadays. Unfortunately, this is not a seed that gave rise to a flourishing plant within the contemporary Constitutions of the European Countries[43].

[42] J.S. Mill, *On Liberty*, cit., p. 252-254.

[43] Not even in the U.S. experience, since 'the Supreme Court has tended to adopt an individualist approach', rather than a socially oriented one (D. Feldman, 'Content Neutrality', in I. Loveland, *Importing the First Amendment. Freedom of Expression in American, English and European Law*, Oxford, Hart Publishing, 1998, p. 143).

The "negative" approach (just granting freedom of expression from undue interferences from public authorities, the most common hypothesis being censorship) is the approach that can be commonly found in these Constitutions. In some cases, the wording is so generic that even an explicit recognition for the mass-media to be considered in these provisions is missing. In the Czech Republic the Charter of Fundamental Rights and Freedoms[44] generically considers freedom of expression in Art. 17, without giving any specific acknowledgement for the media, as well as the Danish Constitution (Sec. 77), the Estonian Constitution (Art. 45 (1)), the Finnish Constitution (Sec. 12), the French Declaration of human rights of 1789 (Art. 11), The Latvian Constitution (Art. 100), the British Human Rights Act 1998 (Sec. 1 i.c.w. Sch. 1; Sec. 12).

In some other cases, the acknowledgment of the value pluralism is missing as well, but the constitutional provisions at least explicitly grant the same "negative" freedom to the mass-media, either in the same article where the basic principle is stated, or in an apposite article or paragraph. The Belgian Constitution does not provide guarantees for pluralistic information, but provides for freedom 'to demonstrate one's opinions on all matters' (art. 19) and free press (art. 25); similarly the Bulgarian Constitution acknowledges an individual right to free expression (Art. 39) and a similar, but separate, statement concerning mass-media (Art. 40); the Greek Constitution has a statement of freedom of expression generic enough to be commonly considered applicable to all the different kinds of media (Art. 14 par. 1) and an analogous, but tailor-made, provision granting freedom of the press (Art. 14 par. 2-3); the Hungarian Constitution is framed in the same way (respectively Art. 61 par. 1 and 61 par. 2)[45] as well as the Irish Constitution (Art. 40, § 6.1, i, considering the radio, the press, the cinema and so on), the Lithuanian Constitution (Art. 25,

[44] Act No. 2/1993 coll.

[45] Furthermore, Art. 61 par. 3-4 require that a majority of two-thirds of the votes of the Members in Parliament present are required to pass the laws on the freedom of the press and on the supervision on public radio, television and news agencies.

granting a general right to free speech; Art. 44, prohibiting censorship), the Dutch Constitution (Art. 7), the Polish Constitution (Art. 54, granting general freedom of expression, and Art. 14, ensuring 'freedom of the press and other means of social communication'), the Slovak Constitution (Art. 26, also providing that issuing of press is not subject to licensing procedures, but enterprises in the fields of radio and television may be), the Slovenian Constitution (Art. 39, considering 'the press and other forms of public communication'), the Swedish Fundamental Law on Freedom of Expression[46].

The sole exceptions, where a claim for pluralism can be found, come from Austria, where Art. 1 (2) of the Constitutional law on assuring the independence of broadcasting[47] imposes a duty to guarantee the variety in opinions on the broadcasters; from Portugal, where Art. 38, § 6 of the Constitution provides that the mass-media in the public sector will spread different lines of opinion; at a certain extent from Romania (where Art. 31 (5) of the Constitution states that 'public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time') and from Spain (Art. 20 of the Constitution: 'The law shall regulate the organization and parliamentary control of the social communications media owned by the State or any public entity and shall guarantee access to those media by the main social and political groups'): in these last two cases more than a proper "right to pluralism" there is a right to wide access to the media.

In some cases, a few Constitutional Courts have been able to catch the hidden seed of pluralism from the national Constitutions and apply the "paradigm" mechanism and widen the boundaries of non-explicit statements: in Germany, where the Constitution encompasses an explicit statement of freedom of expression for the press and broadcasting (Art. 5 (1)) but is silent about pluralism, the Constitutional

[46] SFS 1991:1469.
[47] *Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks*, 1974.

Court released some decisions[48] stating that it is a duty of the State to regulate the information industry so that both external and internal pluralism are ensured. In France, the *Conseil Constitutionnel* has stated that pluralism is an aim with constitutional relevance being a prerequisite for democracy[49]. In Italy, the Constitution (Art. 21) generically grants a 'right to express freely [...] by all [...] means of communication' and does not say a word about pluralism; nevertheless, in a series of decisions, the Constitutional Court has progressively acknowledged the interest of the receivers of communications[50], a "citizens' right to information" and a duty on public authorities to provide the maximum degree of external pluralism[51], an "absolute individual right to information"[52], and a principle, implicitly arising from the Constitution, that the maximum degree of external pluralism should be provided in order to fulfil the individual right to information[53].

Both the German and the Italian Constitutional Court operate a double logic inference: first, they deduce a passive layer of freedom of expression (that has been called above "right to information") and then they consider that the fulfilment of this right imposes that information should be provided in a pluralistic manner. The reasoning from the *Conseil Constitutionnel* is slightly different as it acknowledges the value of pluralism directly from its link with democracy.

These three experiences offer relevant examples of how constitutional wordings can be "stretched" to find pluralism where there is no explicit provision for it. The French case is less paradigmatic as the *Conseil* faces looser boundaries to its interpretative chances due to the peculiar "fluidity" of the *Bloc de constitutionnalité*,

[48] Decision of 16-6-1981 (*Dritte Rundfunkentscheidung*; *FRAG/Saarländisches Rundfunkgesetz*), 57, 295; NJW 1981, 1774; Decision of 4-11-1986 (*Vierte Rundfunkentscheidung*; *Landesrundfunkgesetz Niedersachsen*), 73, 118; ZUM 1986, 602; NJW 1987, 239.
[49] Decision no. 84-181 DC of 10 and 11 October 1984; Decision no. 86-210 DC of 29 July 1986 (about the press); Decision no. 86-217 DC of 18 September 1986 (about the audiovisual media).
[50] Decision 105/1972.
[51] Decision 826/1988.
[52] Decision 112/1993.
[53] Decision 420/1994.

while the other Constitutional Courts usually have a more limited freedom of manoeuvre. The German and the Italian Constitutional Courts, on the other way round, follow reasoning that could be, more or less, followed by other Constitutional Court in a similar way.

While similar decisions can be positively valuated for their impact on the provision of diversified information, it could be objected that they push the boundaries of interpretation too far. As for the Italian case, it has been stated that these decisions were undue since the "right to information", imposing a duty on those who communicate, contradicts the absolute freedom of expression *ex* Art. 21[54].

From that point of view, the issue arising from the lack of a constitutional statement for pluralism is that the classic and "negative" acknowledgement of freedom of expression, on its own, can even constitute a barrier for the legislator to impose any duty to spread diversified information on media outlets. The same rationale for the passive layer of free speech (that is freedom of receiving information) must be considered as an implicit aspect of the same right explains that freedom of the press (and other media) not only consists of prohibition of censorship, but also of the flipside that is an implicit prohibition of positive obligations to "say" anything. Intuitively, one can understand that, could a Parliament or a Government require any media outlet to spread any message, this would be a breach of the fundamental right to free speech. Free speech means indeed that the "speaker" must be "untouchable" when deciding the contents of their speech. It is a formal guarantee, where the value of the (hypothetical) duty does not matter. Obviously, where a constitutional provision, as the ones from Austria and Portugal, is missing, a statute imposing the duty to provide information about, for

[54] See A. Pace, 'Libertà di informare e diritto a essere informati', in Id., *Stampa, giornalismo, radiotelevisione. Problemi costituzionali e indirizzi giurisprudenziali*, Padova, Cedam, 1983, p. 11; R. Zaccaria, 'Dal servizio pubblico al servizio universale', in L. Carlassare (ed.), *La comunicazione del futuro e i diritti delle persone*, Padova, Cedam, 2000, p. 9.

instance, the activities and the proposals of all the political parties active in the Country would be socially highly valuable; but, formally, it would not differ from the imposition, given by an authoritative Government, on the media outlets to spread information about the outstanding results (true or false) achieved by the Government itself. It cannot be done, irrespectively of the inner value of the information to be provided, simply because this would not be "freedom of expression".

Legislators or Constitutional Courts, as seen above, may have the chances to indirectly deduce the pluralistic principle and provide some apposite pieces of regulation (or call for them, in the case of Constitutional Courts), as it often happens with must-carry rules provided via primary legislation. Anyway, similar interpretations given by Constitutional Courts could be disputable, as noted above; and legislators have poor freedom of manoeuvre in balancing the aim for pluralism with absolute freedom of expression. Once more, it must be stated that, provided that no direct "duty to pluralistic information" can be imposed on media companies[55], regulating the market is the best possible choice the achieve the purported goal.

1.3 The European approach to pluralism

The EU and its approach to pluralism – When approaching the matter of the European Union and its role in enhancing pluralism within the Member States, one notes first the discrepancy between the two different levels at which the principle of pluralism might be implemented: a possible declaration of principle, to be found in the Treaties, and its implementation in secondary legislation. The former is substantially missing while a set of directives apply to the broadcasting industry.

[55] This is true even in those Countries, like Austria and Portugal, where there is a constitutional acknowledgement of pluralism: freedom of expression coexists in these Constitutions with the value of pluralism, and thus the legislators must still seek a balance, despite they face looser boundaries.

The first explicit statement of the value of pluralism can be found in an Annex to the Treaty of Amsterdam[56] where it is stated that 'the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism' and therefore the provisions of the Treaty shall bring no prejudice to competence of Member States to provide for the funding of public service broadcasting. Rather than providing a direct acknowledgement of pluralism as a general aim of the EU, this provision only introduces a sector-based exception to the general principle of prohibition of State aids[57]. Art. 151 par. par. 4 of the Treaty of Amsterdam declares that 'the Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures', and the wording really seems too much vague and general to be considered as a relevant provision for the purposes of setting a EU competency for setting rules up to implement pluralism. Promoting culture and promoting pluralism (intended as diversified information) are not the same matter indeed, despite they show some overlapping aspects. They might even indeed conflict one each other, when the promotion of cultural aspects is assessed as protection of national cultural identities whereas pluralism as a value relies on the idea of different ideas free to circulate; the value of pluralism would thus require to be implemented through a policy for open communications rather than through protection of national productions. While pluralism might be regarded as a specific sector of the cultural

[56] *Protocol on the system of public broadcasting in the Member States*.

[57] See J. Harrison, L.M. Woods, 'Defining European Public Service Broadcasting', (2001) 16 *European Journal of Communication* 477, arguing that EU approach to public service broadcasting reveals tensions between social, political and cultural values on the one hand and economic values on the other due to a lack of clarity about what policy should be considered the most relevant. This consideration is particular noteworthy since this struggle for a balance will be a constant characteristic of all the following EU attempts to deal with pluralism, as it will be shown hereinafter. A comprehensive discussion of the EU approach to public service in regards of telecommunications and the Directive 2002/22 can be read in E. Ciampani, 'Telecomunicazioni e servizio pubblico', in N. Parisi, D. Rinoldi (eds.), *Profili di diritto europeo dell'informazione e della comunicazione*, Napoli, ESI, 2nd ed., 2007, p. 211 ff.

aspect of society, it cannot be enhanced by using the same policy instruments[58]. Furthermore, pluralism and culture overlap in the sense that they both are society-oriented and non-directly economic values in their nature; nevertheless, this aspect of the value of pluralism appears to have been disregarded insofar in the development of EU policies and rules, the economic

The EU competency to regulate cultural activities arises from Art. 151 par. 2 of the Treaty of Amsterdam which provides that 'action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in [...] artistic and literary creation, including in the audiovisual sector', and this has been so far the basis for a set of Directives regarding the broadcasting sector.

The thinking of regulating the broadcasting sector at European level dates back to 1974 and relies on the ECJ decision in the *Sacchi* case[59], when the Court found that the broadcasting would be considered as a 'service' under the meaning of Art. 49 of the EC Treaty, due to its cross-boundary nature within the Member States. The decision had the impact of strengthening and eventually defining the European competency to regulate the matter.

This decision will give an imprinting to the whole following toolkit of legislative and non-legislative instruments approved by the EU institutions in this matter that have their mainstay in Art. 43 and 49 (as mentioned above) of the EC Treaty, granting freedom of services and establishment to the broadcasters.

[58] As argued by M. Di Filippo, *Diritto comunitario e pluralismo nei mezzi di comunicazione di massa*, Torino, Giappichelli, 2000, p. 148-149. About the cultural policies of the EU, see A. Loman, K. Mortelmans, H.H.G. Post, S. Watson, *Culture and Community Law – Before and After Maastricht,* Boston, Aspen, 1993; M. Niedobitek, *The Cultural Dimension in EC Law*, London – Boston, Kluwer, 1997; E. Machet, S. Robillard, *Television and Culture. Policies and Regulations in Europe*, Düsseldorf, The European Institute for the Media, 1998.

[59] Judgement of the Court of 30 April 1974, *Italy v Sacchi*, Case 155/73.

The first exercise of this competency was the *Television Without Frontiers* Directive (TVWF Directive)[60]. As for the purposes of pluralism, the Directive provides some broad goals as establishing a single market for TV programmes and cultural diversity to be considered and protected as a public interest objective. Being the broadcasting considered as a service due to the *Sacchi* decision, the basis for the TVWF Directive are Articles 47 (2) and 55 of the EC Treaty, Member States being required to coordinate their national legislations in order to facilitate free movement of services in the internal market. The basic provision of the Directive is to oblige the Member State to permit broadcasting services from other Member States to provide their services within their jurisdiction, while they can eventually impose stricter standard obligations. The introduction of the Directive has brought to a wide (minimal) harmonisation of national legislations with a whole effect of comprehensive deregulation.

Two Articles of the Directive are particularly interesting for the purposes of this survey, Art. 4-5 aiming to increase pluralism by promoting independent and European productions. Member States are requested to reserve, 'where practicable and by appropriate means', 66.1% of their transmission time to European productions and 10% to independent productions.

The Directive shows two orders of issues[61]. First, there is a lack of clarity as for 'independent' contents means, and there is indeed a range of different interpretations and applications throughout the Member States; the limit of

[60] Directive 89/552/EEC (lately amended by Directive 97/36/EC). About the TVWF Directive see: S.M. Schwarz, 'The EEC Directive on "Television without frontiers"', *Revue belge de droit international*, 1988, p. 329; R. Wallace, D. Goldberg, 'The EEC Directive on Television Broadcasting', (1989) 9 *Yearbook of European Law* 175; R. Collins, 'Unity in Diversity? The European Single Market in Broadcasting and the Audiovisual', (1994) 32 *Journal of Common Market Studies* 89.

[61] A third, and more general, may be found in some claims arguing that 'the legal basis for Articles 4 and 5 if the TVWF Directive remains somewhat questionable' (M. Feintuck, M. Varney, *Media Regulation, Public Interest and the Law*, cit., p. 215). This could even more correct in the case for information as no direct competency is hold by the EU; despite these criticisms, it can be agreed that more than 20 years after it has been passed 'these arguments have become less significant' (E.M. Barendt, L.P. Hitchens, *Media Law*, London, Longman, 2000, p. 194).

practicability and appropriateness is equally non-unequivocal. Second, and more important for the purposes of this study, the Directive applies also, and not only, to the informative sector, and thus it is difficult to assess the real impact of pluralist information within the quotas provided for the general broadcasting industry.

In 2007 the TVWF Directive has been amended by the Audiovisual Media Services Directive[62] (AVMS Directive) which keeps the basic principles of the current directive but takes some steps forward. The new Directive broadens its scope comprising also the non-linear services (television on demand) providing that they should directed to the general public for the purposes of providing information, entertainment and education[63]; the most part of the new provisions, anyway, has a poor or no impact on diversification of information as it deals with technical (jurisdiction for satellite broadcast, definition of audiovisual commercial broadcasting) or by any mean different issues. More directly addressed to the issue of pluralistic information are the provisions for promoting the free flow of information, granting access to exclusively transmitted events of high public interest for transmitting short news reports to any broadcaster established in the EU[64]. Also relevant are the provisions that forbid product placement in news and current affairs broadcasts[65] (a rule that could be really significant in making broadcasting outlets more independent from the influence of advertisers – a matter that will be further discussed in the following chapter); those that allow EU Countries to restrict the retransmission of unsuitable on-demand audiovisual content even if it may not be banned under the legislation of its original Country[66] (and this provision, if on the one hand is respectful of national competencies in setting the constitutional boundaries of free speech and dealing with particularly sensitive matters, as for instance Nazi

[62] Directive 2007/65/EC.
[63] Art. 1 (a).
[64] Art. 3k.
[65] Art. 3g.
[66] Art. 2 (4)-(6).

propaganda, on the other hands could undermine the rationale itself of free movement of contents and ideas within the EU, that is the basic *raison d'être* of the Directive); and the acknowledgement of the role of national independent regulators[67], encouraged to cooperate among themselves and with the Commission for the purpose of the correct application of the Directive.

Further rules are included in a set of four Directives: the Access Directive[68], the Authorisation Directive[69], the Framework Directive[70] and the Universal Service Directive[71]. The general aim of these Directives is turning the legal framework of electronic communication networks into a competitive landscape. A two-layered legal setting is provided: those competitors that have a 'significant market power' face specific *ex ante* provisions of competition law, while all the other (minor) competitors only face an *ex post* obligations provided by general competition law. Some provisions nevertheless apply to all the competitors, irrespectively of their market power, the most important of them, for the purposes of pluralism, being the duty to provide conditional access facilities to all broadcasters 'on fair, reasonable and non-discriminatory basis'[72]. Art. 5 (1) (b) of the same Directive leaves the Member States free to decide if the same obligations to different technologies as electronic programme guides and applications programming interfaces.

These provisions should be positively evaluated, eventually even more than the TVWF and the AVMS Directives for their impact on pluralism, as they can constitute a possible way to avoid the negative results of bottleneck effects.

The pieces of regulation considered up till now are sector-based in their nature as they deal with specific areas of the whole information landscape

[67] Art. 23b.
[68] Directive 2002/19/EC [2002] OJ L 108/7.
[69] Directive 2002/20/EC [2002] OJ L 108/21.
[70] Directive 2002/21/EC [2002] OJ L 108/33.
[71] Directive 2002/22/EC [2002] OJ L 108/51.
[72] Access Directive, Annex 1, Part 1 (mandatory under art. 6 (1) of the Directive).

(broadcasting and the related services); moreover, they are aimed to regulate the relevant commercial or technical activities rather than attempting to set up rules to enhance pluralism. It must also be stressed how the European institutions have a long story of attempts in enhancing pluralism in their jurisdiction on a more comprehensive basis; due to the lack of an explicit competence for it, anyway, those instruments dealing (more directly) with the issue of pluralism have the nature of soft-law provisions and thus are more political than regulative in their nature[73].

Back in 1992, Commission Green Paper *Pluralism and Concentration in the Internal Market*[74] had already underlined the fundamental objection ('there is no exclusive competence in the area of pluralism and concentration of the media'[75]) and suggested an answer ('the principle of subsidiarity as set out in the second paragraph of Article 3b of the Treaty on European Union needs to be applied'[76]), the possibility to achieve the target without any mean of harmonisation being disregarded ('harmonization of restrictions on media ownership which would result from the purely voluntary amendment of Member states laws seems unrealistic and ineffective'[77]) and thus believing that the aim of pluralism would be better achieved at Community level. The proposal drafted by the Commission is about the harmonisation of restrictions on media ownership and the full application of internal market mechanisms to this sector: this would, in the Commission's view, facilitate access to media activities and guarantee the diversity of media controllers. The scope of the provision might have encompassed television, radio and the press, either television, either considered on its own or in a multimedia calculus of cross-

[73] See R. Mastroianni, *Riforma del sistema radiotelevisivo italiano e diritto europeo*, Torino, Giappichelli, 2004, p. 39.
[74] COM(92)480 final, 23 December 1992.
[75] *Pluralism and Concentration in the Internal Market*, p. 102.
[76] Ibidem.
[77] Ibidem.

ownership shares[78]. Different options, as for the approach to be envisaged, were considered, including the co-ordination of national legislations by means of a Council directive, the approximation of the differing laws by means of a Council regulation and the approximation of legislations accompanied by the establishment of an independent committee. In the opinion of the Council, the first would facilitate the functioning of the internal market created by the differences in the national legislation and would in the meanwhile leave a certain degree of independence to the national legislator, but would also be possibly not effective enough and difficult to prepare in regards to the balancing of the different values and principles at the stake (and was also considered to be possibly premature at that time); the second would be, compared to the directive approach, more effective but also less flexible; the third would offer the possibility to take advantage of the national expertise by setting up a network of local authorities but might result too intrusive in the structure of national audiovisual systems. In lack of any practical result of this Green Paper[79], a European harmonisation of ownership restriction never having been come true[80], one should note how this provision would not have achieved the desired result: the fault of this proposal is that it relies on the false assumption (as it will be demonstrated later on in this survey) that plurality of owners automatically means plurality of contents. Therefore the Commission stated that 'harmonization would focus on national, media-specific anti-concentration rules and not on the pluralism

[78] In those years the EU policies were still notably faulty in addressing the proper relevance of media convergence, as stressed by H. Schoof, A. Watson Brown, 'Information Highways and Media Policies in the European Union', (1995) 19 *Telecommunications Policy* 325.

[79] A draft directive based on the Green Paper was made at a later stage by the then Internal Market Commissioner Mario Monti, but it was rejected twice by the College of Commissioners, last time in 1997.

[80] About the lack of legitimacy of the European institutions to operate in this field and the inconsistency of their trials with the current scope of audiovisual activities, see S. Kaitatzi-Whitlock, 'Pluralism and Media Concentration in Europe. Media Policy as Industrial Policy', (1996) 11 *European Journal of Communication* 453.

rules relating to programme content'[81]. The following chapter will demonstrate how this assumption is faulty.

The Parliament responded by asking the Commission to draft a proposal for a directive aimed at harmonising national restrictions on the concentration of media ownership[82] and then releasing two further Resolutions[83] urging the Commission to present a proposal for a Directive.

[81] *Pluralism and Concentration in the Internal Market*, p. 105. This approach is anyway consistent with a previous assumption of the Green Paper itself, that is assessing pluralism by measuring the number of owners rather than the number of channels or different contents, as a minimum condition for diversity (p. 20). It has been thus noted that 'The European Commission's 1992 Green Paper (GP), for instance, does not provide a definition of media pluralism; on the contrary, it mentions a variety of expressions used in national legislative statutes containing the pluralism concept: pluralism of the media, pluralism in the media, the pluralist nature of the expression of currents of thought and opinion, pluralism of information, pluralism of the press and plurality of the media (GP 1992, 14). The concept is therefore imprecise, but is easily used as a reason to justify measures in support of freedom of expression or diversity of information sources' (P. Iosifides, 'Pluralism and Media Concentration Policy in the European Union', (1997) 4 *The Public* 85, p. 86). This approach is anyway consistent with some other previous documents as the *Resolution on the Economic Aspects of the Common Market for Broadcasting in the European Community* adopted by the Parliament in 1985 (EP, 10 October 1985, PE Texts 7/85, 57-60), the *Resolution on the Fifteenth Report of the CEC on Competition Policy*"(EP, 14 November 1986, PE Texts 10/86, 58-65) adopted by the Parliament in 1986, the *Resolution on the Sixteenth Report of the CEC on Competition Policy* (EP, 17 December 1987, PE Texts 12/87, 56-61) adopted by the Parliament in 1987, the *Resolution on Media Take-overs and Mergers* (OJ No C 68, 137-8) adopted by the Parliament in 1990, the *Communication to the Council and Parliament on Audio-visual Policy* (COM(90) 78 final) published by the Commission in 1990; in all of these documents both the Parliament and the Commission were stressing the relevance of competition and spread of ownership to fulfil pluralism. An example of a different approach is offered by the *Resolution on Media Concentration and Diversity of Opinion* (OJ No C 284/44, 2 November 1992) adopted by the Parliament in 1992: for the first time the Parliament stated then that competition law cannot prove sufficiently to ensure pluralism as 'the conditions of freedom of competition are no automatic guarantee for diversity of opinion' and therefore proposed that the EU policy in this sector should shift from a focus on competition law to a focus on proper media law. Unfortunately in the following Green Paper – and afterwards in the following documents – a similar proposal is rejected on behalf of a more competition-oriented approach.

[82] Resolution of 20 January 1994 (OJ C 44, 14.02.1994, p. 177). About the dialogue within the different EU institutions in those years, see A.J. Harcourt, 'EU Media Ownership Regulation: Conflict over the Definition of Alternatives', (1998) 36 *Journal of Common Market Studies* 369, underlining that the selection of the proper scope of regulation was the main source of conflict between the Parliament and the Commission.

[83] *Resolution of 27 October 1994 on concentration of the media and pluralism* (OJ C 323, 21.11.1994, p. 157); *Resolution on pluralism and media concentration* (OJ C 166 , 3.7.1995, p. 133).

As time went by the focus on competition and ownership issues is not significantly changed. In the more recent Resolution on media concentration[84] the Parliament comes back on addressing its concern for 'an environment of increasing media concentration and monopolies' and thus 'calls on the Commission to draw up a framework directive on media concentration so as to safeguard media pluralism and ensure that media in all the Member States remain free and diversified'.

A further Resolution, in 2004[85], states that 'a free and pluralist media is essential to freedom of expression and information. [...] Where Member States fail to take adequate measures the EU has a political, moral and legal obligation to ensure within its competence that media pluralism is respected'. It is certainly questionable if the EU has any legal obligation to substitute itself for the Member States (a legal basis for it lacks indeed); it might be questionable if a political or moral obligation like this exists (it sound quite paternalistic indeed) but the acknowledgement of pluralism as a constitutive facet of freedom of expression is highly valuable.

A broader view on this topic is the one addressed in the Commission Staff Working Document *Media pluralism in the Member States of the European Union*[86] where the Commission eventually recognises that 'diversity of ownership of media outlets is not sufficient per se to ensure media pluralism of media content. [...] Readers who consult several newspapers sometimes find they contain the same articles, usually preceded by the initials of a press agency. Television viewers who switch from one channel to another often see the same news reports'[87]. This can be considered as a notable step forward in the EU policy for pluralism. Furthermore, the Commission also expresses its assumption that 'the reason for this uniformity is that the newsrooms of media companies do not themselves produce all their articles or programmes. They use outside agencies that supply information, photos, newsreel, broadcasts, documentaries [...]. The intense competition between newspapers or television channels may not itself guarantee pluralistic content. This raises

[84] 14 November 2002, PE 325.096, B5-0588/2002.
[85] *Risk of breaches of freedom of expression and information in the Union, particularly in Italy (art. 11, 2 Charter of FR)* (INI/2003/2237), 22 April 2004.
[86] SEC(2007) 32, 16 January 2007.
[87] *Media pluralism in the Member States of the European Union*, p. 10.

the concern of whether, and if so to what extent, inadequate competition among information sources can have a negative effect on the functioning of democratic society, owing to a pluralism deficit'[88]. The issue of ownership in now assessed more in depth and where newspapers or channels are owned by large media groups, smaller companies can benefit from a strong owner and their capability to negotiate effectively with strong news agencies, newsprint producers, right holders, global advertising agencies and so on. The two new thoughts in this document are thus the recognition that the value of diversity goes beyond the sole industry assets and that large size companies might be regarded as having a positive influence on diversification rather than as a threat on pluralism.

From then on, the Parliament has kept trying to urge the Commission and the Member States to safeguard media pluralism by adopting new regulative tools – with no luck, it must be admitted. In a new *Report on concentration and pluralism in the media in the European Union*[89] the democratic value of pluralism is stressed with a strength unknown in the previous documents (the Parliament 'firmly believes that a pluralistic media system is an essential requirement for the continued existence of the democratic European social model'[90]) though the legal means identified to fulfil it are focused on mere competition policy again ('the consistent application of competition legislation at European and national level in order to ensure a high level of competition and enable new competitors to enter the market'[91]). A notable step forward is the broader scope now considered, as the Report deals with the digital media and the case for cross-media convergence ('the rules on media concentration should govern not only the ownership and production of media content, but also the (electronic) channels and mechanisms for access to and dissemination of content on the Internet, such as search engines'[92]).

[88] *Media pluralism in the Member States of the European Union*, p. 10-11.
[89] *Report on concentration and pluralism in the media in the European Union* (2007/2253(INI)), 10 July 2008.
[90] *Report on concentration and pluralism in the media in the European Union*, pt. 2.
[91] *Report on concentration and pluralism in the media in the European Union*, pt. 10.
[92] *Report on concentration and pluralism in the media in the European Union*, pt. 14.

The strong statement about the democratic value of pluralistic information is expressed again in a following and recent Resolution[93] where it is stated that 'freedom to receive and communicate information without interference from public authorities is a fundamental principle upon which the European Union is based and an essential element of democracy, as well as pluralism of media, both enshrined in Article 11 of the Charter of Fundamental Rights'[94].

The overview of these policy instruments shows some basic tenets of the EU approach to pluralism. A competition-oriented approach, that is surely consistent with the original mandate of the EU institutions, but cannot prove sufficiently as for the purported aim in this case. Arguments about the perverse functioning of competition when applied to the market for news have been considered above; furthermore, it will be demonstrated in the following chapter that the number of competitors (and the correlate rules for ownership limits) are not a way to secure diversification of contents and opinions. The approach adopted by the European Parliament and Commission until now should be considered a poor and faulty one. In the latter documents, a shift appears to be taking place in this regard: the democratic relevance of pluralism is being more and more stressed in the most recent instruments. What could really turn out to be decisive, anyway, is the connection to Art. 11 of the Charter of Fundamental Rights in the Resolution of 2009.

The next step forward may be represented now by the Treaty of Lisbon, that gives the Charter of Fundamental Rights a binding legal force. The EU therefore has acquired for itself, since the Treaty entered into force on 1 December 2009[95], a catalogue of civil, political, economic and social rights, which are legally binding on the EU institutions and on

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[93] *European Parliament resolution on freedom of information and media pluralism in Italy and in the European Union* (B7-0093/2009), 14 October 2009.

[94] *European Parliament resolution on freedom of information and media pluralism in Italy and in the European Union*, pt. 3.

[95] About the value of the Charter, and in general the EU approach to human rights before the Treaty of Lisbon, see J.H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', in N.A. Neuwahl, A. Rosas, *The European Union and Human Rights*, The Hague, Martinus Nijhoff Publishers, 1995, p. 51 ff.; G.F. Ferrari, 'I diritti tra costitutizionalismi statali e discipline transnazionali', in Id. (ed.), *I diritti fondamentali dopo la Carta di Nizza. Il costituzionalismo dei diritti*, Milano, Giuffrè, 2001, p. 1 ff., especially p. 41-60.

the Member States as regards the implementation of Union law, including obviously the above mentioned Art. 11.

The provision is a three-layered one. On the one hand, it encompasses the recognition of free speech already stated nation-wise in all the Constitutions in the European Countries[96] as a civil and "negative" freedom. On the other hand, it goes farther, as it also states that 'this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'[97]: this second phrase has a specific relevance as it considers the flipside of the coin, that is a right enshrined in the specific situation of any individual who is the receiver, rather than the author (as in the classic statements of freedom of expression, including the one from the opening phrase of Art. 11) of the message; the general frame of this provision still reflects anyway a classic civil freedom approach, as the right to receive information is protected against undue interference by public authorities. The second paragraph is even more relevant as it explicitly states that 'the freedom and pluralism of the media shall be respected': for the first time in history, the European citizens have now a (*sui generis*) Constitutional right to pluralist information. The Draft Charter of Fundamental Rights of the European Union released in 2000[98], a sort of explanatory notes of the Charter, offers a suggestive definition of this provision defining it as 'freedom of the media'; it furthermore considers freedom of the media as 'the consequences of paragraph 1'. From the logic and historic perspective, freedom of the media would thus be the development of an individual right to express opinions and thoughts (step 1), which has a mirroring equivalent in the right to receive communications, generally considered (step 2), which on a broader landscape has the meaning of a right to receive information in a diversified manner (step 3).

The logic inference needs some clarification about a few possibly weak points. First, the shift from step 1 to step 2 is a clear, logically due one. From step 2 to step 3 it looks more like a jump: rather than by logic, it can only be justified by political and democratic considerations. Second, and more relevant, this chain of inferences does not explain clearly

[96] 'Everyone has the right to freedom of expression', Art. 11 par. 1.
[97] Art. 11 par. 1.
[98] *Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50*, 11 October 2000.

who should be the natural beneficiary of this newly declared right. In step 1 the relevant right is hold by individuals (who are willing to communicate), in step 2 the relevant right is hold by individuals as well (who are willing to receive communications), in step 3 the relevant right is still an individual one? Logic would suggest so: any individual has a right to express thoughts, hear to others' thoughts, and to receive pluralist information.

The definition of 'freedom of the media' does not anyway sit comfortably with this reasoning: it appears to suggest something different, that the holders of the right would be the media companies. Is freedom of the media, as expressed in the Charter of Fundamental Rights, a right to receive pluralist information, or a right to provide pluralist information? Is it an "active" or a "passive" right? The former would be a proper "freedom of the media" as a broader conception of ordinary free speech, with a special category of beneficiaries (the media companies); the latter would be a more innovative "right to pluralism" enjoyed by the public. The Draft is not a legal binding instrument, so one could easily forget about the suggestion of the 'freedom of the media' definition contained in it, except that the wording of Art. 11 itself is not a clear one and could be interpreted in both these ways. Thus the question is not a loose one.

The Draft offers a further clue as it recalls some relevant judgements from the Court of Justice, and explicitly the *Gouda* case[99]. In that decision the Court clearly states that the ground for assessing a similar matter is 'in the first place, the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided'; a balance should though be made with 'the overriding reasons relating to the public interest which the Court has already recognized include professional rules intended to protect recipients of the service' and 'a cultural policy understood [to safeguard pluralism] may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services', but the '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'. Thus it seems that: (a) the fundamental right is held by the

[99] Gouda and others v. Commissariaat voor de Media, 25 July 1991, Case C-288/89.

broadcasters (it is therefore a sort of further application of freedom of expression, and matches the definition of 'freedom of the media'); (b) pluralism itself is not a right, but a value of public interest that can constitute the ground for a public policy; (c) the balance between the two is to advantage of the former as the latter can prevail only when strictly necessary. It should be concluded thus that the *Gouda* cases considers the existence of a 'freedom of the media' as a "positive right" which does not technically corresponds to a "right to pluralism".

Other cases not directly mentioned in the Draft appear to confirm the ambiguous approach of the ECJ: on the one hand, one can find several statements of the fundamental importance of pluralism (always as a public interest, never as a right) and its capability to override merely economic rights can be found; on the other hand these statements are often followed by the assessment of a lack of sufficient ground to justify similar overrides. This reasoning can be found in *Bond van Adverteerders*[100], where the Court rules down the national legislation under which the distribution by cable of programmes transmitted by broadcasters established in other Member States is conditional on the absence of advertisements and subtitling in the language of the Member State in question. The Dutch Parliament had passed such a regulation in order to protect the national pluralistic system where the advertisement revenues were then all managed by a public body (called STER) and distributed to the private broadcasters on fair and equitable basis; advertising times were thus strictly regulated and the Government was worried about foreign broadcasters offering more space to the advertisers, reducing the profits for the STER and eventually breaching the pluralistic system ensured by the law; the national legislation was considered by the Government as an exception to general EC law as permitted by Art. 56 of the EC Treaty. The ECJ ruled down the Dutch statute finding that 'even where they are presented as being justified on grounds of public policy, namely the maintenance of the non-commercial and hence, pluralistic nature of the national broadcasting system, such discriminatory restrictions cannot fail within the derogations authorized by article 56 (now 46) of the Treaty since they are not proportionate to the intended objective'. It has been noted that in this decision the Court fails in assessing the difference between aims and means: the Dutch

[100] Bond van Adverteerders and others v The Netherlands State, 26 April 1988, Case 352/85.

statutes, considered by the judges as non-proportionate aim, should have been regarded as a mean (with economic results) to achieve a non-economic aim. The proportionality test should have been taken in regards of the means, not of the final aim[101].

Similarly, in *Commission v the Netherlands*[102] where the Court states that 'a cultural policy with the aim of safeguarding the freedom of expression of the various [...] components of a Member State may constitute an overriding requirement relating to the general interest which justifies a restriction on freedom to provide services', but even if 'a restriction forms part of a cultural policy intended to safeguard the freedom of expression of the various social, cultural, religious and philosophical components of society by ensuring the survival of an undertaking which provides them with technical resources, it goes beyond the objective pursued, since pluralism in the audio-visual sector of a Member State cannot be affected in any way by allowing the national bodies operating in that sector to make use of providers of services established in other Member States. Conditions affecting the structure of foreign organizations operating in the audio-visual sector cannot be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism'. Again, in *Vereinigte Familiapress*[103] it is acknowledged that 'maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods', but 'the Court has also consistently held [...] that the provisions of national law in question must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade'.

It looks like the Court so far has been considering the value of pluralism more in theory than in practice. This can be surely justified both by the economic background of the mission of the EU itself (which was born as a trade-oriented organisation) and by the nature of the Charter of Fundamental Freedom, that was not legally binding until its incorporation in the Lisbon Treaty. Due to the lack of explicit rules to apply to information, the Court uses

[101] See M. Di Filippo, *Diritto comunitario e pluralismo nei mezzi di comunicazione di massa*, cit., p. 141-151.
[102] 25 July 1991, Case C-353/89.
[103] Vereinigte Familiapress Zeitungsverlags- und vertiebs GmbH v. Heinrich Bauer Verlag, 26 June 1995, Case C-368/95.

those regarding general competition law[104]. This approach, nevertheless, appears insufficient to achieve the purported result.

Now that the value of pluralism is enshrined in a legal text of the EU, there could be room for a change in the ECJ practice. It should be also considered anyway that the wording of Art. 11, as already noted above, is vague enough to be interpreted in two ways, one of them would be considerably close to the current orientation of case-law; the explanations in the Draft are likely to suggest that this interpretation is the most correct. In lack of any explicit legal basis for the "right to pluralism" to be considered as a proper right, it will all depend on the political favour accorded to the fulfilment of this "right to pluralism", which, due to the economic interests at the stake, often conflicting with it, seems unlikely to happen.

The value of pluralism in the ECHR – Art. 10 of the European Convention on Human Rights[105], as explained in the Draft European Charter of Fundamental Rights, has been the paradigm for the wording of art. 11 of the European Charter of Fundamental Rights. The first lines are exactly the same: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. Hereinafter the two wordings are different: while the first paragraph of the Charters ends here and then, in the second paragraph, there is the explicit referral to pluralism commented above, the first paragraph of the Convention allows the States to 'the licensing of broadcasting, television or cinema enterprises'. The second paragraph provides some limitations to the previously stated right as it '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

[104] A comprehensive analysis of the ECJ practice in regards of the application of competition law to the information sector can be read in M. Megliani, 'Concorrenza e liberalizzazione nel settore dell'informazione e della telecomunicazione' in N. Parisi, D. Rinoldi (eds.), *Profili di diritto europeo dell'informazione e della comunicazione*, cit., p. 181 ff.

[105] About the ECHR in general, and its role in protecting human rights at European level, see J. Frowein, 'The European Convention on Human Rights as the Public Order of Europe', in *Collected Courses of the Academy of European Law*, *I*, Firenze, Kluwer, 1990, p. 267 ff.

protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

The rationale for the exception to the general principle allowing the States to set national legislations for licensing of broadcasting (and cinema, which is not relevant here) obviously relies on the scarcity of frequencies (that will be further discussed above) which makes some sort of regulation needed. The States are hence allowed to set rules in this matter as otherwise the technological could not be used. The European Court of Human Rights (ECtHR) has clarified that the second paragraph specifies the conditions for allowing exceptions to the general principle of freedom of expression: any exception must be (a) prescribed by law, (b) necessary for the purposes of democracy and (c) aimed to one of the public interests listed in the last phrase. This interpretation is particularly noteworthy as the only (indirect) reference to pluralism might be found by interpreting extensively the reference to those restrictions 'necessary in a democratic society'; the case-law shows anyway that the democratic needs cannot found exceptions by themselves, they can only operate as a parameter of proportionality for those conditions aiming to protect the interests listed in Art. 10.

Consequently, while the ECJ case-law considers pluralism as a general interest possibly (but practically never) overriding general principles of free competition, the ECHR does not even contain a provision justifying the use of the value of pluralism at least as a considerable ground for exceptions; furthermore, there is no explicit acknowledgment of it, on the contrary of the Charter of Fundamental Rights (that nevertheless is inspired from the Convention).

Despite the lack of an explicit recognition, in the ECtHR case-law strong statements of the importance of information and pluralism within a democratic society can be found[106]. The Court affirmed that since it 'is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals [...], Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic

[106] See A. Nicol, G. Millar, A. Sharland, *Media Law & Human Rights*, Oxford, Oxford U.P., 2nd ed., 2009, p. 195-201.

legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force [...]. Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation'. The Court retains indeed 'supervisory functions [obliging the States] to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued'[107].

The Court hence retains for itself an ultimate power to judge those rules provided by the national legislations and assess if they fall within the scope of Art. 10 or not, The ECtHR released some decisions regarding the matter of broadcast licensing, showing a strict approach to the three requisites for providing exceptions (hence the three requisites apply also to the licensing of broadcasting), requiring the Governments to explicitly demonstrate the necessity of any exception in a democratic society[108] and requiring the licensing procedures to be consistent with such requisites as non-arbitrariness and transparency[109]. The case-law also explains that Art. 10 does not give an absolute right for any private citizen to have access to the broadcasting media, but the denial must motivated on the ground of

[107] Handyside v the United Kingdom (Series A no. 24, 7 December 1976); see also Castells v Spain (application No. 11798/85, 23 April 1992).
[108] Groppera Radio AG and others v Switzerland (1990) 13 EHRR 321; Autronic AG v Switzerland (1990) 12 EHRR 485; Informationsverein Lentia and others v Austria (1993) 17 EHRR 93; Demuth v Switzerland (application No 38743/97, 5 November 2000).
[109] Glas Nadezhda Eood and Elenlov v Bulgaria (application No 14134/02, 11 October 2007); Meltex Ltd and Mesrop Movsesyan v Armenia (application No 32283/94, 17 June 2008).

the technical unfeasibility of granting a channel to any individual[110] and cannot be politically oriented[111].

Notably, despite the unflattering provision of the Convention, the ECtHR has gone considerably far in its interpretation of the value of pluralism. First, it developed a doctrine of pluralism as a right to receive diversified and unconditional information. The Court stated that 'freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media'[112]. The Court thus rules that criminal responsibility of journalists for defamation should not 'hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so': the balance between the public interest and individual rights prefers the former, and the ground for such a balance consists of the strong acknowledgement of the democratic role of information.

Second, it acknowledged the role of competition in the information industry but also found it insufficient to constitute a proper safeguard against all the possible conditions affecting pluralism, and hence allowed some forms of *ex ante* regulation if aimed to enhance the diversification of the informative landscape. In the *Informationsverein Lentia* case[113] the Courts clearly stresses '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, which the public is moreover entitled to receive [...]. Such an undertaking

[110] Haider v Austria (1995) 83 DR 66.
[111] Benjamin v Minister of Information and Broadcasting [2001] 1 WLR 1040.
[112] Jersild v Denmark (application No. 15890/89, 23 September 1994); see also Observer and Guardian v the United Kingdom (Series A no. 216, 26 November 1991).
[113] Informationsverein Lentia and others v Austria (application No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, 24 November 1993).

cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely'.

It must be noted, anyway, that this decision is a bit less far-reaching than it is commonly understood. The Court rules down the legal monopoly in broadcasting granted to the Austrian Broadcasting Corporation; while the Austrian Government tried to adduce that such a system was intended to provide impartial information, the Court finds this argument not persuading, the interferences in issue disproportionate to the aim pursued and not necessary in a democratic society. The national statute was indeed quite evidently faulty and easy to rule down; the level of protection accorded to pluralism in this case is hence a "basic" one. It is not sure if in less evident cases the Court would be granting a higher threshold of protection of pluralism in less evident cases. It looks like the ECtHR could be providing a basic level of pluralism but maybe lacks the legal basis to go farther, being the wording of Art. 10, as it has been noted, 'general and generic'[114].

Moreover, the ECHR is not a new one and even before the incorporation of the Charter of Fundamental Rights in the EU legal system Art. 6 par. 2 (ex Art. F) of the Treaty on European Union had provided that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms': thus technically the principle arising from the ECHR already had some legal force within the EU system[115]. Nevertheless, it has already been noted above how the EU policies for pluralism are faulty in assessing the non-economic layer of pluralism; the new wording of Art. 11 of the Charter could now provide a stronger legal basis for further improvement, but case-law from both the ECJ and the ECtHR seem not to provide a suitable pathway to follow for future developments.

The Council of Europe and its approach to pluralism – A further European organism that has adopted some instruments in order to enhance pluralism is the Council of Europe.

[114] R. Mastroianni, *Riforma del sistema radiotelevisivo italiano e diritto europeo*, cit., p. 19.
[115] See on this topic A.G. Toth, 'The European Union and Human Rights: The Way Forward', (1997) 34 *Common Market Law Review* 491; P. Alston (ed.), *The EU and Human Rights*, Oxford, Oxford U.P., 1999.

Moreover, these instruments are relevant as a practical interpretation of the provisions of Art. 10 ECHR.

The Council of Europe has been the first European organisation trying to provide some international regulation for the broadcasting activities, the first of them dating back to 1960[116]; the first explicit reference to pluralism appears anyway in 1989 when the European Convention on Transfrontier Television[117] was passed. The preamble stresses indeed 'the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties'; the link between culture and pluralism recalls the same approach taken by the EU policies, but the importance of pluralistic information is remarked more explicitly than in any other previous European instrument. The Convention was later amended by a Protocol[118] which added Art. 10bis, requiring the Parties to 'endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction [...] endanger media pluralism'. Before this amendment the matter of pluralism was considered in Art. 10 joint with the cultural objectives, the States were requested not to 'endanger the pluralism of the press and the development of the cinema industries'. On the one hand, the new wording separates information from different communicative activities (as the cinema industry); on the other hand, it has, in regard of the information industry, a broader scope as it deals with media in general rather with the sole press as it did before. Both these changes have to be positively evaluated. The Explanatory Report specifies that the amendment was considered necessary

[116] *European Agreement on the Protection of Television Broadcast*, (STE No. 034) of 22 June 1960; *European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories*, (STE No. 053) of 22 January 1965; *Protocol to the European Agreement on the Protection of Television Broadcasts*, (STE No. 054) of 22 January 1965; *Additional Protocol to the Protocol to the European Agreement on the Protection of Television Broadcasts*, (STE No. 081) of 14 January 1974; *Additional Protocol to the Protocol to the European Agreement on the Protection of Television Broadcasts*, (STE No. 113) of 21 March 1983.

[117] *European Convention on Transfrontier Television*, (STE No. 132) of 5 May 1989. For a commentary about it, and a comparison with the EU Directives, see Michael J., 'The Council of Europe's Convention on Transfrontier Television and the European Community Broadcasting Directive', in M. Aldridge, N. Hewitt (eds.), *Controlling Broadcasting*, cit., p. 205 ff.

[118] *Protocol amending the European Convention on Transfrontier Television*, (STE No. 171) of 1 October 1998.

in order to assess in a 'more general manner the responsibility of the transmitting Parties in view of the importance of maintaining media pluralism, without however imposing any specific obligations on them'.

The last phrase is a worthy one: it stresses that the States face no specific obligations arising from the Convention. Once again, it seems that a bombastic declaration is not likely to be followed by any practical result. The application of the Convention relies on the principles of mutual assistance and co-operation between the Parties. A Standing Committee on Transfrontier Television is in charge for monitoring the implementation of the Convention and acting as a forum for the exchange of views on developments in the broadcasting sector among the Parties[119]. The Committee has no judicial power neither the possibility to impose fines for cases of breach of the duties arising from the Convention.

The rules contained in the Convention can thus be considered a minimum for the transfrontier circulation of programmes. The States are nevertheless free to apply stricter or less stringent rules to services with only domestic relevance as the Convention does not apply to them. The most relevant effect of the Convention is hence that its standards are commonly reflected in the national broadcasting legislation of many Countries and are applied to both domestic and international programmes (also due to the parallelism between the Convention and the TWVF Directive which applies to those Parties that are also members of the EU). Therefore, on the one hand, the Convention creates a (broad) framework for the international circulation of programmes, and on the other hand it had the indirect effect of approximating and harmonising the domestic broadcasting legislation of European States. It cannot be said, anyway, how much this harmonisation was the effect of the TVWF Directive and its "political" weight also on the non-UE States, and how much the Convention should take credit of it.

Next to this legal instrument, the Council also released some others more political in their nature. The Committee of Ministers adopted in 1992 a Declaration on the freedom of

[119] The Standing Committee is composed of representatives of the Parties; it meets 3 times a year in Strasbourg. Among its duties there are: discussing any difficulties arising from the application of the Convention; intervening in the friendly settlement of such difficulties; formulating opinions on the interpretation of the Convention. Council of Europe member States that are still not Parties to the Convention can also participate in the meetings of the Standing Committee as observers.

expression and information[120] in which the Committee stresses the importance of 'the existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions' (Art. II.d); the way to deal with this aim should be a intensification in the co-operation among the States and the Committee itself in sharing 'their experience and knowledge in the media field' (Art. III.d).

The Resolution on measures to promote pluralism[121] is the first document of this kind in which the wording recalls an acknowledgement of an individual interest to pluralism ('the importance for individuals to have access to pluralistic media content') – but cannot obviously be considered as the recognition of a proper right due to the lack of any legally binding force of this instrument – and calls for a widespread access to media as a mean to communicate ('the media, and in particular the public service broadcasting sector, should enable different groups and interests in society — including linguistic, social, economic, cultural or political minorities — to express themselves'). Within the measures proposed, some of them deal directly with the issue of ownership (counteracting concentration, bearing in mind the issue of diversification in the licensing procedures, preventing vertical integrations when detrimental to pluralism, launching independent authorities for these purposes) while others are expressly regarding the issue of contents. The wording of the general principle provided for this matter ('Member States should consider possible measures to ensure that a variety of media content reflecting different political and cultural views is made available to the public, bearing in mind the importance of guaranteeing the editorial independence of the media and the value which measures adopted on a voluntary basis by the media themselves may also have') is notably a trial to balance the necessity of a diversification in contents with the constitutional principle that prevents State authorities from imposing any positive obligation to communicate any kind of message. The measures proposed encompass requiring 'in broadcasting licences that a certain volume of original programmes, in particular as regards news and current affairs, is produced or commissioned by broadcasters', '"frequency sharing" arrangements so as to provide access to the airwaves for other broadcasters', strengthening 'editorial and journalistic independence voluntarily

[120] Decl-29.04.82E, 29 April 1982.
[121] R (99) 1, 19 January 1999.

through editorial statutes or other self-regulatory means', a strong public service broadcasting and the provision of adequate support to media.

In the Declaration of freedom of communication on the Internet[122], in order to ensure a high degree of free circulation of information on the web, the Committee calls the States to not apply further restrictions than those provided for the other media (and moreover no special filters or other means to prevent the public from accessing the contents on-line) and to encourage a wide public access and self and co-regulation of the Internet, not to impose on service providers a general obligation to monitor contents on the Internet.

The Parliamentary Assembly has not been insensitive to the issue. In 2001 it had already adopted a Recommendation on freedom of expression and information in Europe[123], assessing that 'a pluralist and independent media system is [...] essential for democratic development and a fair electoral process' and proposes that it would be 'essential to eliminate oligopolism in the media, and to ensure that the media are not used to gain political power, especially in those Countries where a mixed public-private system would enable political movements, supported by the private sector, to control all information after elections, especially through radio and television'. Moreover, this Recommendation contains an outstanding analysis of the deleterious trend towards a lower quality of information, in very similar terms to those examined above, but for the first time written in a political document. The Assembly stresses indeed that 'there is a growing trend for the media to be considered as a purely commercial product rather than a specific cultural and democratic resource. Even if certain journalists are willing to live with it, this trend puts the majority of them under unacceptable pressure to sacrifice quality journalism to "infotainment" and therefore restricts freedom of expression and information. The merciless competition between media enterprises puts increasing pressure on editorial boards to ensure immediate coverage, at the expense of in-depth analysis and research'[124]. Lately in 2003 it released a

[122] 28 May 2003.
[123] Recommendation 1506 (2001), 24 April 2001.
[124] The Recommendation goes on in these words: 'Cuts in editorial budgets and new ownership policies result in a decline of editorial standards and to increasing reliance on freelance journalists and consequent damage to professional responsibility. Investigative journalism is becoming unprofitable. Sensational stories and "advertorials" or "Big Brother"-style programmes are replacing independent editorials. On the other hand, employed journalists are censored and often limited in expression by

Recommendation of freedom of expression in the media in Europe[125] in which it expressed its concern for the persistence of the same issues already underlined in the previous Recommendation; interestingly, the Assembly suggests that all the Member States should incorporate the ECtHR case-law in their national legislations and request the assistance of the Council in reviewing their legislations.

The Council replied to this latest Recommendation by approving a further document[126] where it confirms the findings of the Assembly and calls the Secretary General to have a monitoring role and to bring to the attention of the Committee of Ministers any serious breaches of freedom of expression in Member States in urgent cases.

The Parliamentary Assembly also released a *Recommendation on Public Service Broadcasting*[127] (considered 'a vital element of democracy in Europe [...] challenged by political and economic interests, by increasing competition from commercial media, by media concentrations and by financial difficulties') in which its fundamental role due to the special remit, the editorial independence and the provision of information and culture to the whole society; public service broadcasting should hence be considered and provided as a universal service.

The Committee of Ministers replied to the Assembly's Recommendation by approving a *Recommendation to member states on the remit of public service media in the information society*[128], developed some guidelines principles concerning the remit of public service media, stressing that a public service remit should encompass 'a reference point for all members of the public, offering universal access; a factor for social cohesion and integration of all individuals, groups and communities; a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards; a forum for pluralistic

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their employers (owners or chiefs of wireless media companies, editors of newspapers) when they impose their own views and political or commercial interest upon the journalist's personality, name and professional responsibility'.

[125] Recommendation 1589 (2003), 28 January 2003.

[126] CM/AS(2003)Rec1589 final, 17 September 2003.

[127] Recommendation 1641, 27 January 2004.

[128] CM/Rec(2007)3, 31 January 2007.

public discussion and a means of promoting broader democratic participation of individuals; an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage' and that all the Parties are free to remit a service like this to one or more organisation. The Committee further states that 'Member states should establish a clear legal framework for the development of public service media and the fulfilment of their remit'; anyway the Recommendation does not explicitly explains what should a suitable legal framework for this purpose as it only says that such legal provisions should make the functions of public service work 'as effectively as possible'.

The *Recommendation of the Committee of Ministers to member states on media pluralism and diversity of media content*[129] expressly deals with the issue of pluralism. The Committee proposes a set of measures: as for ownership regulation, they include 'rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets'; public service media regulation, in whose regards 'Member states should ensure that existing public service media organisations occupy a visible place in the new media landscape' , promoting social cohesion, introducing forms of public consultation, granting the independence of public service broadcasting companies and ensuring various and appropriate means of funding; a broad call for Member States to encourage the development of a wide media scenario 'capable of making a contribution to pluralism and diversity', to grant content providers a fair access to electronic communication networks and to eventually take 'any financial and regulatory measures necessary to protect and promote structural pluralism of audiovisual and print media'. As for content diversity, the Recommendation contains an outstandingly noteworthy statement as it declares that 'Pluralism of information and diversity of media content will not be automatically

[129] CM/Rec(2007)2, 31 January 2007.

guaranteed by the multiplication of the means of communication offered to the public. Therefore, member states should define and implement an active policy in this field, including monitoring procedures, and adopt any necessary measures in order to ensure that a sufficient variety of information, opinions and programmes is disseminated by the media and is available to the public'. This assumption brilliantly catches the difference between the mere plurality of voices and pluralism of contents and opinions, their diversity being a basic tenet of any discussion about the democratic role of information. The line drawn by the Recommendation can certainly be strongly agreed. As for the instruments to improve this variety of information wished by the Commission, a set of proposals are given including respect for editorial independence, include indicators for content diversification in their frequency allocation procedures, set up must-carry and/or must-offer rules, protection of the local media landscape, provide financial support 'without neglecting competition considerations' and support the training of media professionals 'to address the role that media professionals can play in favour of diversity'. Furthermore, the Recommendation calls for transparency rules allowing the public to know certain features of media companies, including the nature and the extent of the interests of those person or bodies participating in the structure of any media company.

Within all the European institutions, the approach taken by the Council of Europe (considering both the Parliamentary Assembly and the Committee of Minister) is way far the most satisfactory. It encompasses consideration on both the economic aspect of the matter and on its democratic and social threshold; moreover, and more important, the starting assumptions are absolutely right as they encompass a correct understanding of the role of information and pluralism within the society. The measures proposed that follow from these assumptions are theoretically both feasible and profitable, as it will be demonstrated in the survey developed in the next chapter. The thinking of matching ownership regulation with non-economic and

content-oriented rules is far-reaching and it seems suitable to deal with the different issues of this matter as competition law, far from providing all the answers, can even increase some issues. The measures proposed in the different documents adopted (to increase the role of public service broadcaster, to increase the funding of media outlets, to promote the independency of editorial boards, to promote self regulations, widespread ownership assets, access to networks) are, at different levels, reasonable and likely to produce significant effects.

Nevertheless, the efforts of the Council of Europe show at least a weak point, if one notes that the proposals in the 1999 Recommendation and those in the 2007 Recommendation are not significantly different one each other. It is a clear clue that the policies of the Council, while having a possible strong political influence, being not legally binding cannot sort the positive effects they may have if consistently implemented in the national legislation. Looking at the wording of the different Recommendations, they seem only slightly different from the way directive are usually drafted. Now that the EU has an explicit mission to enhance and guarantee pluralism in its jurisdiction, there is no apparent reason for it not to take the same approach that the European Council has been developing for long time.

The European Council Recommendations are respectful of the freedom that the Member State should have in deciding, for instance, the private or public nature of public service broadcasters, the way of funding media outlets, the framing of any piece of national regulation to provide, and so on; the ECtHR, from this point of view, has already gone much farther when ruling down the legitimacy of public monopoly of advertisement revenue raising in TV broadcasting.

Some worries have been expressed about the possibility of an excessive "activism" of EU legislation in deciding about the media landscape as constitutional and civil rights (namely, freedom of expression) are at the stake; furthermore, some of the instruments already provided, as the TVWF Directive and the duty to provide a

certain amount of contents produced in Europe have been considered inconsistent with a principle of pure economic liberalism: hence the EU policies, according to these claims, should take a step behind rather than a step forward. None of the concerns expressed here would come true if the EU institutions share the approach taken so far by the European Council. The measures proposed in the Recommendations commented above could significantly increase the provision of different contents and opinions within the European scenario (as they match some of the theoretically assumptions that will be discussed in the next chapter) without involving any breach of the constitutional principles of the Member States if the EU is adopting regulations rather than directives: the spirit of those principles will not surely be affected by some general requirements only dealing with side aspects of the matter and not challenging the basic rationale of freedom of expression[130].

[130] See G. Bognetti, *Costituzione, televisione e legge antitrust*, Milano, Giuffrè, 1996, p. 24-30.

2 – Economics & Information

2.1. The scope of this survey: definition of pluralism.

First of all, some clarification is needed about what should be assumed as the kind of welfare to be optimized. At a first glance, any policy, in light of the efficiency of the allocation of resources, could be considered satisfactory when the greatest possible number of people (in this case, listeners of radio or TV news, readers for newspapers, and so on) accede to the kind of information they value the most. In regards to the market of news, I will assume that the final aim is not to provide the most-wanted kind of information to the largest possible number of viewers, but to provide the largest possible number of different points of views. This is only apparently a paradox, and it does not imply that people's will should not be considered at all.

It is important indeed to consider that welfare optimization in this case can be considered with a slightly different approach from the one commonly used. We are still, in a general sense, looking for the allocation of resources that can maximize value, but in this case potential Pareto superiority on the distribution of wealth (the situation in which the welfare of some could compensate the others) cannot find place. Consistent with that approach, a situation in which some of the consumers have access to the good they prefer can be considered satisfactory under certain

conditions. Market distribution of wealth is usually considered efficient when, if the preferences of the consumers have a high degree of overlap and most of them prefer the same kind of product, this is the product most produced and available in the market. As regards the market for news, this would lead to particular results that concern both the content and the bias of the news. If the consumers prefer, for instance, sports or gossip column over crime news, home affairs over foreign politics, and so on, the market should favour the preferred items and reduce (and eventually reset) the production of the other ones. The same mechanism would apply to the bias of single pieces of news, within the same kind of content: assuming that the consumers want news about national politics, it could also be the case that they prefer it to be presented and discussed with a particular approach (i.e., moderate rather than inclined towards a particular position, or even right-wing rather than left-wing or vice-versa). The whole production should thus shift towards the preferred genres and biases and subdue the others.

In the marketplace of ideas, this hypothesis can be considered as a case of market failure. The specificity of the market for news justifies some departures from the ordinary concept of efficiency, and can be explained both from a socio-political and more purely economic approach. As regards the first, it must be noted that there is 'a special bond between media outputs and the character and vibrancy of democracy – a connection that does not exists for other consumer products'[131] and explains the need for a different treatment. The welfare that the widespread of differentiated information brings to the society has thus to be considered as a positive externality and more thoughtfully than the interest of individuals in the audience.

[131] E.P. Goodman, 'Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets', (2004) 19 *Berkeley Technology Law Journal* 1390, p. 1394.

Some other scholars have explained the same point with an economic approach by considering information within the category of 'credence goods'[132]. Stucke and Grunes state that, due to this particular nature of news, the consumers are unlikely to properly evaluate the quality of the information they can receive from different sources. This implies that market failures give rise to different, and definitely more serious, issues than in other industries. Whenever the media industry gets more concentrated and the number of different voices decreases, specific market failures take place in terms of diminishing of the quality of reporting and even self-censorship. The authors thus conclude that 'in the marketplace of ideas a premium is placed on diversity of ideas'[133], that is exactly what will be considered as the kind of welfare to be finally optimized.

The true essence of the marketplace of ideas is indeed the spread of the largest possible amount of different opinions. The worthiest value for the society is indeed the availability of different information (as regards both topics and biases), which can be defined as "pluralism" from now on. As stated in some classic pieces of economic literature, 'the most important aspect of freedom of political speech is ... the right to disseminate information that may affect how people vote in the next election'[134]; Posner also explains that a reduction in the general quantity of information available brings some adverse effects, namely distorting the choice of the voters and reducing welfare, in the same way as it occurs in the market for ordinary goods. Coase furthermore considers that 'the public is commonly more interested in the struggle between truth and falsehood than it is in the truth itself'[135].

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[132] M.E. Stucke, A.P. Grunes, 'Towards a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy', (2009) 52 *University of Tennessee Legal Studies Research Paper Series* 1, p. 18.
[133] M.E. Stucke, A.P. Grunner, 'Towards a Better Competition Policy for the Media', cit., p. 35.
[134] R.A. Posner, 'Free Speech in an Economic Perspective', (1986) 20 *Suffolk University Law Review* 1, p. 11.
[135] R.H. Coase, 'The Market for Goods and the Market for Ideas', (1974) 64 *The American Economic Review* 384, p. 390.

Lopatka and Vita add a further consideration to this point. They modify the "Dennis formula" originally elaborated by Posner adapting it to the case of information. Posner states that it is economically efficient to suppress some kind of speech (potentially dangerous for the society) whenever the cost of doing so is less than the probability of the harm (caused by the speech, if not forbidden) multiplied by the magnitude (that means, the social cost) of the harm itself. The authors consider that, when not a generic form of speech but information is considered, the social cost is composed of the social loss of valuable information and the cost of error, in those cases where pieces of news are needlessly suppressed. The magnitude has to be considered as the potential audience of the piece of news suppressed. Viewpoint-based restrictions have even higher social costs, since they potentially bias public opinion and prevent positive externalities of information (as a public good, as will be discussed later on) from taking place[136].

Thus the first assumption is that the fundamental aim of the policy proposed will be the maximisation of pluralism, that means to create the conditions for a market in which 'media consumers ... have access to a wide choice of content'[137].

Two points have to be considered and kept in mind in the following discussion. Firstly, some evidence exist that market concentrations could be more efficient, in terms of cost-savings, than a fully-competitive model. A possible counter-argument is that the regulator could indeed decide to sacrifice some economic efficiency when different values, potentially worthier, exist. To strike a balance between different values is indeed one of the duties of legislators and thus it could also be appropriate to consider different values than the plainly-economic ones. Nevertheless, it is worthy to try and pursue both the aims of matching economic efficiency with pluralism and so the proposed policy will consider the need for

[136] E. Lopatka, M.G. Vita, 'The Must-Carry Decisions: Bad Law, Bad Economics', (1998) 6 *Supreme Court Economic Review* 61, p. 86-88.
[137] As stated in the *Draft Report on concentration and pluralism in the media in the European Union* (2007/2253(INI)).

reaching the maximum possible optimization of both. Secondly, the concept of pluralism has to be narrowly defined. The kind of welfare supposed to be maximised here is the widespread of different opinions, in regard to which the number of outlets is just an ancillary element. As it will be discussed below, the number of outlets is a poor indicator and thus, instead, the number of different contents provided will be considered as really significant.

2.2. Setting the basic framework: the role of competition

Once the general aim of the policy has been defined, the first step will be to discuss whether competition should or should not have any role in the proposed model. Since, as stated below, the objective is the pluralism of opinions, not the pluralism of outlets, the possibility to achieve the former without the latter must also be considered.

Posner argues that it is a misconception that monopoly of sources of information would harm pluralism, stating that the monopoly owner is neither likely to distort the news (he would reduce his profits doing so, since he would lose some shares of the audience) nor likely to distort the panorama of different ideas, since the general theory of monopoly explains that the absence of competition can be an incentive to differentiate the offer to capture larger shares of the audience[138].

Furthermore, it has been argued that monopoly could be the best model to ensure the highest possible degree of diversity. Steiner, for instance, supports this point with an elaborated and complex reasoning[139]. Steiner's reasoning is tailored for radio broadcasting, but it could be applied in general for any kind of media. He also

[138] R.A. Posner, *Economic Analysis of Law*, New York, Aspen, 6th ed., 2007, p. 737-738.
[139] P.O. Steiner, 'Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting', (1952) 66 *The Quarterly Journal of Economics* 194, p. 194-197 and 204-207.

adopts a slightly different approach from the one proposed here, since he assumes that the final aim should be the optimization of listeners' satisfaction and broadly defines satisfaction in terms of availability of most-wanted programs. According to him, the grater is the number of listeners who can listen to their favourite program, the greater is the satisfaction generally achieved and thus the better is the policy. As stated before, this is not a satisfactory achievement in regards of news broadcasting, but since Steiner also finds that monopoly is the best model to comply with differences in tastes and demands, his point is worthy nevertheless. Was he right, this would offer evidence that monopoly is the best pattern to achieve pluralism.

Steiner claims indeed that monopoly is more likely to produce diversification, in terms of contents, than alternative models, such as a competitive market. If this is true for general radio programs, we might assume that it could be true as well if we substitute news' contents and biases in his model, obtaining the desired spread of different opinions. The fulcrum of this reasoning is that, since the aim of each broadcaster is to maximize the number of listeners, each outlet will try to "capture" the largest possible number of them offering the most-wanted program. It is unlikely that the whole audience has the same choices and tastes; but it can be assumed that a certain program will be the most-wanted, and that this one will be also the first choice of the broadcasters that will prefer to compete for the highest possible market share rather than for the smallest ones.

The mechanism of competition in media market and its implication for diversity are explained by Veljanovski with an example that can be applied here as well. Veljanovski discusses the case for TV products in a market based on advertising revenues; but the general implication about profit-maximisation orientated companies operating in the market for news are generally true also for a more general situation. The author considers three programme categories (A, B and C, which can be translated in three different contents or three different biases) for a

potential audience of 100 individuals. The tastes of the audience are spread in 80 for A, 18 for B and 2 for C. Assuming that only an outlet operates in the market, it would choose the content type A; 2 outlets would both choose type A since sharing that audience would still be more profitable than the other options (80/2 is 40, more than 18 for B), and so on. In this model, content type B would become economically appealing only when 5 competitors operate in the market and content C when 48 competitors exist[140]. The real market rarely has such broad dimensions.

Thus competition will result in a repetition, by every single outlet, of the preferred program, while the single monopolistic owner of all the outlets would have no reason for duplication and, on the contrary, would have an incentive to differentiate, in order to take profit also from that smaller quotas of the market that are unlikely to be considered under a competitive market.

This argument can also be applied to the market for the news, but a background remark has to be taken into consideration. In this paper, "program duplication" has to be given a slightly different definition from the one that Steiner and the other authors apply in the context of media broadcasting. While "program duplication" is usually referred to the duplication of the same kind of program, in the case of the market for news duplication does not refer to the genre of the program (since, obviously, we are always dealing with newsreels in radio or TV programme schedule, and so on) but to the repetition of the same piece of news, from the same point of view, without any differentiation both in terms of contents and opinions. Translated in the news market, Steiner's favour for monopoly would mean that also those contents and points of view in which few listeners are interested would have some chances to be offered, achieving that pluralism that is considered as the final aim of this research.

[140] C. Veljanovski, 'Competition in Broadcasting', in Id. (ed.), *Freedom in Broadcasting*, London, IEA, 1989, p. 18-19.

Steiner's reasoning has however some weak points which make it inapplicable in the search for pluralist information. What it fails to properly assess is the behaviour of the listeners in regards of their shiftability. The author considers three different hypotheses: in lack of their first choice, listeners may decide (1) simply not to listen to any of the broadcasted programs, or (2) to be content with the one available and shift all of them towards that one, or – and this is the case that is supposed to be the most realistic – (3) some of them will decide to switch off their radios while some others will shift. Steiner himself admits that in the second hypothesis the final result would be zero diversification, but also states that this case looks not realistic to him.

This argument in favour of monopoly can be confuted by demonstrating that, in the special case for news broadcasting, the behaviour of the listeners is different and the second hypothesis – the one in which there is the greatest shiftability and the result is zero diversification – is the one that is most likely to come true. The behaviour of news-consumers is different from Steiner's prevision as regards their selection of contents, the selection of the bias of these contents, and their willingness to accept any kind of information if the preferred one is not available.

First of all, as regards the selection of contents, news-consumers have a natural preference for those sources of information in which they can find pieces of news about their favourite topics and a tendency to disregard those pieces of news they're not interested in[141]. It implies that, in comparison with the consumers of other kinds of programs, they have a lower degree of shiftability, or, saying it differently, they have fewer or no second-best choices.

Secondly, the special polarization of news listeners has to be considered. The consumers indeed 'prefer to hear or read news that is more consistent with their

[141] D. Strömberg, 'Mass Media Competition, Political Competition, and Public Policy', (2004) 71 *Review of Economic Studies* 265, p. 268.

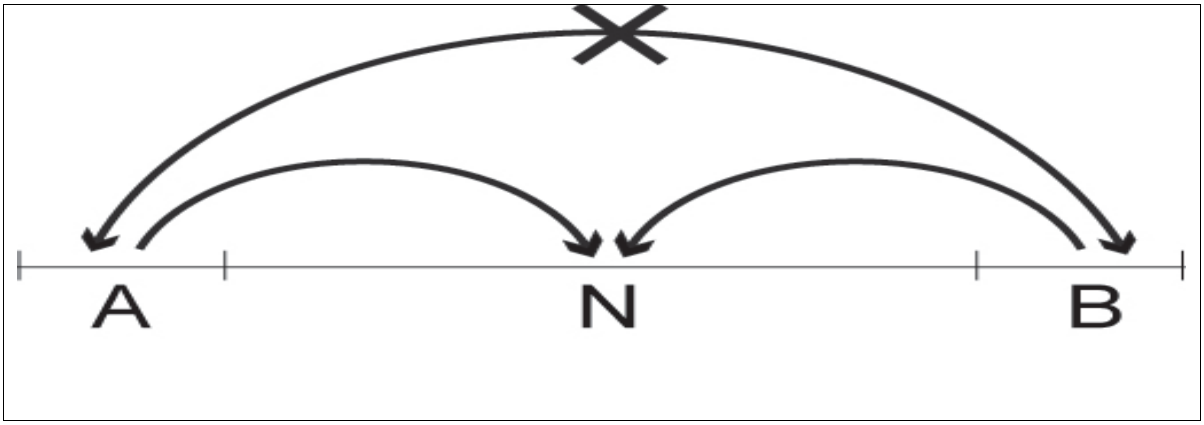
beliefs':[142] this imply that when they select their sources of information they are inclined to prefer those outlets that have their same biases or tendencies. Media outlets compete among themselves "slanting" the presentation of their news, that means trying to offer the point of view that is favoured by this or that group or customers. This phenomenon of "slanting" is naturally more evident as regards political inclination, but it can be applied as well to different situations. The more some customers favour a point of view, the less they are likely to read or listen to these outlets that "slant" in the opposite directions. Translating this point into Steiner's model, it means that, for instance, those who favour extreme left-wing newspapers will reluctantly shift towards extreme right-wing newspapers, or vice-versa, while moderate readers could easily shift from moderate left-wing to moderate right-wing and vice-versa, as supposed to be in the third hypothesis.

Considering the landscape of news market, it can be noted that, since media outlets compete through slanting, some of them have a high degree of bias, while some others are less tendentious and more moderate. Furthermore, it has to be considered that the news, in general, has a different degree of substitutability than other products (such as ordinary radio programs considered by Steiner). In Steiner's model, some consumers decide not to listen when they cannot find their favourite program and thus, allegedly, they will do something else than listening to the radio, spending their time in some other ways they consider more valuable. As regards information, it is unrealistic to imagine that all the consumers will simply "switch off" the news, as they would do with their radios, when their favourite opinion or content cannot be found. Different sources of information (radio, TV, newspapers) can hardly be compared in terms of substitutability, since they imply different activities (reading, listening, etc.), have different costs for the customers (newspapers have to be bought, while radio and TV are generally free for the listeners) and different

[142] S. Mullainathan, A. Shleifer, 'The Market for News', (2005) 95 *The American Economic Review* 1031, p. 1032.

approaches even to similar contents. Nonetheless, the news in general, as a singular (broadly defined) good, is indeed non substitutable. It also has to be considered that usually people refrain from ignoring any kind of information, since there is an inner value in it, that mostly consists of the social stigma on those who appear uninformed and thus, implicitly, uncultured. Being this a matter of social participation, people who cannot find their favourite piece of news will most likely shift towards a different source of information (probably a free source like TV news) but it is unrealistic that they will totally ignore the news in general.

Thus Steiner's model can be reconsidered and split into a two-layered model, as in the table below:



The model is simplified and considers only two possibilities of extreme slanting (A and B), that match consumers' biases, and another share of the market (N for Neutral) in which slanting has a lower degree and the pieces of news are presented with a more moderate approach. It could be further elaborated in order to consider also different levels of bias and different contents, but the final output would not be significantly different. I assume that the consumers who prefer product types A or B have zero shiftability towards the opposite one – consistently with Mullainathan and Shleifer's assumption – and this situation matches Steiner's first hypothesis of

exclusive preferences, in which monopoly is still the preferable scheme. But I also assume that the same consumers have also a perfect shiftability towards product type N, the one in which there is less slanting, since, in lack of their favourite option, they still do not accept to read or listen to opinions totally different from their own ones, but in the meanwhile they do not want to be left "out in the cold", and this matches Steiner's second hypothesis, the one in which the final output of monopoly is zero diversification. The third hypothesis, the one in which some consumers switch and some others do not, is not likely to come true since they are the same customers who, in the meanwhile, refrain from shifting from A to B and vice-versa but are totally available to shift from A and B towards N.

The model A →N / B→ N can be applied only in the market for news since news-consumers and other program-consumers have different behaviours. Other programs are more easily substitutable, as already stated, and moreover are not polarized in such a biunivocal relation as slanted news (it means that, for instance, there is no way to assess if all those who prefer sport programs have zero shiftability towards action movies, or if all those who prefer soap operas are also willing to accept reality shows if the formers are not available).

The scenario of perfect shiftability of all the consumers is considered unrealistic by Steiner and thus voluntarily not discussed; in the light of consumers' behaviour examined accordingly with Strömberg and Mullainathan and Shleifer and also in the light of the assumption of news' zero substitability, it is, on the contrary, the most realistic one in the market for news. Other authors have already discussed the case, even if from different points of view that can nevertheless be applied here. Both Rothenberg and Beebe[143] discuss Steiner's second hypothesis, defining it as the one where 'there exists a program that all viewers will watch, although many viewers

[143] J. Rothenberg, 'Consumer Sovereignty and the Economics of TV Programming', (1962) 4 *Studies in Public Communications* 45; J.H. Beebe, 'Institutional Structure and Program Choices in Television Markets', (1977) 91 *The Quarterly Journal of Economics* 15.

would prefer a different program'[144], that is exactly the conditions in which, as seen before, the market for news operates, where the program that all the viewers accept to watch is the most content-neutral and least slanted news report. Beebe, in particular, notes that the monopolist's diversification derives from a sort of protection from product competition and is based on the assumption that all the consumers have no second choices than non-viewing (non-listening, non-reading and so on, depending on the type of media considered) but, in those cases where consumers have a second-best choice, this is the only one produced by the monopolist in order to maximize his profit. Thus Beebe's reasoning, translated in the market for news, would imply that the monopolist is likely to provide only the most possible neutral-orientated information, that is the most economically efficient for him (a sort of one-fits-all schedule programme) but in the meanwhile is the opposite of pluralism.

Beebe's final conclusion, which can be assumed to be right as well in the context of the search of the best policy for pluralist information, is that, in terms of consumers surplus (which the author defines as the sum of all preferences, which can still be accepted here since it matches the aim of spreading as many different opinions as possible) monopoly and competition are equally worth when limited channels are available, but competition is a better model when unlimited channels are available. What the author fails to define, unfortunately, is the amount of channels necessary for competition to perform better than monopoly. In lack of this definition, and also assuming that properly unlimited channels are unlikely to be available in the market, due to technical and economic reasons, the general principle that can be taken as true is that the largest possible number of outlets (TV and radio channels, different newspapers and Internet websites) is a requirement that permits competition to offer better conditions from pluralism than monopoly. The larger is

[144] J.H. Beebe, 'Institutional Structure and Program Choices in Television Markets', cit., p. 19.

the number of outlets in the market, the more competition is likely to provide pluralism.

Thus the achievement of this first step is that the legislator should forbid monopolies in the market for news and favour the largest possible number of outlets – that means, voices. The next paragraphs will also examine if the availability of many outlets is on its own a sufficient condition for the achievement of pluralism.

2.3. Why regulation is needed? Information as a public good.

Once it is established that competition can perform better – under certain conditions – than monopoly, the further question is how the legislator can provide a fully competitive environment where the news providers can operate. This question is noteworthy since, as seen in the previous paragraph, a large number of competitors in the market is one of the conditions for the profitability of competition. Furthermore, it has already been stated also that the largest possible number of outlets is not an aim but a medium, since the final aim is the diversification of opinions. Thus the object of this paragraph is to assess what should be the role of the legislator and to what degree the market should be regulated, while in the next paragraph the different possible approaches to regulating competition will be discussed.

Consistently with a libertarian approach, some classic scholars have proposed that the market for news should be as little regulated as possible, and that the legislator should not regulate the market for news in any different way than the one used for other markets. In one of the very first pieces of literature on this topic, Director claims for the same approach to be used both for the market for goods and the one for news, supporting this point with the thought of some social philosophers, as Hume, Bentham and Mills, stressing the link between freedom of expression and democracy, and finally stating that a free marketplace of ideas is the only viable way

to ensure social participation and government by discussion and consensus[145]. Coase compares the market for goods and the one for ideas and finally deduces that 'there is no fundamental difference between these two markets and, in deciding on public policy with regard to them, we need to take into account the same considerations [and thus] we should use the same approach for all markets when deciding on public policy'[146].

These positions look outdated nowadays. Coase suggests the same approach in regulating different markets (which not necessarily the same actual policy for any of them) but this is unlikely to provide the high degree of pluralism we are in search of. The main reason for this is that those classic authors failed to capture a specificity of news when placed in a free market. The point is stressed later on by Farber who defines information as a public good[147] and thus accessible also for "free riders", all those people who do not pay for the good but still have access to it, since information can be easily spread through different channels than news outlets, even through conversation.

Information is a public good in the sense that no exclusivity can be provided for it: once a piece of news is available to someone, none else can be excluded from it, and the "use" of information does not consume it, so that it can keep circulating within the society. In regarding of the market, this implies that the value of the good is difficult to capture and the final result is an underproduction of news, since producers are unable to capture also the part of the audience who, even being possibly willing to pay for the good, do not so since they can have it for free. Furthermore, Ferber stresses another point specific for political speech, considering it a 'double public good', the second good being the political participation that it

[145] A. Director, 'The Parity of the Economic Market Place', (1964) 7 *Journal of Law and Economics* 1, p. 3-6.
[146] R.H. Coase, 'The Market for Goods and the Market for Ideas', cit., p. 389.
[147] D.A. Farber, 'Free Speech Without Romance: Public Choice and the First Amendment', (1991-1992) 105 *Harvard Law Review* 554, p. 558-562.

permits. As a double public good, political speech is supposed to be even more underproduced[148].

Due to these peculiar features that make a market for public goods particularly unlikely to succeed in efficiently allocating them, the most classic response is that there should be a public monopoly for them in order to avoid market failures. A public monopoly in the provision of information would be obviously a severe breach of the constitutional principle of freedom of expression, thus option should be discarded without further discussions. In more recent times, the option for applying a contractarian approach, setting transferrable property rights, has been analysed and considered to be possibly suitable to solve the issues of public goods. As for pluralistic information, this approach seems anyway faulty as well. A basic prerequisite for applying the contractarian approach to public good is the possibility to reach broad collective agreements about an arrangement that would be profitable to everyone[149] (in theory; at least on a large scale, in practice). The necessity of a broad agreement appears to deny the idea itself of pluralism: the provision of different contents and opinions that not everyone would agree with. Pluralism requires the chance of choosing among different alternatives, on the basis of subjective interests and tastes: the opposite of the ground for broad agreements. Furthermore, the intimate nature of information, its immateriality, its likeability to be shared, make it 'an unruly object of property rights'[150].

The nature of information as a public good makes the role of the legislator even more complex. The risk is that the legislator may react to underproduction by overregulating the market. Due to the crucial role of information in the democratic

[148] Ibidem.

[149] See R. Sudgen, 'Rules for Choosing Among Public Goods: A Contractarian Approach', (1990) 1 *Constitutional Political Economy* 63, p. 64.

[150] E. Mackaay, 'An Economic View of Information Law', in W.F. Korthals Altes *et al.* (eds.), *Information Law Towards the 21st Century*, Deventer – Boston, Kluwer Law and Taxation Publishers, 1992, p. 54.

process, the legislator traditionally provides for its freedom, that means avoiding restrictions as much as possible. In accordance with its nature of a public good, information should be, on the other way round, promoted by the legislator. This promotion might be considered both from a financial point of view (that is properly subsidizing media outlets: in this case, content neutrality should be of high importance, but in any case this goes beyond the scope of this paper) and from the framework of ad hoc policies.

By introducing the notion of public good in this survey, it is demonstrated that, since the market on its own is supposed to underproduce information, the legislator has necessarily to intervene. Farber states that the legislator should have an active role in promoting media outlets but he does not go into details about what it means in terms of concrete policy drafting. Also, the market for news is such a sensitive field, due to its implications of freedom of expression for the democratic life of any society, that any intervention is always at risk of influencing the debate among the different positions. Thus, the unavoidable intervention of the legislator should be taken at the lowest possible level. The next steps of this paper will try to identify what is the lowest level of intervention that still permits to promote the market for news and its diversification.

3 – What regulation to implement pluralism?

3.1. The press.

The economic background: the print media industry – Within the contemporary scenario, print media (hereinafter intended as both newspapers and magazines) represent the oldest mean of spreading ideas and information, although the current business model dates back to mid- to late nineteenth century major social changes (the most relevant two being the Industrial Revolution, with the consequent changes in printing technologies and business organisation, and the decrease in illiteracy rates) turned newspapers in mass media as known nowadays.

From then on, the industry of print media has displayed some stable characteristics that can be broadly resumed as follows. In terms of financial assets, the industry traditionally shows high capital requirements – which obviously operate as entry barriers – mostly due to its high fixed costs and equally high levels of production and distribution costs. The highest percentage of costs that any publishing firm has to bear comes indeed from those activities related with the launch of the business (i.e. hiring the editorial and management staffs) which remain

unchanged through the whole life of the enterprise. Along with these high fixed costs, low variable and marginal costs exist for the print media industry, mainly involved with printing and distribution whose incidence obviously depends on the circulation and the size of the market in which any firm operates.

This proportion between high fixed costs and lower marginal costs implies that publishing firms are particularly likely to realize economies of scale as the unitary cost of providing one extra copy of the same newspaper or magazine is lower than the average cost and the final output expands. The result is that there are incentives to concentration as large sized firms are in a better position to benefit from economies of scale.

Publishing companies have a set of possible strategies to deal with this premise, most of them traditionally resulting in various forms of convergence. The most common strategy of corporate growth are vertical mergers, in which the same firm spreads its activities through the whole supply chain, which in the case of print media can be synthetically depicted in the three stages of production, packaging and distribution[151]. General theories of convergence say that firms can gain from similar expansions in terms of revenue maximisation and reduction of transaction costs; moreover, a specific benefit for media enterprises derives from the possibility to control both the production of contents and the access to audiences, securing in this way a certain share of the market. On the one hand, this could be considered to have a positive effect on the widespread of different ideas, as in this way it is less likely that some contents cannot reach the audience; on the other hand, anyway, such concentrate firms could also reach a dominant position on the market that could let them to prevent other competitors from entering the market.[152]

Another strategy consists of horizontal mergers, which occur when two firms merge at the same level of the chain, i.e. two content providers, two carriers and so

[151] See G. Doyle, *Understanding Media Economics*, London, Sage, 2002, p. 18.
[152] As stated by G. Doyle, *Understanding Media Economics*, cit., p. 35-37.

on. In this case, efficiency raises from the low marginal costs as seen above, which make horizontal expansions particularly profitable, the common result being several proprietors publishing more than one title in order to share the costs related to printing or distribution services within them.

A further tendency exists towards diagonal expansions, when firms diversify their core business in different sectors, thus operating as large multiproduct firms. The profitability of economies of scope (which is in turn linked with the public-good nature of information) explains this tendency: media enterprises are particularly favoured in creating product formats that can be adapted and sold in different markets (for instance, the same story can be printed in newspapers, showed in a film report both in newsreels and Internet websites, and so on), thus allowing savings from the use of the same output more than once. This practice is obviously more cost-efficient than creating a specific product for each market. The implications of multi-media economics will be further discussed later on in this work.

Media firms experience thus high fixed costs for initial production and low marginal costs and economies of scale and scope are particularly favourable to them; this explain why large-scale production is the most appealing corporate strategy for those enterprises operating in these sectors. Diversification can also give rise to different kinds of efficiency, allowing publishers to target different segments of the market by launching different products. This strategy is particularly feasible for print media as they impose direct charge on their consumers, while other media such as television, whose revenues are traditionally based mostly or even only on advertising, cannot differentiate in this way and are thus more prone to target only mass audiences. The first sample of this strategy in action is stated to have taken place in late seventies of the XIX century as a Swedish publisher firstly launched a working-class oriented title, then a “quality” newspaper and finally acquired two more middle-

class oriented titles[153]; this is also an evidence of the particular feasibility and "naturalness" of trusts and mergers in this market.

Large-scale production obviously means a tendency towards mergers and the result is that oligopoly is the endowment in which media firms most commonly operate. According to the theory of imperfect competition, each firm tries to grow to its most efficient size until the whole market is dominated by few large-sized competitors and very significant barriers to entry exist. As already discussed in the previous chapter, competition is a fundamental prerequisite for pluralism and the larger is the number of competitors in the market, the better are the conditions for the spreading of pluralist information (although the mere quantity of outlets is not a sufficient condition, as demonstrated above, it is indeed necessary nevertheless). Thus some form of regulation is necessary to prevent the characteristic failures of imperfect competition from arising.

Another relevant feature is that print media operate in so-called dual-product markets. The easiest way to look at the market for news is, intuitively, to consider that basically any title produces pieces of news and stories trying to sell them to the broadest possible audience (as of course the greatest value for the consumers comes from the information contained in the paper rather than from the paper itself, which is mostly only the medium needed to provide the relevant information). Another possible way to look at it is considering that media outlets generate a different product than news – that is, the audience itself – and sell it to those who can greatly value it – advertisers who pay for spaces in newspapers and magazines. The rates of revenues that any outlet can bear from advertising vary from case to case: while it

[153] See J. Fritz, 'The Economics and Politics of Media Concentration', in M. Keren (ed.), *The Concentration of Media Ownership and Freedom of the Press*, Tel Aviv, Ramot Publishing, 1996, p. 17. The mentioned newspapers were, respectively, *Aftenposten*, *Nationaltidende*, *Dagens Nyheder* and *Dagblated* and the entrepreneur was Christian Ferslew who, according to Fritz, took the advantage of being the first to introduce the rotary press in Denmark in 1875, which is also an *ante-litteram* evidence of how technologic developments have a strong influence in media market assets, as will be further discussed later on.

had been shown how "quality" newspapers generally rely more on advertising revenues than the "popular" ones[154], from the mid- nineties on the emergence of a new business model such as free print highlights the genuine case for a print medium which is fully subsidized by its advertising revenues as the readers are not charged for their copies.

Advertising as a source of revenues also have an impact on business strategy of the firms in the market. As it has already been explained, major costs in this industry are fixed and thus firms have an incentive in expanding the circulation of their products as much as possible in order to improve their revenues. Were these revenues only coming from the sale of papers, competition would be played only in this field. The scope of price competition depends, obviously, on the degree in which different titles are perceived as close substitutes; and this depends on very personal tastes and perception of the inner qualities of each paper. While the product sold is formally the same (a newspaper or a magazine), experience can teach that not any title is a close substitute for another: there are "quality" newspapers and tabloids (and the readers of the former is not likely to easily shift towards the latter as they could do for other different products, as food, clothes and so on), papers specialised in specific topics (in finance, for instance: in the British market a newspaper like *The Financial Times* and a magazine like *The Economist* do not have close substitutes), and different regional markets (local newspapers and national newspapers cannot be considered substitutes for each other)[155].

Economics of advertising make for print media firms a particular value to access the widest possible audience and maximise advertising revenues. Such a consideration has a relevant impact on business strategies: in deciding the price,

[154] See G. Doyle, *Understanding Media Economics*, cit., p. 121, citing the data available from the UK Advertising Association about newspapers' sources of revenue in 1999.

[155] See for instance R.G. Picard, *The Economics and Financing of Media Companies*, New York, Fordham U.P., 2002, p. 53.

circulation can be a higher value than direct profits (those that come from sales) and thus competitions through prices can be affected. The demand for newspaper appears to be significantly inelastic in the short run and more and more elastic after a year or two since the price boost[156], as the consumers need time to find a cheaper substitute due to the imperfect substitability. Even when the demand has an inelastic function, publishers do not have an incentive in rising the price not to affect the circulation within the audience, which could bring to a loss in advertising revenues.

On the one hand, publishers keep the price even lower than the equilibrium price for their utility function, and this brings to positive externalities for consumers. On the other way round, the aim to reach the largest possible share of the audience could lead to the massification and tabloidization discussed above.

Economies of scale (and scope) and advertising revenues are both market mechanisms that make concentration and oligopoly the most common structure in this area.[157] As oligopoly sits uncomfortable with pluralism, as demonstrated above, some kind of regulation appears to be needed in order to cope with this market failure.

The antitrust approach – Unlike other media sectors, as the television and radio sphere, print media do not face any problem of scarcity. Thanks to constitutional guarantees, in practice anyone in any advanced democracy can start a paper, provided that they have money enough to do so. In the case for print media, there are market pressures that call for concentrations and reduction of competitors,

[156] G. Doyle, *Understanding Media Economics*, cit., p. 131-134.
[157] See D. Demers, *Global Media: Menace or Messiah?*, Cresskill, NJ, Hampton Press, 1999, p. 45 ff. The Author states that, according to Marx's insights, the growth of large-scale media firms and centralisation of ownership are plain results of unfettered competition as they are just more efficient than other possible structures. The final output of this mechanism is what the Author calls 'paradox of capitalism': competition stimulates vertical integration and oligopoly through economies of scale, resulting in less competition and less choices for the consumers in the long run.

and as seen above experience teaches that economic assumptions are right as in the last decades the number of competitors has dramatically decreased world-wise[158].

Thus a classic approach is to regulate the market for print media in any different way than the other markets, which means checking for cases of undue market concentration. This approach would have the unquestioned advantage of having practically no interference with the contents of the news and thus it can be considered totally respectful of freedom of expression.

Due to these technical difficulties, in most of the European Countries there are no specific antitrust provisions for cases of concentration in the market for newspapers; on the contrary, general competition rules are commonly applied. In Belgium, the Competition Act 2006[159] grants the Council of Ministers the power to declare a concentration admissible for general interest reasons that override the risk of impeding effective competition on the Belgian market. In the Czech Republic, the generic antitrust law[160] applies to any industry and thus to the print media sector as well: Art. 10 (3) defines "dominant positions" as the control of 40% or more of the relevant market. The provision contained in the Estonian Competition Act[161] is also quite generic: Art. 22 (2) puts the Competition Board in charge for prohibiting any concentration that would eventually result in creating or strengthening a dominant position and significantly restricting competition. The Hungarian Competition Act[162] forbids agreements or concerted practices between undertakings that have the effect of fixing prices, limiting production, hindering of market entry, and so on, thus adopting a strongly economic and market-driven perspective; concentrations and

[158] L. Grossberg, E. Wartella, D.C. Whitney, J. Macgregor Wise, *Mediamaking: Mass Media and Popular Culture*, London, Sage, 2nd ed., 2005, p. 403, for instance, note that in the US in 1900 2226 newspapers used to exist while in 2004 there were only 1500.
[159] *Gecoördineerde Wet 15 september 2006 tot bescherming van de economische mededinging*.
[160] Act No. 143/2001 Coll. of 4 April 2001 on the Protection of Economic Competition.
[161] RT I 2001, 56, 332, June 5, 2001.
[162] Act LVII of 1996, lastly amended in 2008.

direct control are prohibited as well. The Lithuanian Law on Competition[163] is mostly inspired by the EU competition policies and provides that cases of concentration will be notified to the competent Competition Council. A further piece of regulation[164] exists as well, providing rules specifically settled for the media sector: the general principle that the media cannot be monopolized, and that the State should create equal legal and economic conditions for fair competition among the producers and disseminators of public information, ensuring the preservation of pluralism in the provision of information to the public and avoiding the abuse of dominant position by producers and/or disseminators of public information or in any separate media market. While the provision itself sounds unquestionably interesting, but it must also be noted that so far no specific regulation has been passed to practically implement the principles enshrined in the statute mentioned above. In Poland, mergers and acquisitions in the press sector are generically regulated and may be limited under the Act on Competition and Consumer Protection 2007[165] in order to prevent dominant positions on the press market.

Some other Countries apply the general competition legislation, though providing some tailor-made rules for the whole market for media: in Austria, for instance, the Federal Act on cartels and other restrictive trade practices[166] (KartG), arts. 35 (2)-(2a) and 42c (1-5), prohibits, as a mean of media concentration, mergers that occur within two or more media enterprises, when either two or them are media enterprises, media services, media support companies or a company operating in any other market holding in the meanwhile 25% or more of the share in a company as one of those mentioned before (Art. 42c (2)), or one of the merging companies matches the criteria set in the previous article and another one has 25%

[163] 23 March 1999 No VIII-1099.
[164] Law on the Provision of Information to the Public of the Republic of Lithuania of 2 July 1996 as amended by 23 January 1997.
[165] *Ustawa o Ochronie Konkurencji i Konsumentów*, adopted on 16 February 2007, art. 13-27.
[166] *Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen*, in force since 2005.

of its capital held by one or more media enterprises (Art. 42c (3)). The only specificity provided for the market for media is lowered thresholds, respectively of 1/200 for media enterprises and media services and of 1/20 for media supporting companies of the amount of annual turnover of 300 mio. Euro worldwide and 15 mio. Euro domestically that makes a merger relevant, imposing a duty to notify it to the competent authorities. Similarly, in Germany, the Competition Act[167], art. 38 (3), lowers the threshold of relevant mergers in the media market of 5% of the ordinary provision. In Greece there is a specific antitrust regulation that applies to all the media[168] and explicitly states that in the definition of concentration the concept of influencing the public by media control through ownership or participation or other forms (Art. 3). Thus mergers are forbidden when the same person controls more than 35% of a single media market, or, in case of cross-sector mergers, when the same person controls 32% of at least one out of the three relevant markets (television, radio and press), 28% in two of them or 25% in all of them. Advertising expenditure and revenue sale are the criteria used to determine if a case of dominant position exists; the direct or indirect coercion on purchase or selling prices is, along with some others, the main element to detect and abuse of the dominant position, but quite relevant is the provision under letter d), which forbids limiting production, consumption or technical development to the detriment of consumers. This sounds as a generic provision and pieces of regulation like this can be often found in antitrust regulation; nevertheless, thanks to the specific aim of this statute, it could also be interpreted as a provision flexible enough to be applied to cases of limitation of "production" of contents and points of view, if the courts will be showing open-mindedness enough to apply this provision in the most efficient way to achieve pluralism. In Ireland, the Competition Act 2002 contains some *ad-hoc* provisions that

[167] *Gesetz gegen Wettbewerbsbeschränkungen (GWB) Bekanntmachung der Neufassung*, adopted on 15 July 2005.
[168] Law nr. 3592/2007.

refer to the market for media. Sections 22-23 define a media merger as "a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State"; "media business" means "(a) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs; (b) a business of providing a broadcasting service; (c) a business of providing a broadcasting services platform" but there is not any specific provision about relevant percentages of threshold. Further regulation[169] details deeply the thresholds to be detected for supposed cases of mergers: namely, the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings, the extent to which the diversity of views in Irish society is reflected through the activities of the various media businesses in the State, and the share in the market in the State of any "media business'' held by any of the undertakings involved in the media merger. The Competition Act, Sec. 22, provides furthermore a different procedure for media mergers complaints: while, in the ordinary procedure, the competent Minister has the power to override a decision from the competent Authority, in the case for media this faculty is not conferred as the Authority will not have to refer the decision. By contrast, the Minister can block or impose stricter conditions on a case of merger approved by the Authority, according to the relevant criteria provided by the law: (a) the strength and competitiveness of media businesses indigenous to the State; (b) the extent to which ownership or control of media businesses in the State is spread amongst individuals and undertakings; (c) the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings; (d) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State. In Portugal,

[169] Statutory Instrument (S.I.) No. 122of 2007.

general Competition Law[170] provides that every case of concentration, when it leads to the creation of a share of 30% or more of the relevant market, must be communicated in advance to the competent authorities and authorised by them. When the merger or acquisition involves media companies, the Media Regulatory Entity must authorize it too, and will not make so in case of menacing the free expression and exchange of different lines of opinion. Checking that excessive market concentration does not harm pluralism and diversity is a specific attribution of the Regulatory Entity for the Media, in coordination with the Competition Authority. The ERC plays a specific role in this role, and the scope of its mission comprises judgements about property acquisitions or about concerted practices by any company dealing with media, identification of the sources of influence on the public opinion, protection of pluralism and diversity, and the adoption of the necessary measures to its safeguard. In order to le the ERC accomplish its role in the best possible way, the Press Law[171] provides that cases of concentrations that occur in the market for the print media must be notified in advance to the ECR. In the United Kingdom, the Enterprise Act 2002, Section 58 (2B) (2C) provides that, within the legitimate public interest consideration to be taken in account in applying the Enterprise Act, a legitimate purpose is also a sufficient plurality of views in each market for news; thus a sufficient plurality of persons with control of the media enterprises should exist in the national market and some specific provisions are settled to control cases of concentration in the relevant market.

In few European Countries there are specific rules aiming to improve pluralism of ownership in the print media market: the most relevant case comes from France, where the Law on the reform of the press[172], Art. 11[173], prohibits any transaction (as

[170] *Regime Jurídico da Concorrência* No. 18/2003, amended by the Decree-Law No. 219/2006.
[171] *Lei de Imprensa* No. 2/99, as amended by Law No. 18/2003.
[172] *Loi n° 86-897 du 1er août 1986 portant réforme du régime juridique de la Presse*.
[173] As amended by the *Ordonnance n°2000-912 du 18 septembre 2000 - art. 3 (V) JORF 21 septembre 2000*.

mergers, acquisitions and so on) that would have the effect of allowing the same natural or legal person to possess, control, directly or indirectly, or to edit daily publications that deal with political or general information and have a total distribution that exceeds 30% of the whole market. In Italy, any operation (agreements, mergers or acquisition) that leads to a dominant position in the market for newspapers is void, as well as any other kind of operation that would eventually bring to the same result. The relevant regulation[174] provides that, in similar cases, the Authority for Communications will set a deadline to cancel the dominant position (also making the Parliament aware of it); a failure to accomplish with this order will be a relevant case for the judicial authority. In the Netherlands, the Parliament passed a special statute[175] to cope with the demand for improved opportunities for development for the press; the final results of this policy are about to be assessed in 2010 and the regulation will be eventually substituted with another provision. So far publishers of daily titles are prohibited to merge if merger leads to a market share of over 35% on the market or if in case of combining two or three of the markets of press, television or radio, the sum of the market shares on the related markets exceeds 90%.

As already stated before, antitrust policies are appealing, in terms of constitutional guarantees, as they do not interfere at all with the content of newspapers and magazines. On the other way round, this approach also presents disadvantages with respect both to its feasibility and its actual appropriateness to improve pluralism.

As regards the first point, it must be reminded, at first, that the final aim in this study is to improve pluralism in terms of different opinions, not just in terms of different outlets. Common antitrust policies are usually set in order to detect economic indicators of concentration among market competitors, that is worthy for

[174] Law 67/1987.
[175] Temporary Law on Media Concentrations.

cases of reduction of outlets but might be not for actual reductions of points of view in the marketplace of ideas. The major concern regards the capability of this approach to capture all those situations that are potentially threatening for media pluralism, but could eventually be irrelevant in light of purely economic measures traditionally applied. This is an inner issue related to the nature itself of media competition that involves a non-economic threshold in terms of other forms of so-called non-price competition.

Antitrust-plus and local newspapers – The geographical distribution of the market can vary from Country to Country. The U.S.A., for instance, traditionally has a strong sector of local newspapers, while some European Countries have a less developed local sector[176]. Thus the argument about pluralism in the local market is not an unworthy one. Those market structures where local firms sit aside national ones are traditionally depicted using the so-called "umbrella" model, firstly elaborated by Rosse[177] in whose insights the market for print media in any major metropolitan area (where the market for local press is as developed as in the U.S., one should add) is fragmented in four different layers: from top to down, metropolitan dailies with regional coverage, satellite city dailies with narrower markets, suburban dailies with local coverage, and a four tier made of weeklies and specialized media. Wherever there is a demand for local papers (which is mostly a matter of culture and tastes), the whole market is likely to take this shape, driven by economic efficiency: the tendency towards concentration, as seen before, in a small arena (as a suburban area) can lead to a final monopoly of the only publisher survived in the market; this publisher can be a monopolist only in local and small

[176] See G. Doyle, *Understanding Media Economics*, cit., p. 125: 'In most large European countries than the UK (e.g. France, Germany) and in the USA, regional dailies play a much more important role than national titles. [...] By contrast, there is a predominant consumption of national rather than regional papers in Ireland, Australia and Japan'.
[177] J.N. Rosse, *Economic Limits of Press Responsibility*, Stanford, Stanford U.P., 1978.

market as distribution costs would increase and the demand would drop off, as the contents of the paper would not match the demand for local news anymore. Thus in a small area one paper can gain the whole market, but as the angle become wider it has to compete against other similar products that have a broader circulation, and so on. The demand for local audience from advertisers has to be considered here, as a further reason for the "umbrella" model to become into existence. Intuitively, for small business operators (such as shops, restaurants and so on) it makes much more sense to advertise their products on papers which operate in the same area than in nation-spread publications, which could also very likely be unfeasible due to the higher costs at which larger newspapers sell their advertising spaces.

Metropolitan dailies are usually large firms where economies of scale spread their effects as seen above; in the case for satellite city and suburban dailies, the whole exploitation of economies of scale is partially prevented by the demand for local news and local audience that products published for broad markets cannot provide. Although economies of scale do not have a significant incidence in market layers 2 and 3, these are nevertheless imperfect competitive markets: on the one hand, the three levels are not perfect substitutes for each other, as they target different readers and different advertisers, and each lower level is supposed to operate in the niches of the market left free by the upper level. Nevertheless, different levels can also overlaps in their boundaries, that is in geographical areas where readers and advertiser have interests both in the narrower and in the larger focus. In similar context, it usually considered that different levels can eventually have a high degree of competitiveness, as 'Minor changes in readership demographics, advertising rates and household penetration are said to be able to shift important market sectors from one tier to another. Similarly, minor changes in

the editorial quality and local news coverage in papers can cause a flight of readers from one tier to another'[178].

The classic insight is that one-layer competition is non-existent, as papers on the same level of the pyramid are competing in different markets and are thus non substitutable by any mean; more extremely, it has even been stated that competition at the same level would be, from a purely economic point of view, 'a disequilibrium situation', as it would bring to significant losses in terms of economic efficiency, and thus any regulation aiming to improve competitiveness in the same layer, such as an antitrust policy, 'is simply doomed to failure'[179]. Nevertheless, it is an issue to be considered, as, while the readers of nation-wide newspapers can choose among different products, the readers of local papers, if no intervention were provided to cope with the above-said situation, would have no choice than the only monopolist publication in their area.

The most common answers given to the issue above are non-economic policies in their nature, and vary from the so-called "fairness doctrine", to direct-access regulation, to market restructuration (compulsory unbundling) and so on.

The "Fairness doctrine" is a concept well known in all the different media sectors, but usually much more applied in television broadcasting than in the press. Not at random, it was provided for the first time in 1949 in the U.S. by the Federal Communication Commission, requiring all of the broadcasters not to ignore topics of public interest and to treat them with equity and honesty. But it has to be kept in mind that (even though with some opposition in this field) the Fairness Doctrine in the broadcasting sector finds its own rationale in the scarcity of the available frequencies, which are commonly allotted by a public body (as the Government or an *ad-hoc* agency) and thus considered as a sort of "common good": the holder of a

[178] K.E. Gustaffson, 'The Umbrella Model – Upside-Down', www.nordicom.gu.se, p. 4.
[179] B.M. Owen, *Economics and Freedom of Expression. Media Structure and the First Amendment*, Cambridge, Mass., Ballinger Publishing Company, 1975, p. 53.

licence for the exclusive use of it does not have by any mean a property right and is not allowed to 'monopolize [it] to the exclusion of his fellow citizens'[180]. Being the frequencies a common good, the regulator is entitled to operate on behalf of social welfare rather than in the sole interest of the broadcasters.

The case for print media is obviously much different. There is not a scarcity problem at the stake, and, moreover, there is not State intervention to make private companies entitled to operate in the market. Constitutional freedoms of speech and economic enterprise (not explicitly mentioned in every Constitution, but all the same considered as foundations of contemporary Western democracies) are the sole basis on which publishers operate. It is more difficult to justify a regulatory intervention imposing on someone the duty to say someone, but theoretically, until the two rights at the stake are not affected too seriously, it could be the case for comprising them in order to gain a higher social welfare in terms of pluralism.

A similar provision is indeed theoretically appealing. A Fairness Doctrine in the print media sector would certainly offer the possibility to deal with the three-legged sheep's paradox from Mosley. Any rule voiding to write the story about the sheep would be clearly a breach of the two principles above; but how about a rule that would impose to provide information about fiscal policy (using the same example), everything else being equal? It could be considered as a less severe breach of freedom of expression, as every title could decide its own editorial policy just adding to it some more pieces of news legally imposed.

From an economic perspective, this policy could raise relevant issues. Economies of scale also spread their effects on the number of pages of a paper: it is less costly for a "big" newspaper to add some extra pages than for a "little" one[181].

[180] This is the main argumentation in the reasoning of the case *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), when the US Supreme Court ruled the constitutionality of the Fairness Doctrine implemented by the FFC. The decision is considered indeed a milestone of this approach to regulation.
[181] See. B.M. Owen, *Economics of Freedom of Expression*, cit., p. 36. The Author gives the example that 'it costs less to go from 34 pages to 36 than from 32 to 34'.

Thus local dailies would be likely to be more affected by a similar policy than national papers. This would be a relevant contraindication: while implementing competitiveness in local markets were the main aim, this rule could eventually perform in the opposite way, imposing higher costs and thus operating as an entry barriers.

Further issues may arise anyway. What scope should this Fairness Doctrine for print media have? Should it impose on local dailies a duty to provide publicly relevant information in the national or in the local sphere? In the first case, the whole market structure would be completely turned upside down. Providing some pieces on nation-wide news, local dailies could eventually lose their specificities and end up competing against national newspapers. Such a competition would quite certainly turn out a losing game: large-sized papers can invest more resources and provide more information about the same topic, attracting more readers; competing against bigger papers, local dailies would lose shares of their readers and consequently sale revenues. Furthermore, providing more than plain local news, local papers would also be in worse conditions for targeting their audience and thus less appealing for their advertisers (which would already be discouraged by the loss of audience share after competing against larger dailies).

Imposing a duty to provide some locally relevant pieces of news would be even less feasible. Who should be in charge for deciding what should be considered publicly relevant? In the original model from the U.S., an independent body (the FFC) was in charge for it; and certainly this model is the one that provides the highest guarantees of impartiality in setting such a politically sensitive matter[182]. But any independent body could find somewhat difficult assessing what should be considered relevant in light of the specificities of every small area. There should be a large group of officials with the necessary expertise in local matters; this would imply

[182] B.M. Owen, *Economics of Freedom of Expression*, cit., p. 57, for instance, rightly states that 'Government regulation, even in theory, seems far worse than local monopoly'.

an extensive use of public resources and still there could be cases of failure in assessing local matters from the higher central level.

Another possibility is setting up a number of local independent bodies, each of them with a specific geographic competence. Even though this would imply an even higher use of public resources, there could be room for a similar framework[183]. It could be difficult anyway to decide the proper boundaries of any local or regional area: as stated above, there are cases of market overlaps among different layers of the industry, and this would definitely make a similar policy too muddled to implement.

The idea of setting up a Fairness Doctrine in the market for print media – especially in its local layer – seems doomed. But an example coming from the UK experience could demonstrate that there is room for properly economic regulation of this field. This approach implies the addition of non-economic factor in the analysis for cases of market concentration to the normally used ones. The underlying idea is that cases of mergers in the media market deserve greater attention than different markets, due to the democratic implications of information. Thus cases of concentration might be claimed even if the normal economic indicators (advertising revenues, for instance) would not justify an intervention.

The general inspiration of this approach is possibly ideal to cope with the general issues of the ordinary antitrust regulation and the incapability of capturing cases of diminished diversity that do not result from a merely economic analysis.

An interesting sample of this approach can actually be found in the UK regulation: the Enterprise Act 2002 provides some specific rules tailored for the market for news, disposing that the Secretary of State can intervene in cases of mergers considering some specific elements (accurate presentation of news, free

[183] The Republic of Ireland, for instance, has numerous local independent agencies for regulating utilities that duplicate at different levels the same duties often attributed to national agencies; this model, also feasible, is commonly considered not particularly efficient.

expression of opinion, and plurality of views) that transcend a purely economic analysis. In June 2009, the Office of Fair Trading (OFT) has published a document in which the case for this special approach is considered with specific regards to the market for local newspaper.

The document stresses the lack of public interest considerations in dealing with cases of mergers in the market for local newspapers so far, while competition considerations should sit together with media plurality considerations. It is also particularly noteworthy that one of the major reasons of concernment is the increasing transition of advertising revenues from local press to Internet websites; cross-market competition (local newspaper competing not only with other media, but also with different ones) is acknowledged, and this new step is coherent with the issue of properly defining a market benchmarked faced by the ordinary antitrust approach, as stressed above. Technically, it becomes possible to deal with these special cases of market concentration in reason of the extreme elasticity of the assessment of possible cases of mergers, based on a case-by-case evaluation; also, a variety of forms of evidence can be taken in consideration, and the special regard with which the actual behaviour of firms and consumers has to be considered can offer more chances to capture also atypical market failures. It is interesting as well, especially from the point of view of joining different technicalities, that OFT declares that from now on intends to cooperate with the agency competent for the media sector, Ofgem, in order to take an advantage from Ofgem's better knowledge of the actual condition of the relevant market.

This approach looks interesting and capable of perform successfully. It appears to be a feasible mean to match the two spheres – the economic and the pluralism-orientated one – finding a righteous balance between them. The link between the two authorities provides the necessary level of expertise, and it seems a

reasonable solution to copy with the problems of market targets highlighted while discussing the ordinary antitrust approach below.

Some issues might nevertheless arise if the necessary background regulation is not sufficiently clear. The UK legislator decided to take an elastic approach, leaving the Secretary of State and the competent authorities free to deal with possible mergers with a case-by-case approach without providing detailed rules. In less efficient systems than the UK it could also result in possible overlaps of tasks among the subjects involved and systemic failures.

Distribution unbundling and the Common Carrier idea – Another possibility arises from the evaluation of the chain of supply of the print industry. As already observed above, the supply chain of print media is made of production, packaging and distribution. A common business structure is to internalize all these stages, eliminating – or at least strongly reducing – transaction costs. Thus often distributors are under direct ownership of publishers. In some pieces of economic literature, similar firm aggregations are seen as a threat to pluralism: 'it is in some of these functions that we find the economies of scale responsible for local newspaper monopolies'[184]. The theoretical basis of this argument relies on the role of distributors as "gatekeepers", allowing pieces of information to find their way to the audience.[185]

Although the distribution stage appears to play such a fundamental role in the implementation of pluralism, there are not many European Countries that regulate the matter in order to guarantee the "gatekeeper" role. In Denmark, the Press

[184] B.M. Owen, *Economics of Freedom of Expression*, cit., p. 58.
[185] See W.B. Shew, I.M. Stelzer, 'A Policy Framework for the Media Industries', in M.E. Beesley (ed.), *Markets and the Media*, London, IEA, 1996, p. 127: 'Concerns commonly expressed about media influence centre on gatekeeping. There is no evidence of a dearth of writers or would-be programme producers; rather, the question is whether they can gain reasonable access to the public'. Thus the issue is a broad one and can be raised also in regards of other media than the press, as television and radio.

Subsidies Act[186], Section 1 (2), provides economic support to the distribution of newspapers and explicitly states that the aim of this regulation is to implement pluralism and diversity through newspaper diffusion. In Finland, the Press Subsidy Ordinance[187], Section 4, provides a subsidy for distribution, according to certain requisites (an audit of the circulation scope of the newspaper; free distribution cannot exceed the 30% of the whole figure of subscriptions). In Latvia, the new Postal Law[188], recently approved in June 2009, ensures access to the public delivery service to all the publishers of newspapers or magazines sold for subscription[189], so to guarantee equal conditions to any competitor in the market. In Sweden, the Press Subsidy Ordinance[190], Section 11a, generically provides subsidies both for production and distribution of newspapers and magazines; furthermore, a joint distribution model operates, that allows low-coverage newspapers, including those from other publication areas, to take advantage of the larger newspapers' scale benefits.

All this examples can be considered public subsidies to the press, and thus by definition at risk of distorting competition. Nevertheless, according to some authors they play a fundamental role in assessing pluralism. In regards to both production and distribution subsidies, it has been written, for instance, that 'as the entry barriers are high, the role of [...] support in ensuring the survival of low-coverage newspapers is crucial to diversity. A newspaper that has closed down cannot be replaced'[191]. An analysis of the Swedish press market case offers evidence that distribution subsidies (namely, the join distribution model) are effective in eliminating

[186] *Lov om tilskud til distribution af dagblade*, Act no. 570 of 9 June 2006 on subsidies for the distribution of daily newspapers.
[187] Decree 1481/2001 as last amended by Decree 224/2005.
[188] *Pasta Likumi*, published in Latvijas Vēstnesis, 2009, 190.nr.
[189] Sec. 19 (2): 'Such periodicals (newspapers and magazines), for delivery of which a press publication subscription has been drawn up, shall be delivered to addressees'. (English translation provided in the Latvian Public Utilities Commission website, www.sprk.gov.lv/)
[190] *Presstödsförordning*, SFS 1990:524 as last amended by SFS 2007:1356.
[191] K.E. Gustafsson, 'The Market Consequences of Swedish Press Subsidies', Analysis commissioned by the Swedish Ministry of Culture, 2007, available at www.sweden.gov.se/content/1/c6/01/90/32/c6a0f7aa.pdf, p. 36.

entry barriers brought by economies of scale; on the other way round, anyway, a market survey showed how they have failed in letting new competitors enter the market, as they could just help the existing ones to "survive" in the market[192].

Another possibility to deal with the "gatekeeper" issue rather than public subsidies theoretically exists. Owen proposes that 'the press and typesetting functions [...] could be centralised and independently owned, serving two or more newspapers. [...] The result might be that a number of different organisations could exist, each producing a newspaper of more or less competitive editorial content, and each using the facilities of a central printing and distribution service'[193].

As regards at least the distribution stage of the chain, a policy like that appears to really exist in a few Countries. In France, the law on the distribution of newspapers[194] provides a system that, at a certain extent, appears to match the policy proposed by Owen. This piece of regulation does not forbid the common vertical integration system[195] but in the meanwhile also allows a cooperative organisation: publishers can start cooperative societies to jointly outsource distribution operations (Art. 4). As a mean to ensure the same conditions to any "voice" in the market, any newspaper or periodical that will conclude with the company a contract of carriage or bundling and distribution must necessarily be admitted to the cooperative on the basis of a fee schedule approved by the General Assembly of the cooperative and mandatory for all the newspaper companies that are clients of the cooperative society (Arts. 6 and 12). The Greek legislation[196] provides a detailed regulation in this matter and a sort of centralised system for the

[192] K.E. Gustafsson, 'The Market Consequences of Swedish Press Subsidies', cit., p. 34 ff.
[193] B.M. Owen, *Economics of Freedom of Expression*, cit., p. 58.
[194] *Loi n°47-585 du 2 avril 1947 relative au statut des entreprises de groupage et de distribution des journaux et écrits périodiques*.
[195] See Art. 1: 'La diffusion de la presse imprimée est libre. Toute entreprise de presse est libre d'assurer elle-même la distribution de ses propres journaux et publications périodiques par les moyens qu'elle jugera les plus convenables à cet effet'.
[196] Law 2943/1954.

sell of newspapers and magazines. The Daily Newspaper Owners Association entitles distribution agencies and lessee booths to operate on the basis of a mandate renewed annually. Newsboy names have to be registered and their remuneration is fixed on statutory basis.

While quite different from each other, these two pieces of regulation both have in their backgrounds the Common Carrier Idea approach, that is separating the distribution function from the whole supply chain. While the original idea from Owen was broader, as he was thinking about a centralized printing function as well, they appear to be a significant mean to avoid the negative externalities of economies of scale not representing in the meanwhile, as public subsidies are indeed, a threat to the competitive landscape[197].

3.2. Television and radio

The economic background: the broadcasting media industry – Television and radio can be dealt jointly as these two media share the same technological requirements that, when the two devices were created, gave rise to common economic issues and thus similar regulatory frameworks.

Since the early 1910s, when the broadcasting system had its birth, the keyword has been "spectrum scarcity". In those times, the only available mean for broadcasting was transmission through ether. As a mean for transmission, the ether spectrum is in theory suitable of different uses and different regulative options. Apart from radio and television broadcasting, it can be used for military and police communications, microwave relay systems, communication satellites, and so on; the

[197] But it should also be observed that Owen himself states that 'there is no guarantee that the result will be a marked improvement' (*Economics of Freedom of Expression*, cit., p. 59). In the final chapter, a practical assessment of how these policies effectively performed will be shown.

major issue is that all these possible uses may conflict one each other when the interference of other signals lowers the quality of transmission generating noise and eventually making the transmission totally unfeasible. Some sort of regulation is thus needed, both at international[198] and national level, where different options are available.

The leading experience, from an historical perspective, is the one from the U.S., where the traditional libertarian approach brought at first to let the spectrum free for all the communication purpose, only preventing interferences with certain major public functions[199]; but when the use of spectrum growth to a point where the congestion and the related interferences appeared unbearable, a different regulatory framework had to be set.

Like any other scarce resource, the electromagnetic spectrum could be regulated in several different ways; some reasons[200] led the Government to decide that the best choice would a been reserving some frequencies for each of the different uses and then providing a system of government allocation to assign those dedicate to broadcasting purposes to the private operators requiring them. While a different policy framework, namely a public monopoly, had been initially established in different Countries – as in the UK, for instance, where the BBC was the only broadcaster until some private companies were admitted to use some dedicated frequencies – the system of government allocation of frequencies is nowadays commonly in use world-wise and therefore a first economic feature of the

[198] Available frequencies have to be divided through States; the first international convention dealing with this purpose is the International Telecoms Convention of Atlantic City 1947.

[199] The Radio Act 1912, for instance, gave the Secretary of Commerce the duty to assign licenses for the use of spectrum for the purpose of preventing amateurs from interfering with the navy.

[200] B.M. Owen, *Economics and Freedom of Expression*, cit., p. 88, identifies four of them: the usefulness to military and security services, the spread of amateur stations that were commonly perceived as risky for public safety, the unwillingness to establish property rights in the spectrum and the technical unfeasibility of charging the consumers for service they received. This last point will be further discussed later on.

broadcasting sector is the limited number of private competitors, due to the scarcity of frequencies.

A second feature, pretty unique (but nowadays out of date, at least at a certain extent), is the incapability to raise revenues directly from the customers, charging them for the programs they watch or listen to. The absence of direct revenues originates two economic implications: first, that broadcasters cannot estimate the value that any consumer would attribute to the programs transmitted, thus the price that they would be willing to pay for them, and ultimately what programs they really favour the most. Second, opposite to the print media industry, which has been defined above as a dual-product market, in the case of broadcasting one must conclude that what operators actually do is selling advertising time to advertisers[201].

Thus, again, as news provided by papers, also broadcasted information has the nature of public good; even more if one considers that, due to the free ether transmission, no viewers can be excluded from direct viewing or listening to the news, and not only from the indirect spread of them as in the case for print media. Economies of scale also find room in this market, as the major costs are those for the initial equipment and for producing programs, while the costs for providing the service to additional audience are close to zero[202].

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[201] The broadcasting industry is commonly understood to be a dual-product market itself (see, *ex multis*, R.G. Picard, *Media economics: Concepts and issues*, Beverly Hills, CA, Sage, 1989, p. 17 ff.) as broadcasters provide programme services to their audiences and in the meanwhile access to audiences to advertisers. While this is technically unquestionable, one should also consider that the sole source of revenues is the sell of advertising spaces and therefore, from the sole point of view of the industry funding, this definition does not appear totally correct. This is true anyway for traditional radio and TV freely broadcasted, while technological developments have changed this scenario as pay TV now makes direct charges for programmes or channels technically feasible; the implications of this shift will be evaluated later on.

[202] See. C.F. Pratten, *The Economics of Television*, London, PEP, 1970, p. 16. This assumption is also true for radio broadcasting and, almost at the same radio, for different technologies, as cable transmission, where the costs for additional provision are anyway relatively modest.

A number of inefficiencies arise both from the zero-price and from the advertiser-support factors. As regards the former, the arrangement resulting from it is found to be inconsistent with an efficient allocation of resources in terms of social welfare, as broadcasters have no sufficient information about what are the most desired types of programme[203]. As regards the latter, the reliance on advertising makes larger audience volumes more valuable for broadcasters since it is true for advertisers first, and therefore more popular programmes are provided at the expense of the less popular ones, with the obvious ultimate effect of reducing diversity[204].

This original scenario has been significantly changed by technological development. While ether radio and TV still exist – and their features still are as described above – new systems exist to deliver the signal and – what is worthier – to increase the whole amount of available channels, such as coaxial cables, optical fibers, satellite transmission, cellular radio and rooftop microwaves. Another relevant effect of technology (namely, in this case, encryption and decoding technologies) is the current possibility of direct charge on customers for channels (or programmes, but this hypothesis is not relevant in the market for news, as usually there is no offer of single newsreels provided in this way). Pay channels offer the chance to avoid

[203] See R.G. Noll, M.J. Peck, J.J. McGowan, *Economic Aspects of Television Regulation*, Washington, DC, The Brookings Institution, 1973, p. 32-33. The authors state that this condition is not a Pareto optimum as 'its framework is not hospitable to a mutually beneficial exchange between the groups of viewers'. Nevertheless, they also distrust pay TV as a viable solution since, while it would make feasible to measure the intensity of tastes within the audience, it would exclude that part of the audience not willing to pay the prize for a specific programme and therefore it would bring to another inefficiency in terms of total viewing within the entire population. The authors finally state that an "intermediate solution", with some free channels alongside some pay service, could be the best asset.

[204] Moreover, as radio and TV compete for advertisement revenues, at a certain degree, also with other media, this market structure is capable to alter the choices and the production of the whole media market: see F.A. Lees, C.Y. Yang, 'The Redistributional Effect of Television Advertising', (1966) 76 *Economic Journal* 328. According to B. Sturgess ('Advertising Revenue and Broadcasting', in C. Veljanovski, *Freedom in Broadcasting*, cit.) the distortive effects of advertising would be lowered and could even turn into an incentive to enhance the quality of programmes if regulation could provide: regional markets with several competitors (several channels); these channels should be independent one another; they should be allowed to contract flexibly their airtime with advertisers; governmental franchises should favour those areas with lower TV audience (p. 125).

cases of consumer surplus[205] and thus, directly targeting different audiences, specialise and differentiate among the specific tastes (a practice commonly defined as "narrowcasting" as opposite to broadcasting).

A *caveat* must now be introduced. In the broadcasting industry, not the whole production consists of news. While newspapers only provide pieces on news (although of different kinds) a radio or TV outlet also provides entertainment, music (in the case of radio), movies (in the case of TV) and so on. Being information only a part of the total output of the industry, not all the economic features of this market can be applied here for the purposes of this study[206]. Nevertheless, it cannot be denied that the market for news is a major part of the broadcasting industry considered as a whole, as the provision of news is indeed a 'profitable strategic business for broadcast networks'[207].

The market structure of the whole broadcasting industry is often considered, by political scientists and legal scholars, as the main reason for the lowering quality of news services provided by TV stations; in particular, there is a spread perception that the firms compete by offering a non specialized, superficial, one-size-fits-all kind of news and by duplicating the same products, each of them trying to appeal the

[205] That is the difference between the actual cost of a product or a service (that in ether broadcasting is zero) and what the consumers would be willing to pay for them, that producers or seller are not able to capture. See A. Griffiths, S. Wall, 'Competitive and contestable markets', in A. Griffiths, S. Wall, (eds.), *Intermediate Economics, Theory and Applications*, Harlow, Pearson, 2000, p. 246 ff.

[206] For instance, "windowing" (that is a form of price discrimination used to deal with the nature of public good of broadcasting industry outputs, and consists of identifying different categories of potential customers and apply different prices, according to the intensity of demand of each of them) is commonly used in the market for movies, where a film can be released in cinemas and in cassettes or DVDs at different prices. The same strategy cannot be applied, at least in the same way, in the market for news, as it is supposed (the name really tells it) to be *new* and thus cannot be broadcasted in different run periods.

[207] B.M. Owen, S.S. Wildman, *Video Economics*, Cambridge, MA, London, Harvard U.P., 1992, p. 177. The authors also offer evidence that, since the 1980s, an ongoing tendency towards substitution of entertainment programs with news programs is taking place: the economic reason is that 'although news programs draw smaller audiences than do entertainment programs, their cost is much less'. Thus, again, there is a strong economic rationale in the market for news, despite the peculiar regulatory framework in which the firms operate.

largest possible share of the audience[208]. Since the competitive landscape of the broadcasting industry is "accused" of having harmful effects on the quality of information, there is room for applying some theories and deductions, originally drawn for the whole industry, to this specific sector, having regards of its specificities whenever they require some distinctions to be made.

Competitive duplication and programme choice models – In economic literature, some models have been elaborated that appear to match and confirm the claim introduced above – that, especially in regards of the broadcasting market, competition eventually undermines rather than enhancing diversity and pluralism.

The most classic of these models, elaborated by Steiner[209], has been already discussed above and its ultimate findings have been contested in the broader scope of diversification in the whole market for news. This model is based on the assumptions that the only source of revenue for a firm is advertising, all viewers are of equal value in this regard, and the costs of programmes are ignored; in a market like this, when channel capacity is limited, the viewers do not switch to second-best choices if their first is not available and audiences are shared among outlets that offer the same programmes, the ultimate implication is that competitors duplicate the same kind of programme while a monopolist would paradoxically offer more diversification.

Further elaborations of this model confirm this conclusion. So do Rothenberg and Beebe, both already considered above as well. According to the former, if second-best choices are considered (which was found to be what happens in the case for the market for news), competitors will duplicate, rather than the most wanted product as argued by Steiner, the most "accepted" one, even if it would not

[208] See G. Sartori, *Homo Videns*, Bologna, il Mulino, 1999, especially p. 105-110 and 131-136.
[209] P.O. Steiner, 'Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting', cit.

possibly be the first-best of any of the viewers[210]. According to the latter, competition provides more choices than monopoly especially when channel capacity in not limited[211].

The Beebe model is thus particularly interesting in contemporary market asset where technological developments have increased the number of available channels. The underlying assumption is that, competing one each other, different outlets have in a similar landscape the possibility to differentiate trying to attract niche audiences rather than duplicating mass appealing products. It must be stressed anyway that minority tastes will be satisfied only at condition that the relevant audience will be large enough to attract advertisement revenues large enough to cover production costs; thus a market with enhanced channel capacity offers conditions for more diversification but small minorities could still not find their favourite programs. Another noteworthy implication of this model also regards the impact of advertisement: the author adds a further element to his model, considering the case in which not all the audiences are valued the same by advertisers. When advertiser try to seek specific shares of the whole audience, valuing them more per viewer than other groups (typically, because of a greater expenditure capacity), the tastes of these groups are the most likely to be favoured by the market. The positive implication is that minority tastes can find satisfaction from the market; on the other way round, from the specific point of view of the market for news, this implies that, since the most appealing minorities for advertisers are the wealthiest groups, information provision can still be biased on the side of what these groups are

[210] J. Rothenberg, 'Consumer Sovereignty and the Economics of TV Programming', cit. Notably, similar conclusions are reached by P. Wiles, 'Pilkington and the Theory of Value', (1963) 73 *The Economic Journal* 183. The tendency is further explained by the 'law of central tendency', according to which broadcaster find more profitable to aggregate in the central segments of the market rather differentiate tying to target marginal fringes of the market itself: P.J.S. Dunnett, *The World Television Industry: An Economic Analysis*, London, New York, Routledge, 1990, p. 57 ff.

[211] J.H. Beebe, 'Institutional Structure and Program Choices in Television Markets', cit.; B.M. Owen, J.H. Beebe, W.G. Manning, *Television Economics*, Lexington, Mass., D. C. Heath, 1974, chapter 3.

interested in. A final conclusion of this model is that, in a competitive structure with unlimited channels, pay TV would permit to allocate resources more efficiently by measuring and matching viewers' preferences. "Large" minorities could have the possibility to influence production choices irrespectively of their expenditure capacity and thus more differentiation could find place.

The better workability of competitive markets and pay TV appears to be confirmed by further studies. More recent models[212] also finally state that, as regards diversity, advertiser-supported competition performs better than monopoly and a market with pay support can do even better. Indeed 'if channel owners are competitive and advertiser supported, then programming decisions exhibit a strong tendency toward wasteful duplication. [...] Competitive pay programmers often exhibit the same tendency toward excessive cannibalization in heavily populated audience segments. However, these tendencies are greatly reduced relative to an advertiser-supported system because the price mechanism takes account of preference intensity. [...] Because prices can reflect preference intensity, pay services have a much greater incentive to program to minority audiences than advertiser-supported services'[213].

But such a market structure does not appear to solve all the issues: tendencies towards favouring large audiences at the expenses of minority tastes still exist, as well as a favour for less expensive productions[214]. Thus the market for

[212] See A. Spence, B. Owen, 'Television Programming, Monopolistic Competition and Welfare', (1977) 91 *Quarterly Journal of Economics* 103.

[213] S.S. Wildman, B.M. Owen, 'Program Competition, Diversity, and Multichannel Bundling in the New Video Industry', in E.M. Noam (ed.), *Video Media Competition. Regulation, Economics, and Technology*, New York, Columbia U.P., 1985, p. 244 ff., especially 252-255.

[214] See *inter alia* B.M. Owen, *Economics and Freedom of Expression*, cit., p. 113: 'There is a bias against products demanded by a relatively small group of consumers with rather intense preferences – that is, products for which demand is relatively insensitive to price. Broadcasting would have this problem even if consumers could pay directly for programs, because fixed costs are very important. But advertising and limited channel capacity almost certainly make the problem worse'.

broadcasted news effectively shows those inefficiencies claimed above, which sole competition cannot counter, since they are indeed negative effects of it, as stated by Sartori. Some specific rules should therefore be provided in this respect.

Antitrust regulation – The first possibility is to regulate the market for broadcast news in any different way than the other markets, which means checking for cases of undue market concentration.

Various mechanisms to limit the possibility of mergers and acquisitions in this market are widely provided all over the European Countries; some of them have specific thresholds provided by law, either in terms of percentages of market share, or in terms of the whole number of licenses that can be hold by the entity resulting from the concentration at the stake. In Austria, the Private Television Act and the Private Radio Act[215] provide that any change in the ownership structure of a TV or radio station must be communicated to the competent authorities within 14 (in the case of TV) or seven (in the case of radio) days, and, when this operation involves more than 50% of market shares, it must be notified *ex ante* to let the authorities decide if the awarded licence can be further confirmed or revoked. In Belgium, the French Community Broadcasting Act (FRBA)[216] and the Flemish Radio and Television Broadcasting Act (FLRTA)[217] both provide that a licence cannot be obtained or kept if two or more radio groups merge and would thus share more than a frequency in the same area; any similar operation must be allowed by the competent regulator only under condition that it would not constitute a threaten for media pluralism. The independent regulators are in charge for a constant monitoring of market conditions

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Furthermore, the author also considers the possible influence of advertising on the content of programmes, at least under certain circumstances, as 'this was particularly apparent in the McCarthy era, when no advertiser could afford to support programming with blacklisted talent' (p. 115).

[215] *Privatfernsehgesetz* (PrTV-G) 2001, art. 10(6); *Privatradiogesetz* (PrR-G) 2001, art. 5 (5), 7 (5).

[216] *Décret sur la radiodiffusion du 27 février 2003* (lastly amended in 2007), art. 56bis.

[217] *Decreten betreffende de Radio-Omroep en de Televisie, gecoördineerd bij besluit van de Vlaamse Regering van 4 maart 2005* (lastly amended in 2008), art. 41par. 1, 45 par. 1, 49.

likely to threaten pluralism. In Slovenia the Ministry can void mergers that would bring any entity to cover more than 15% of the population with analogue terrestrial radio programmes, or 30% with terrestrial analogue programmes[218]. In Hungary, the holder of a national licence cannot acquire a controlling share in another company, and the same provision is applied at the regional level[219]. In the Netherlands mergers are prohibited if they would give rise to an entity controlling more than 90% of the relevant market[220]. In Romania, quite a strict control is exercised by the competent Council, as any entity willing to buy a capital share equal or higher than 10% in a broadcasting company must notify the operation within one month. The Council will consider if voiding any concentration, balancing the aim of economic efficiency of the industry with the protection of pluralism and diversity; a concentration is anyway considered to constitute a dominant position whenever a competitor holds more than 30% of the whole relevant market[221].

In some other Countries, a different approach finds place: rather than providing any figure, the relevant legislation entitles some authority (usually an independent authority, either the one in charge for assessing competition law in any specific market sector, or an *ad hoc* one for the media sector. In the Czech Republic, the Broadcasting Act[222] does not provide a specific legal framework, but entitles the competent Council to receive compulsory notification, from the firms interested, about cases of consolidation among the broadcasters, and possibly void them. Similarly, in Estonia the National Broadcasting Act[223] envisages a role of joint supervision for the Ministry of culture and the State Audit Office and in Ireland the

[218] *Zakon o medijih* (ZMed-UPB1), 2006, as lately amended, art. 58.
[219] Act 1 of 1996, art. 123-124.
[220] Temporary Law Media Concentrations, art. 2, 1, b.
[221] Law no. 504/2002 (Law on Radio and Television Broadcasting - Audiovisual Law), amended by Law no. 402/2003, art. 43-44.
[222] Act No. 231/2001 coll. of 17 May 2001 on Radio and Television Broadcasting Operation and on Amendments to Other Acts, art. 58.
[223] RTI, 06.02.2007, 10, 46, par. 34.

Broadcasting Commission, the Competition Authority and the competent Ministry can value the opportunity of any market concentration in this sector[224]. While there are no provisions about particular percentages to be void, the law provides quite strict definitions of what a media merger is ('a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State') and what media business means ('"media business" means "(a) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs; (b) a business of providing a broadcasting service; (c) a business of providing a broadcasting services platform"')[225]. While assessing these cases of concentration, the Authority has to bear in mind elements like the degree of concentration already existing in the market or the spread of diversity in the media landscape[226]; a negative decision by the Authority is mandatory, while a positive one can be further overridden by the Ministry, having regards to criteria as the competitiveness, the spread of ownership and the diversity of ideas in the market[227]. In Italy, all contracts, mergers and acquisition in the media sector have to be notified to the competent authority, that will void them if they likely to result in a concentration in the market[228]. In Greece, any transfer of a company holding a radio or TV licence, or a percentage higher than 1%, must be approved by the competent authority[229]. In Poland, cases of merger must be previously notified to the National Council, that can void them if a dominant position would result from them, or if another person takes over direct or indirect control over the activity of the broadcaster[230]. In Portugal the ordinary competition law finds application in this field plus a further provision requiring the Media Regulatory Entity to authorize the merger, provided that the

[224] Competition Act 2002, Sec. 22-23.
[225] Ibidem.
[226] Statutory Instrument (S.I.) No. 122 of 2007.
[227] Competition Act 2002, Sec. 23 (10).
[228] Legislative Decree 31 July 2005, no. 177, *Testo unico della Radiotelevisione*, art. 43.
[229] Law 2328/1995 art. 1 par. 13, art. 6 par. 11.
[230] *Ustawa o Radiofonii i Telewizji*, 29-12-1992, as lately amended, art. 38(a)3.

concentration at the stake will not threaten free expression or diversity of opinions[231]. In Slovakia the competent Council can revoke any licence following any market operation that is likely to threaten the pluralism in information[232].

Thus different approaches to this regulatory policy appear to exist in the EU Countries scenario: a stricter one, with the provision of specific figure and a legislative definition of what is allowed and what is not, and a more flexible one, where the law indicates the authorities in charge and only provides some clues to assess the cases on practical basis. In some experiences, the relevant legislation is so flexible that almost appears to give *carte blanche* to the competent authority as for operational matters, but in the same time provides a stricter than usual definition of pluralism and diversity. The two different options on the table seem to be either defining procedures or defining the goal.

Both these approaches have to deal with some possible faults. As for print media so in the case for broadcasting common antitrust policies are usually set in order to detect economic indicators of concentration among market competitors, that is worthy for cases of reduction of outlets but might be not for actual reductions of points of view in the marketplace of ideas. The major concern regards the capability of this approach to capture all those situations that are potentially threatening for media pluralism, but could eventually be irrelevant in light of purely economic measures traditionally applied. This is an inner issue related to the nature itself of media competition that involves a non-economic threshold in terms of other forms of so-called non-price competition.

In ordinary antitrust regulation, some elements are usually to be considered such as the sale of advertising space (regarding, in general, every type of media, as television, press, radio and Internet). This is, already, a first reason of concern. The

[231] Law No. 18/2003, as amended by the Decree-Law No. 219/2006 (*Regime Jurídico da Concorrência*), art. 9, 57.

[232] Act No. 308/2000 Coll. of 14th September, 2000 on Broadcasting and Retransmission and on Amendments of Act No. 195/2000 Coll. on Telecommunications, art. 42, 44 (2).

starting point of any antitrust regulation is the definition of a relevant product and a related market; in the case of the market for news, this operation usually has a severe lack of clarity. Further issues demonstrate the lack of efficiency of this approach. First, even the ordinary indicators for mergers, such as increases in price, can hardly be defined and checked in the competition among media outlets. News does not have a definable price like other products; as observed above, provision of news is only a part of the whole output produced by radio and television outlets, and it therefore particularly challenging to assess cases of market restriction that imply this particular sector of the whole broadcasting industry. Thus competition for prices, that is the most common indicator in merger analysis, cannot be properly checked in this way since it is unfeasible to compare the prices of different outlets. Second, the low degree of substitutability among different kinds of media has to be considered. Newspapers, television news and Internet websites are different as regards both their mode of consumption and the preferences expressed by the consumers. Due to this peculiar kind of non-substitutability, it has been correctly stated that the merger of two close substitutable outlets would result in a greatest harm for the consumers than the ownership convergence of two from different technologies[233], as it would result in the loss of potentially differentiated sources of information. Third, media competition involves much more than purely economic elements. Media outlets compete for advertising revenues but to succeed in that they have to reach larger and larger shares of the audience: this implies elaborating editorial strategies whose possible convergence cannot be checked in light of economic evidence, since this antitrust approach is, by its nature itself, content-neutral.

A further concern regards the level of acceptable market concentration that should be decided by the regulator[234]. On the one hand, it could be reasonable to set

[233] M.E. Stucke, A.P. Grunes, 'Antitrust and the Marketplace of Ideas', (2001) 69 *Antitrust Law Journal* 249, p. 277.
[234] Ibidem.

even lower levels of acceptable mergers in the market for news than in other markets, as an attempt to provide greater diversification; on the other hand, this might be seen as an economic constraint against freedom of expression, and thus there could even be room for thinking about setting higher levels.

Some conclusions about these points can be learnt from experience, namely from one the most relevant cases of merger in the media market, which occurred in 1982 when four American companies[235] proposed a joint venture to buy one of the three leading providers of pay programming service for cable television in those times, the TMC company. The case, as provided by the Clayton Act, was discussed before the U.S. Federal Trade Commission and the Antitrust Division of the Department of Justice, and was finally forbidden for its potential anticompetitive effects. Some lessons can be raised from it. First, that 'if the market is not specified, then the market shares used for concentration measures are unlikely to be correct, entry conditions are unlikely to be correctly stated etc., and the specific analytical conclusions may well be incorrect'[236]. Thus, any piece of regulation should provide a precise definition of the relevant market, both in terms of product and geographic relevance. The Merger Guidelines then in charge provided quite narrow definition and still the case was anything but an easy one: the difficulty of the antitrust approach in the market for news is particularly severe and it is a proper challenge for the regulators to set an effective policy up.

The specific role of mergers and company sizes in media market has also to be considered. Some studies have demonstrated that companies operating in media markets have strong incentives towards mergers. Gal-Or and Dukes[237] state that merging stations, since they presumably have larger audience, are in a better

[235] Paramount Pictures, Universal Studios, Warner and American Express.
[236] L.J. White, 'Antitrust and Video Markets: The Merger of Showtime and the Movie Channels as a Case Study', in E.M. Noam, *Video Media Competition*, cit., p. 338 ff., especially 343.
[237] E. Gal-Or, A. Dukes, 'On the Profitability of Media Mergers', (2006) 79 *Journal of Business* 489, p. 513.

position than the others in bargaining with advertisers and can obtain some financial benefits from that. Thus, in absence of any specific regulation, it can be assumed that media outlets are likely to merger as long as it is profitable for them. It is thereby noteworthy to consider if mergers in the marketplace of ideas are likely to diminish or not pluralism. Some authors actually argue that they may even improve, rather than not, diversity of opinions. Since journalistic enquiries naturally have a cost, it could be the case that larger companies can afford them better than the smaller ones. Furthermore, they could also be in a better position for exercising their role of watchdog, since they could offer stronger resistance against attempts of government censorship. Moreover, larger companies could be engaged in spreading different contents in order to grow their operations.

The argument for mergers increasing diversity can also be supported using evidence from generic media market, being aware that, as usual, in this context the concept of diversity is meant as diversity among contents and opinions, not as diversity between different program genres. Berry and Waldfogel conduct their survey in regards of radio broadcasting, but since it does not involve particular specificities of that medium, it can be applied also to different media. The authors state that the presence of too many competitors in the market leads to a quantitative abundance of products but too few variety, as a result of decreasing average costs; on the other way round, jointly owned or merged stations should have an incentive to avoid product (that for us means either content or point of view) duplication. The reason is that merging outlets are interested in preventing further competitors from entering the market, and to do so they try to fill every space in the market, offering a wide range of different products. This allows them to achieve both the objectives of avoiding competition among themselves and with different competitors[238]. This

[238] S.T. Berry, J. Waldfogel, 'Do Mergers Increase Product Variety? Evidence form Radio Broadcasting', (2001) 116 *Quarterly Journal of Economics* 1009, p. 1024.

reasoning, if true, could be easily applied also to press, television and Internet mergers.

Some evidence exists that Berry and Waldfogel may be wrong. The authors themselves admit the possibility that, in one case, their conclusions might not be correct: mergers do not increase variety whenever ownership concentration results in the diminution of outlets (if two or more TV channels merger, for instance, and then they decide to close one of them: in this case, since the risks of internal overlaps in the offer would diminish, the incentive to differentiate would diminish consequently).[239] A study by Crandall reports the results of a survey commissioned by the U.S. Federal Communications Commission, according to which, under a regulatory environment particularly propitious to mergers and concentrations, the number of producers of network programs declined from 75 to 57 and suppliers declined from 54 to 49 in the period 1958-1967. Even if the author himself has some doubts that this can be considered the mark of a reduction of variety[240] (this point will be further discussed in a while) it must be noted that this is exactly the case in which Berry and Waldfogel consider mergers not likely to increase diversification anymore. It is also relevant that the FCC itself finally concluded, in its statement, that the convergence among different TV broadcasters in networks was harming the "vitality of competition"[241] and thus the provision of different programs.

Another study analyses five years of TV programming schedules in the U.S. and eventually stresses that the tendency is towards an increase in the quantity of products (that, again, for us means quantity of contents in newsreels) but not in their variety, since different outlets seem to duplicate constantly the same kind of

[239] S.T. Berry, J. Waldfogel, 'Do Mergers Increase Product Variety?' cit., p. 1011.
[240] R.W. Crandall, 'The Economic Effect of Television-Network Program "Ownership"', (1971) 14 *Journal of Law and Economics* 385, p. 396.
[241] Quoted in R.W. Crandall, 'The Economic Effect of Television-Network Program "Ownership"', cit., p. 391.

program (the same content or the same bias)[242] since, in despite of Berry and Waldfogel's thought, apparently the broadcasters find more profitable those programs that are most-wanted by the audience rather than try to capture smaller shares.

Greenberg and Bernett develop a survey trying to investigate the links between competition and program-type diversity, assuming that 'programs within the same type do not increase diversity, while programs of different types do increase diversity'[243], which means here that diversity is increased by different contents and points of views in different newsreels. Applying several diversity indexes proposed by previous studies, the authors reach the conclusion that 'the number of different television offerings during a given time period is a most important measure of diversity and choice'[244], but also that the sole abundance of offers is not a sufficient indicator. The larger is the number of suppliers of offerings in the market, the greater the welfare from an economic, social and political perspective. Nevertheless, since the mechanisms of competition are likely to exclude some kinds of products from the market, it could be valuable if some of them could be classified as "merit goods" and thus supported with special financial aids.

The opportunity to adopt a pure antitrust policy can thus be summed up as follows. A similar approach presents, first of all, some technical issues, since usual evidence of market restrictions cannot be easily and successfully applied here. The legislator should carefully assess a definition for the market itself, as well as for price indicators, and further on develop a specific regulation for the sector. The operation would not be easy and there can be no certainty that it would be successful, but nevertheless it is necessary. Mergers in the market for news do produce restrictions

[242] D.M. Blank, 'The Quest for Quantity and Diversity in Television Programming', (1966) 65 *American Economic Review* 448, p. 456.
[243] E. Greenberg, H.J. Barnett, 'TV Program Diversity – New Evidence and Old Theories', (1971) 61 *American Economic Review* 89, p. 90.
[244] E. Greenberg, H.J. Barnett, 'TV Program Diversity', cit., p. 93.

in diversity, in spite of contrary suppositions. As demonstrated by Crandall, ownership concentration brings towards the diminution of sources of information and it is undisputed that it harms variety of information. Antitrust regulation is thus a necessary but not sufficient condition for improving pluralism. As stressed by Blank and Greenberg and Bernett, the distinction between quantity and diversity must be taken in consideration. Antitrust regulation can enforce competition between different voices, but the latter, while is likely to provide quantity, can fail in providing diversity as well, since it could be still more profitable to offer the most popular contents slanted in the most unbiased way (the N segment from the A → N / B → N model above). Being a necessary condition, antitrust regulation must be considered an essential part of the policy proposed to achieve a sufficient degree of pluralism; being nonetheless it cannot be regarded as sufficient to clear the doubts about the harmfulness of competition in the market for broadcast news.

Ownership regulation – A further possibility is to adopt a structural approach. It usually takes the form of limits in the share of the market that a single company can own, that means, for instance, no more than a certain percentage of the whole number of TV outlets[245], for instance by starting a new outlet or a new title, or by acquiring more audience for its programmes. The theoretical difference with the previous approach – which is anyway separated from this one only by a thin line – is that while the antitrust approach preserves first the existing speakers, thus prevents the *status quo* of the market from getting into further concentrations, this second option prohibits large companies – one could also say "large", or "loud voices" – from operating in the market. This prohibition may operate either at the moment of the market entry, or at the moment of a possible expansion; in any case it has the inner

[245] In the case for cross-media ownership regulation, it could also deny cross-border ownership between different media, for instance the prohibition to buy a newspaper for the owner of a radio station.

meaning of preventing a voice from speaking[246] – therefore it must be addressed particularly carefully.

The broadcast industry has a strong economic incentive in networking, that means linking together radio or television stations in order to share programmes and thus reducing per-viewer costs, profiting by economies of scale. As the number of networks increases, the number of effective competitors in the market decreases and it is commonly believed that 'concentration intensifies concern about fairness in news and public affairs broadcasting'[247].

Why any company should be prevented from acquiring too much power on the market? A first reason can be found in the application of the common principle of checks and balances to this area. It could be considered a mean to implement a 'democratic distribution principle for communicative power'[248]. Add to that further economic reasons: the case for conglomerate ownership is seen to particularly relevant, as a similar firm strategy would increase internal (as editorial boards would be less willing to criticize "affiliated" entities) and external (as pressure from the Government or from economic competitors) incentives to distort the provision of news[249].

Several legal systems provide indeed rules to prevent any firm from acquiring too much power within the market, usually considering this as a condition for having a licence issued or lately held. In Austria, any TV group cannot provide more than

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[246] See: M. Cave, W.H. Melody, 'Models of Broadcast Regulation: The UK and North American Experience', in C. Veljanovski (ed.), *Freedom in Broadcasting*, cit., p. 234: 'Rules concerning the ownership and control of media are regulatory device affecting entry'.

[247] R.G. Noll, M.J. Peck, J.J. McGowan, *Economic Aspects of Television Regulation*, cit., p. 269.

[248] C.E. Baker, *Media Concentration and Democracy. Why Ownership Matters*, Cambridge, Cambridge U.P., 2007, p. 7. See also B. Bagdikian, *The Media Monopoly*, Boston, Beacon Press, 1997: 'Leading corporations own the leading news media and their advertisers subsidize most of the rest. They decide what news and entertainment will be made available to the country; they have direct influence on the country's laws by making the majority of the massive campaign contributions that go to favored politicians; their lobbyists are permanent fixtures in legislatures'.

[249] See C.E. Baker, *Media Concentration and Democracy*, cit., p. 37-41. While the author is mostly concerned about cross-market conglomerates, he also states that 'even pure media conglomerates are subject to this vulnerability' (p. 38).

two digital terrestrial outlets in the same area[250] and similarly any radio company cannot cover the same region more than twice[251]. Furthermore, multiple licences for radio or analogue terrestrial TV can be hold by the same group only if they do not overlap in the same area[252]. In Belgium, there is a specific monitoring procedure at the moment of market entry. The conditions for obtaining a licence under the Flemish legislation include that any group cannot operate more than two communitywide or regional radio stations and no more than one regional TV station[253]. In the French-speaking community, any group cannot own more than 24% of the capital in two TV or radio stations, or control outlets that reach 20% of the audience[254]. In Bulgaria, the Law on Radio and TV[255] provides that a telecommunication operator that holds a monopoly position on the market cannot apply for a licence; furthermore, a national and a regional licence cannot be held jointly. In the Czech Republic, only one licence can be held, any firm can hold only one licence in the TV or radio market; furthermore, the holders of licences cannot have interests in the business of any of their competitors or consolidate with them[256]. In Estonia, a licence cannot be issued to any company that would, in this way, obtain an information monopoly in the relevant area, or that is a business partner of any other holder of a similar licence[257]. The French legislation provides a more complex system, not allowing any natural or legal person to hold more than 49% of the capital or the voting rights of a national terrestrial television channel, or more than 50% in a regional or satellite channel. Natural and legal persons are not allowed to hold more than 15% of the capital share in two national analogue terrestrial

[250] PrTV-G art. 11 (5).
[251] PrR-G art. 9 (3).
[252] PrTV-G art. 11 (1); PrR-G art. 9 (1).
[253] FLRTA art. 41 par. 1, 45 par. 1, 49.
[254] FRBA art. 7, 56bis.
[255] Prom. SG. 138/24 Nov 1998 (lastly amended in 2007), art. 105 (4), 108, 116 (3).
[256] Art. 55 (1-8).
[257] RT I 1994, 42, 680, par. 37.

broadcasters, or more than 5% in three of them; or more than one third in two satellite broadcasters or more than 5% in three of them; furthermore, in addition to these limits, no entity can hold more than one licence for national analogue terrestrial broadcasting or join a national and a regional licence[258]. Ownership limits, when not linked with capital limits, provide that no more than seven licences for digital TV, or, two licences for satellite TV, or one regional licence (or more than one, until the relevant areas do not have more than 12 million inhabitants as a whole) can be held by the same natural or legal person[259]. In Germany, a Commission on Concentration in the Media exists that can check for cases of undue concentration, and dispose in order to put an end to a controlling influence of any company due to its viewer rating; in particular, a broadcaster is supposed to have a dominant position when it has an audience share of 30% of the whole TV market, or an audience share of 25% and a dominant position in an other related market, or an audience share of 30% in the whole media market; in any case, apart from the fixed figures, the competent authorities are free to evaluate if any market condition, with shares lower than those mentioned above, is anyway likely to generate dominant positions[260]. In Greece, no more than one TV or radio station can be controlled by the same company; any natural or legal person can hold 100% of the capital in only one outlet, and own a share in another company provided that they do not control it[261]. In Ireland, the Broadcasting Commission has the power to prevent any company form holding licences enough to control a certain share of the market: three thresholds are provided by the law (up to 15%, 15-25% and over 25%) and for each of them different procedures; a single operator cannot hold licences for more than 25% of the market[262]. In Italy, no entity can broadcast more than 20% of the whole

[258] *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, art. 39.
[259] *Loi Léotard*, art. 41.
[260] *Rundfunkstaatsvertrag* (RStV), adopted on 31 August 1991, art. 26 (1), (2), (4), (6).
[261] Law 3592/2007 art. 5.
[262] Radio and Television Act 1998, Sec. 6 (2) (g); Ownership and Control Policy, Sec. 2 (ii) (d).

panorama of programmes available at national level through digital frequencies or earn more than 20% of the total revenues from the integrated communication system; at local level, any broadcaster cannot hold more than three frequencies in the same area or more than six in the whole national territory[263]. In Latvia, a company cannot hold more than 3 channels and a natural person that controls a broadcasting company cannot hold more than 25% of the capital share in another company in the same market. Some pretty unusual rules provide that applicants to a broadcasting licence cannot be married to the shareholder of another broadcasting company, and if a natural person that already controls one media company inherits capital share of another company much enough to control they have to alienate the inherited capital within three months[264]. In Poland the law generally provides that no licence can be issued or held by a company that has a dominant position on the market; the definition of such a requisite is further precised by the general competition act, that refers to it as to any situation in which a competitor controls over 40% of the market[265]. In Portugal two different regimes apply to TV and radio sectors. As regards the formers, licenses for ether transmission are issued following a public contest, while for cable transmitting a sole authorization is required[266]. The provision are stricter for the radio market: it is forbidden for any natural or legal person to own capital shares in more than five stations, or 25% of capital share in two local outlets transmitting in the same municipality[267]. In Romania the major shareholder of one outlet cannot own more than 20% of the capital share in another direct competitor[268] and in Slovenia a similar rule is provided[269]. In Slovakia any

[263] Legislative Decree 31 July 2005, no. 177, *Testo unico della Radiotelevisione*, art. 43 c. 9, 23 c. 3.
[264] Radio and Television Act (1995), Sec. 8, 11, 33.
[265] *Ustawa o Radiofonii i Telewizji*, art. 36, 38; *Ustawa o Ochronie Konkurencji i Konsumentów* (Act on Competition and Consumer Protection) 16-2-2007 (as last amended), art. 4.10.
[266] *Lei da Televisao*, No. 32/2003 (partially repealed by Law No. 27/2007), art. 13.
[267] *Lei da Rádio*, No. 4/2001 (as amended by Laws No. 33/2003 and No. 7/2006), art. 7 par. 3-4.
[268] Law no. 504/2002, art. 44.
[269] *Zakon o medijih*, art. 56 (2).

investor cannot be connected through capital with more than one licensed outlet, irrespectively of the national or regional relevance of the licence[270]. In Spain provisions for share limits existed until they have been repealed by the new regulation in 2005, and thus now it is theoretically possible to hold multiple frequencies, despite the Government, when granting frequencies, is requested to take into account the need for diversification[271]. Apart from the procedure for awarding the licenses, any person cannot hold more than 5% of the capital share in two companies which both are holders of a licence, either at national or regional level, unless they are two regional licenses in different areas[272]. A further provision applies to the radio industry, where any competitor is prevented from controlling more than 50% of the concessions in a certain area or more than five licenses[273]. In Sweden, a similar provision is relevant only for the radio sector, where two licenses for the same area cannot be held jointly[274]. In the United Kingdom, a person is not to hold more than one national radio multiplex licence at the same time[275] or two local radio multiplex licences at the same time if the two area overlap[276]; further restrictive conditions can be set up by the Secretary of State in regards of local sound broadcasting licences.

The scenario depicted above appears quite varied as very different options are on the table. Quite predictably, different Countries provide different figures as regards levels of allowed power on the market, and thus some appear to be stricter than some others[277]; more interesting are the different options for defining a

[270] Act No. 308/2000, art, 42 (1) – (2).
[271] *Ley 10/1988* (as amended by *Ley 10/2005*), art. 9.a.
[272] *Ley 10/1988*, art. 19.
[273] *Ley 31/1987*, as amended by *Ley 10/2005*, art. 1.
[274] *Radio- och TV-lag*, Act 1991:1559 (as last amended by SFS 2007:1288), Chapter 5 Sec. 4.
[275] Communications Act 2003, Sch. 14.7.
[276] Communications Act 2003, Sch. 14.8.
[277] Similar differences in allowed thresholds of concentration could eventually turn out to be likely not to bring about any of the desired effects: see A. Enker, 'Legal Restraints on Concentration of Media Ownership', in M. Keren (ed.), *The Concentration of Media Ownership and Freedom of the Press*, cit.,

dominant position and assessing the size of a company, including (a) a number of licenses; (b) a percentage of the capital share of the competitors in the market; (c) a quota of the market in terms of audience. Quite significantly, the option for defining the market in terms of advertising control is widely rejected, this being a possible clue that the conception of diversification in the market for news has to be assessed by using different indicators than the ones used in other sectors.

All of the three options considered raise some issues anyway. From a constitutional point of view, the third – the one for limiting audience shares – appears to be even senseless. It technically implies that not more than a certain part of society can watch what they want; even if, as seen above, not every constitutional charter in Europe (but the ECHR does so indeed) provides a similar right, it must be agreed with Baker that 'an audience member has a presumptive right to have the government not attempt to prevent her from receiving communications'[278] and similar policies breach such a right. The other two options do not involve audience's right at a similar scope, but equally are not that smooth. A breach of freedom of the press could be found here; these provisions still mean that anyone is not free to communicate all the contents they want, at the extent they want (and market forces would allow them). Of course, no absolute constitutional rights exist as they all can be balanced if a worthier value is meant to be protected to their harm. This could be the case for sacrificing free speech in favour of the value of pluralism. But many legislators or courts could find uncomfortable to prefer an implicit right to an explicit one; moreover, even if such a balance was be thought to be correct, this would be a further confirmation of how the audience-share limit is wrong.

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p. 28: 'I doubt whether extremely strict limits will solve the problem. It seems to me that we reach a point of diminishing returns at which there is not much difference, with regard to the concerns that interest us here, between ownership of 10% or 15% or even 20% of a TV station by a person or a group that also owns a newspaper in the same locale. The commercial factors are likely to affect all of the owners similarly, in most instances'.

[278] C.E. Baker, *Media Concentration and Democracy*, cit., p. 167.

The theoretical implications of this regulatory approach about company sizes and diversity are not that different from the ones already considered for the antitrust approach and it might be stated, again, that larger companies could have stronger incentives to differentiate, more resources to spend in major enquiries and new contents, and so on. Furthermore, Brenner considers a misconception the common point that large companies would influence the spread of ideas within the society, arguing that, since any news provider has its own editorial strategy that implies some choices, there is no point for assuming that a small company would take better choices than a large one[279].

The point if ownership assets can have any effect on diversity is indeed a disputed one. While many voices have been raised crying for distortion of information by media giants, this argument has also been defined 'anecdotal' and evidence would show the opposite, the whole media industry – thus broadly defined – being very competitive indeed rather than uncannily concentrated as wrongly thought according to some literature[280]. Moreover, some evidence exist that group ownership does not influence the contents of a broadcast product[281] and that even a reduction in group ownership would be equally neutral[282]. It has also been stated that advanced technologies may even reduce the negative effects – if there is any – of group ownership on diversity, making the market more unconcentrated and promoting efficiency[283].

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[279] D.L. Brenner, 'Ownership and Content Regulation in Merging Emerging Media', (1996-1996) 45 DePaul Law Review 1009, p. 1030.

[280] See B.M. Compaine, D. Gomery, *Who Owns The Media? Competition and Concentration in the Mass Media Industry*, Mahwah, Lawrence Erlbaum, 3rd ed., 2000, p. 537 ff.

[281] See P. Cherington, L. Hirsch, R. Brandwein, *Television Station Ownership: A Case Study of Federal Agency Regulation*, New York, Hastings House, 1971, p. 82 ff.

[282] H.J. Levin, *Fact and Fancy in Television Regulation*, New York, Russell Sage Foundation, 1980, p. 170 ff.

[283] See S.M. Besen, L.L. Johnson, 'Regulation of Broadcast Station Ownership: Evidence and Theory', in E.M. Noam (ed.), *Video Media Competition*, cit., p. 364 ff.

This approach could nevertheless be a viable way to grant access to the media market to minorities who are normally excluded. The legislator, while setting ownership limits, might also reserve some quotas to minorities in order to grant them the possibility to exercise their freedom of expression. It could be the case that minority-owned outlets would be more likely to spread less popular contents and opinions. Unfortunately, this idea is probably both unfeasible and wrong in facts. Unfeasible, because a regulation like this would be hard to draft. What should be considered as a minority entitled to have some share of the market? Ethnic minorities (all of them?)? Opposition parties? Any possible group of interest existing within the society, even the most small and unknown? On the one hand, it could be the case that, the smaller is a group, the more it is entitled to have access to mass media, since its ideas are the most overshadowed in the market. But on the other hand, some limits have clearly to be established, since, due to the scarcity of resources, it is technically unfeasible to reserve a quota for any single individual in the world: thus the legislator should face decisions of high social sensitiveness, which would result in a political intrusion in the marketplace of ideas.

Wrong in facts, since Brenner reports the results of some similar experiments taken in the U.S. granting access to mass media to women and some ethnic minorities, and that were finally limited in their effectiveness[284].

This approach is also likely to be affected by some legal issues. Since it involves property rights, it could be inconvenient (in some cases even unconstitutional) for the legislator to operate breaking already consolidated ownership assets. This approach could thus be adopted only as an *ex ante* measure, to prevent further consolidation of large companies. It could be the case for the Internet, a still expanding market where, nevertheless, most of the popular news

[284] D.L. Brenner, 'Ownership and Content Regulation in Merging Emerging Media', cit., p. 1024.

website are already controlled by large groups also active in different media (typically this is the case of newspapers and their on-line version).

The reason why the development of digital communication might provide remarkable achievements in this sector resides in the possible changes in the industry structure that it is likely to introduce. The industry of video products has indeed certain patterns (which can be individuated in 'expensive production and volatile consumption patterns, combined with low variable distribution costs and imperfect price discrimination'[285]) that bring the companies in the market to favour larger shares of audience and ignore minority tastes. The same mechanism can be also applied to the market for TV news, based on advertising revenues as well as other TV products.

In summary, there are several critical points about this kind of regulation[286]. The point for media conglomerates is a disputed one as it cannot be surely assumed that the size of an outlet would have a clear impact on the provision of contents. No evidence exists that media giants are undoubtedly likely to provide more differentiated information; on the other way round, experience appears to show that attempts to spread property in the market eventually failed to accomplish the purported goal. The structural approach thus looks even less satisfactory than the previous one. Not only it does not provide any assurance that it could perform successfully, but it is also technically and legally severely demanding. Even if there is no certainty about the possibility to achieve significant results, the only situation in which this model could (theoretically) find place looks to be the regulation of new emerging or expanding markets like the Internet: actual chances for this approach to

[285] E.P. Goodman, ' Media Policy Out of the Box', cit., p. 1432.

[286] A particularly critical (probably even exaggerated) position is expressed by S. Brittan, 'The Case for the Consumer Market', in C. Veljanovski (ed.), *Freedom in Broadcasting*, cit.: 'Like other controls, broadcasting controls will not be completely effective; yet they still represent a major interference with choice and freedom. Constant vigilance will continue to be the price of liberty in broadcasting, as in all other walks of life' (p. 50).

find place in the market for digital media will be discussed in the following paragraph.

Regulation of the networks – New technologies and the abundance of available channels have made the workability of competition sensibly better, but on the other way round they also raise some issues that deserve to be considered and carefully regulated. As already considered in the print media market, delivery systems can play a fundamental role of gatekeepers that could ultimately result in a sensibly harmful diminution of diversity. It has been therefore raised the point if government regulation should impose any right to access to the cable nets (as the spectrum is already regulated in a different way). Different policies could be set in this regard, the main two options being public or leased access, both theoretically feasible until non-discriminatory conditions of access are guaranteed[287].

The topic is clearly a worthy one if one thinks that 'access is the avoiding or the correcting of imbalances in broadcasting's representation of politics and society by the articulation of a diversity of "directly" stated views from different sections of the public and by the reflection, again "directly", of the real diversity of cultural, social and economic circumstances, particularly those which require attention and action'[288].

In economic literature, the second option is more strongly supported: cable operators are told they should grant access on non-discriminatory basis to those requiring the service. There could be room for setting different prices for different categories of users provided that cablecasters could not discriminate in favour of

[287] See H. Geller, 'The Role Of Future Regulation: Licensing, Spectrum Allocation, Content, Access, Common Carrier, and Rates', in E.M. Noam (ed.), *Video Media Competition*, cit., p. 283 ff., especially p. 303-306. According to the author, while the cable industry would favour bearing a duty of granting public access, leased channels would perform more efficiently.

[288] J. Corner, 'Mediating the Ordinary: The "Access" Idea and Television Form', in M. Aldridge, N. Hewitt (eds.), *Controlling Broadcasting*, cit., p. 22.

their own transmission: thus it should be a public authority that sets the prices for the service[289].

This point is not by any mean an unworthy one, being it on the contrary crucial to the fulfilment of pluralism: 'if access diversity is a legitimate policy concern, then the focus of that concern must be on the effectiveness of competition in the industry of gatekeepers'[290]. While for years network operators had been publicly owned in Europe, in the last years the spread trend of privatisation and liberalisation of public services has involved cablecasters as well, which are now mainly private. Ownership assets of cablecasters are also notably relevant. As all the network operators of net services, cable operators were considered natural monopolists with monopoly pricing powers. The shift to a competitive landscape can be welcomed as some evidence exist that competition both from direct competitors and from other video media may reduce overall price-cost margins[291].

Many Countries provide some "must-carry" rules to deal with this issue: in Austria, all cable network operators must carry the public service broadcasters, all the programmes from licence holders, both at national and regional level, a programme for local information and a programme with Austrian content[292]; all digital terrestrial device operators must carry the programs from the PSB and the

[289] See I. de Sola Pool, *Technologies of Freedom*, Cambridge, MA, London, Harvard U.P., 1983, p. 185-187. In regard of price discrimination, the author correctly states that 'non-discrimination means equal tariffs for all customers seeking the same thing' and thus different rates for different uses would be legally and logically reasonable, as, for instance, 'telephone rates are different for households and business'.

[290] S.S. Wildman, B.M. Owen, 'Program Competition, Diversity, and Multichannel Bundling in the New Video Industry', cit., p. 247. The authors do not refer this thinking expressly of cablecasters, but once it has been noted has they effectively play this role the statement is relevant in their regards as well. See also J. Fritz, 'The Economics and Politics of Media Concentration', cit., p. 19, where the author expresses his concernment that an 'area that is worrisome is the trend toward corporate cross-ownership, enabling companies to promote their products via their own media networks. This has tremendous repercussions in terms of the nature of the media world and the information it is generating. Conglomerates harbour conflicts of interests and hidden forces that pose a threat to democracy'.

[291] K. Thorpe, 'The Impact of Competing Technologies on Cable Television', in E.M. Noam (ed.), *Video Media Competition*, cit., p. 162.

[292] PrTV-G art. 20

programmes from the holders of relevant licences at non-discriminatory basis[293]. In Belgium, cablecasters are obliged to distribute contents provided by the PBS stations, local TV stations, international broadcasters appointed by the Government, and other entities on governmental provision. In the Czech Republic, the cablecasters can be required by the local authorities to reserve one channel for providing unpaid local information[294]; similarly, they can be required by the competent authorities to transmit designated programmes or services[295]. In Denmark, the owners of the aerial transmission system must provide their service to the national and regional public broadcsters[296]. In Estonia, the cablecasters must guarantee their service to the PBS broadcaster and to another range of programmes specified in the relevant regulation[297]. In Finland, the Communications Market Act[298] provides a duty for cablecasters to carry the signal of public broadcasters and all the radio stations in the municipality. In France, distributors must guarantee their services to public broadcasters and to local channels that require so[299]. In Greece, satellite TV owners have to transmit contents provided by the PBS broadcasters; the system is different for analogue TV, where there is a strong vertical integration and thus broadcasters also own their own nets and are subject to must-carry rules in favour of the Parliament, social messages, political plurality programmes and programmes for hearing impaired audience[300]. In the UK[301] and in Hungary[302], a different system is applied: some contents are declared public by law ('basic', in Hungary) services and the broadcasters have the duty to transmit them with no charge for their viewers; a

[293] PrTV-G art. 25.
[294] Broadcasting Act, art. 54 (1).
[295] Act No. 127/2005 coll. of 22 February 2005 on Electronic Communications and on Amendment to Certain Related Acts, art. 72 (1).
[296] *Radio- og fjernsynsloven*, Act no. 338 of 11 April 2007 on radio and television broadcasting.
[297] Electronic Communications Act of December 8, 2004, par. 90.
[298] Act 393/2003 as last amended by Act 119/2008.
[299] *Loi Léotard*, art. 34-2, 34-4; *Décret n° 2005-1355 du 31 octobre 2005*.
[300] Law 2644/1998; law 2328/1995, art. 3 par. 19-21, art. 8 par. 4; law 1730/1987 art. 3.
[301] Communications Act 2003 Sec. 64.
[302] Act 74 of 2007, art. 25.

similar provision is enforced in Portugal[303]. In Ireland, the Broadcasting Authority can require the broadcasters to transmit programmes on the basis of community content contracts[304]. In Latvia, cablecasters must transmit the signal from the PBS broadcasters[305], as well as in Poland[306], in Romania[307], in Slovakia[308]. In Slovenia, the net operators must allow access to all the licensed broadcasters on non-discriminatory basis[309]; a similar provision is applied in Sweden[310]. In Spain, cablecasters operate on the basis of administrative authorizations that provide, in general, must-carry obligations which can be further specified and thus made operative via secondary legislation provided by the Government once specific principles and objectives have been specified by law. In lack of those defined principles, the must-carry obligations are in practice not yet in force[311].

The public-access model seems to be the largely favoured one, the leased-access option (that should on the contrary be the preferred one, according to the most relevant economic literature) being in practice rejected by the European legislators.

In many other net services unbundling provisions have also been set, meaning that network operators are not entitled to carry also different services; in the case for the broadcasting industry, this means that cablecasters would be allowed to compete in the market for the provision of contents. On the one end, this provision would radically solve the issue of their gatekeeper role and its possibly detrimental role in providing pluralism. On the other hand, similar rules could not be set in this field due to the constitutional rights here at the stake. Excluding

[303] *Lei da Televisao*, art. 25 no. 2-3.
[304] Broadcasting Act 2001, Sec. 37.
[305] Radio and Television Act (1995), Sec. 34.
[306] *Ustawa o Radiofonii i Telewizji*, art. 43.
[307] Law no. 504/2002, art. 82.
[308] Act No. 308/2000, art. 17 (1).
[309] *Zakon o medijih*, art. 112.
[310] *Radio- och TV-lag*, Chapter 8 Sec. 1.
[311] *Ley 32/2003*, additional provision 7 and transitional provision 6.3.

cablecasters could be interpreted as a breach of their right of free speech. While claims in this sense exist[312], constitutional theory teaches that very few constitutional rights cannot be balanced with different values considered even worthier: thus it should be a decision of the legislator of each State, according to the relevant procedures provided by the national legal system, decide if freedom of expression of broadcasters should be weighted more heavily than pluralism or not.

Similar pieces of regulation are very seldom to be found within the EU Countries: in Austria, any media group cannot serve more than 30% of the population by an owned cable network[313], in Slovakia the same rule applies, with a maximum market share of 50%[314].

The case for public television – While the U.S., since the early development of broadcasting technology, opted for a fully private market, while in Europe, where the public service tradition was much more developed[315], the use of the spectrum was initially advocated by the State, the first experience in this sense being the British Broadcasting Company. Once afterwards the spectrum was opened for private broadcasters as well, the situation evolved to a public-private mixed system, in which a certain number of private competitors sit aside a State controlled company, usually developing some sort of public service in this field.

As for the underlying rationale, the common justification is that a public service TV station should be needed to fix some inefficiencies arising from a hypothetical fully private market, namely in terms of quality of the service and

[312] See I. de Sola Pool, *Technologies of Freedom*, cit., p. 186-187
[313] PrTV-G art. 11 (3).
[314] Act No. 308/2000, art. 42 (2).
[315] A comprehensive overview of PSB tradition in Europe can be found in P. Humphreys, *Mass Media and Media Policy in Western Europe*, Manchester, MUP, 1996, especially Chapter 4.

provision of those programmes non appealing in the free market, but that, as merit goods, should be nevertheless provided to the society[316].

In the market for news, a public service broadcasting (PSB) could thus be a viable solution for those market deficiencies in terms of diversification claimed above. Nevertheless, some controversial points should be solved first, namely what should be the exact role of the public broadcaster in the media landscape and how it should be funded.

As regards the role of the PSB, the commonly understood rationale for it is to fix some market inefficiencies. A unique way to achieve this goal does not exist, while different orientations are in theory feasible. Should the PSB only provide those contents that other outlets does not provide, or offer a whole range of contents? Would the latter mean diminishing the role of the public service, or would the former setting up a schedule not really appealing for large shares of the society and thus largely useless? Defining the final aim should be the first task of the legislator, as otherwise the public broadcaster would be likely to fail in achieving its goal.

[316] It has been noted that 'European (and especially British) television output as a whole has historically been generally compared favourably, in terms of diversity and quality, with the US equivalent which has developed in the absence of a strong PSB tradition. [...] The experience of the BBC/ITV duopoly suggested that the arrangement resulted in positive outcomes in terms of producing an enviable range of quality programmes [...]. Indeed, the opposite, in the form of homogeneous, lowest-common-denominator programming has largely been the outcome of the American experience of minimalist regulation'. M. Feintuck, M. Varney, *Media Regulation, Public Interest and the Law*, cit., p. 40-41. The efficiency of PSB, especially in regard of the British experience, is nevertheless a disputed matter: in favour of it, see also A. Peacock, 'The Future of Public Service Broadcasting', in C. Veljanovski (ed.), *Freedom in Broadcasting*, cit., p 51 ff. Within the opposing opinions, see A. Budd, 'The Peacock Report – Some Unanswered Questions', in C. Veljanovski (ed.), *Freedom in Broadcasting*, cit., p. 63 ff., highlighting some faults of the British policies in the 1980s; M. Tracey, *The Decline and Fall of Public Service Broadcasting*, Oxford, Oxford U.P., 1998, in whose opinion 'by the closing years of the 1980s that edifice [of public broadcasting] was widely seen to be crumbling [becoming] a potent symbol of a collision of ideas over how western societies should be organized, not just economically, but also culturally, creatively, morally' (p. 40); G. Murdock, 'Corporate Dynamics and Broadcasting Futures', in M. Aldridge, N. Hewitt (eds.), *Controlling Broadcasting*, cit., who states that 'cable policy broke the public service consensus' (p. 13) (but the end of scarcity has not made the PSB useless in enhancing the level of pluralism that competition cannot provide).

As a matter of regulation, for instance, it has been stated that the three aims of PSB should be the independent and impartial coverage of news and current affairs, a high quality standard of programming and the implementation of social cohesion[317]. For the purposes of this study, the report by the Carnegie Commission draws the most suitable "letter of intent" for a PSB: 'The utilization of a great technology for great purposes, the appeal to excellence in the service of diversity'[318] should be the ultimate aims. Thus high quality and different programmes than the ones offered by commercial TV should be the goals, and this really appears, at least in theory, to be the right recipe to solve the issues arising from media competition as stated above. A notable example of this approach comes from the UK experience, where recently in the Green Paper for Charter Review of the BBC it has been stated that 'The BBC should aim to complement what is available on commercial channels, rather than always competing directly against it'[319]: it has been noted about it that 'the new Charter might focus the BBC more specifically towards the nation's needs as citizens, obliging the BBC to produce content which focuses on filling the gaps left by commercial broadcasters'[320].

As regards funding the PSB, a background consideration has to be spent. While viewers of public TV would obviously and directly benefit from it, this is not true as well for non viewers. From a general point of view, the whole society would benefit from more pluralism, as already observed at the beginning of this work. But the individuals wouldn't get any direct benefit from it. The lack of direct benefit for the non-viewers can be explained as follows. While commercial broadcasted are

[317] See J. Curran, J. Seaton, *Power without Responsibility: The Press, Broadcasting and New Media in Britain*, London, Routledge, 2003, p. 401-404.
[318] Carnegie Commission on Educational Television, *Public Television: A Program for Action*, 1967, available at www.current.org/pbpb/carnegie/CarnegieISummary.html.
[319] Department for Culture, Media and Sport, Review of the BBC's Royal Charter, *A Strong BBC, Independent of Government*, 2005, available at: www.bbccharterreview.org.uk/pdf_documents/bbc_cr_greenpaper.pdf.
[320] M. Feintuck, M. Varney, *Media Regulation, Public Interest and the Law*, cit., p. 49.

mainly interested in audience maximisation, they are prone to assume centrist perspectives on public issues in order to seek as many viewers as possible. On the other way round, the PSB would deal with minority issues and positions. It can be assumed that those who decide not to watch public TV are not interested in the contents provided, the specific topics or the opinions there expressed. It can be argued thus that, whenever the spread of different ideas brings society to a change, those who were not interested in the debate before would probably not be interested in the change itself afterwards[321].

This sounds a bit too extreme. First, it could also be the case that some people do not care about and do not get involved in public affairs, but nevertheless they could benefit from some social changes even if they did not contribute to them. So the effective rate of benefit for the non-viewers cannot be exactly estimated in these terms. Second, it could also be considered that more debate about public affairs should theoretically make the whole society more aware of these issues and thus decisions about them should become more pondered and better for anyone – non-viewers included. Third, this would not be the first case in which the whole society bears the cost for some service that only a few enjoy – taxation for public services usually works in the same way. The point thus is if the legislator decides that implementing pluralism should be considered as a sort of a sort of public service or not. As defining pluralism in this way could be quite controversial, there is room for some discussion about the best way to fund the PSB[322].

The most obvious source of funding would be a tax levy, which could raise the issue of public expenditure for the benefit of few individuals. Thus the taxation could

[321] See R.G. Noll, M.J. Peck, J.J. McGowan, *Economic Aspects of Television Regulation*, cit., p. 214.

[322] The same question can be turned in more economic terms: if implementing pluralism is not regarded as a public service, thus it is economically efficient as long as the benefit enjoyed by the viewers is more than the cost of the service itself; if it is a public service, the society should agree on a redistributive mechanism that allows only of a part of it to benefit from a service funded by all. See R.G. Noll, M.J. Peck, J.J. McGowan, *Economic Aspects of Television Regulation*, cit., p. 215.

be oriented to the commercial media firms – for instance, those who get from the State the exclusive right of using a spectrum frequency or a public owned cable, through a licence fee; this tax could look "fairer" than a general taxation[323].

A possible option would also be having a public station funded by advertisement, as well as private competitors in the pre-pay TV era. Such a setting would probably totally undermine the basic rationale itself for PBS to provide more diversification and quality. Evidence exist that, in the era of public/private duopoly in the UK, when the ITV companies where the only ones allowed to raise advertisement revenues, those were providing more populist and mass audiences appealing programmes while the BBC had a more quality-oriented schedule[324]. Allowing PBS to raise advertisement revenues means throwing it in the same competitive arena for mass audience attraction with the detrimental effects observed above[325].

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[323] R.G. Noll, M.J. Peck, J.J. McGowan, *Economic Aspects of Television Regulation*, cit., p. 231. The authors raise this proposal and then also counter-argue that there would be 'no good reason' to use that money in this way rather than for other, more general, purposes. The answer to this objection is quite an easy one – as public expenditure is decided by Governments, there is no better use than another one once it has been agreed that the State should provide a certain service. On the other way round, it should also be considered that a tax levy is told to be a poor mean as for independence of the PSB from governmental influence: 'the licence fee is a means of financing television that would only be adopted, in the circumstances which now prevail, if governmental influence over television programmes was desired. There is no more need to finance television services through a tax than there is to finance newspapers in such a way' (D. Sawers, 'Financing for Broadcasting', in C. Veljanovski, *Freedom in Broadcasting*, cit., p. 81).

[324] See M. Feintuck, M. Varney, *Media Regulation, Public Interest and the Law*, cit., p. 42.

[325] See G. Murdock, 'Corporate Dynamics and Broadcasting Futures', cit., p. 3 ff., and the discussion about 'how fully the BBC's strategies have already been shaped by corporate rationales. If this process continues there will be very little chance of developing a public broadcasting system that is capable of addressing the current crisis of representation and contributing the symbolic resources required for the exercise of full citizenship in a complex democracy' (p. 19). The underlying rationale, which can be obviously thought to be valid for any PSB entity, is that the public service should be kept as far as possible from market and competition logics to completely fulfil its role. Furthermore, it could be thought that by excluding PSB broadcaster from the possibility to raise advertisement revenues both the PSB broadcasters and the private ones would enhance the quality of their programmes. An opinion expressed about the British PSB experience, that could easily fit any other Country, considers that 'by improving the competitiveness of the television advertising industry the Government could ensure that programme standards do not fall. [...] Programme standards could be maintained at their current levels, if not higher, if the BBC did not engage in ratings competition and took over Channel4's distinctive programme remit. In this way viewers would have genuine competition in the purchase of airtime. The Government has one of those rare opportunities whereby it could achieve two objectives

Another option would direct charges for the viewers. This would have a strong economic rationale: as PBS is not supposed to be market-oriented and its role should be offering coverage for overshadowed contents, it is likely that only niche audiences will be interested in it. Rather than charging the whole society (through general taxation) for something only few are interested in, it could be considered fairer if only those who benefit from a service pay for it. Furthermore, by paying for each programme they watch, the viewers would have a chance to exercise a direct influence on the programme selection[326]. The issue with this approach is that it appears to be the opposite of the inner meaning of public service, if those who cannot afford a service are excluded from it. Since the least wealthy minorities are those whose interests are the most likely to be underrepresented in the market, as seen above, as a consequence of their minor appeal on advertisers and their poorer possibilities to access to pay TV services, those should be the first and obvious target of PBS, rather than that part of the society that cannot even benefit from it.

A further possibility would be the provision of automatic general revenue funds, which is in some regards considered as the best possible option[327] since it would raise less discriminatory burdens than a tax levy. But still it could be argued that in this way public funds are detracted from possibly worthier purposes.

It looks like there are no optimal ways to fund public broadcasting without lowering its social value; it is a sort of dilemma, in which either economic efficiency

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with the same policy change' (C. Veljanovski, 'The Role of Advertising in Broadcasting Policy', in Id. (ed.), *Freedom in Broadcasting*, cit., p. 112).

[326] See D. Sawers, 'Financing for Broadcasting', cit., p. 90: 'Experience of subscription television suggests that it will provide viewers with programmes which are different from those already available'. If this is true in general, for common programme schedule, might be true for news programmes as well, but at a different rate. It might be the case that more viewers will prefer more entertaining rather than informative programmes (and thus the whole offer of information might decrease) but also different contents and opinions than those already available (more likely for free) on other channels. Thus the PSB could be offering less but more pluralistic information.

[327] R.G. Noll, M.J. Peck, J.J. McGowan, *Economic Aspects of Television Regulation*, cit., p. 234. But the authors disregard the option for a tax levy, that is not, on the contrary, opposed here. Thus the two sources of revenue could be theoretically considered both efficient.

or social efficiency has to be at a certain extent sacrificed for the other. And some claims exist indeed that 'public broadcasting is a singularly inefficient way to remedy the defects in the commercial system: it occupies valuable spectrum allocations with programs which have miniscule audiences [and] it is deliberately nonresponsive to consumer tastes'[328]. Thus a different option would be for public service programmes to buy time on commercial stations. But this option looks even worse than the previous one. First, contents do not originate from nothing; the upper stages of the supply chain should be anyway arranged by a public entity and production costs are usually the heaviest one in the broadcasting industry. Then these contents should be transmitted by buying time on commercial stations: the price could be either a competitive one or set up by law at a special rate. In the first hypothesis, the public entity buying time should pay it at the price the commercial broadcaster considers convenient, that is at least equal to the revenues they could raise from advertisement for their normal schedule. Since the programme broadcasted as a mean of public service is by definition overshadowed in the market as less appealing for mass audiences than the "commercial" one, it means that the public entity would be paying a price higher than the effective market value of the product itself. So no significant savings there would be (as production costs cannot be excluded) and the cost of buying time would be economically inconvenient. In the second hypothesis, there should be some piece of legislation requiring the commercial broadcasters to sell time at a special rate, lower than the return one. This would mean selling time at a lower price than the market price, and this would bring to an inefficient allocation of resources, as the commercial broadcasters could use the same good (the time) for a more economically valuable purpose. Furthermore, in both these options a further inefficiency arises, as large numbers of viewers are deprived of a product they would be willing to have, while it is substituted for another product appealing only on fewer

[328] B.M. Owen, *Economics and Freedom of Expression*, cit., p. 133.

consumers. Having a channel dedicated to the PSB, these two products would not be mutually exclusive and thus the public could enjoy more choices. A slightly different case would be if cablecasters or satellite operators were required, rather then to pay a fee as proposed above, to guarantee free access to PBS contents. But the difference is not that match: this still would be an inefficient allocation of resources in the same terms as above, and still the viewers would have less choice than if a public channel existed.

Internal pluralism and the fairness doctrine – The concept of internal pluralism refers to seeking a diversification of opinions not among the different voices in the information landscape, but inside each of them, that are required by law to offer different points of view on particularly sensitive and controversial issues.

Internal pluralism, rather than through market regulation, is to by achieved via behavioural regulation, which can be a more delicate regulation to set up, as it is likely to involve contents and thus easily freedom of speech can be breached by similar provisions. Nevertheless, similar kinds of rules are often claimed to be necessary. But often many of these proposals appear to be economically or constitutionally unfeasible. A very famous argument is the one from the philosopher Karl Popper, in whose thinking some sort of licence should be needed for those who produce television contents, and that licence should be revoked in case of severe breach of fundamental principles (not better defined) following a decision by an *ad hoc* court[329]. It is quite evident how this proposal could be hardly implemented: the need of a licence would constitute a gross violation of freedom of expression; furthermore, who should decide in which cases the licence should be revoked? And what court should have the power to deny freedom of expression? The author thinks

[329] See K.R. Popper, 'Una patente per fare TV', in G. Bosetti (ed.), *Cattiva maestra televisione*, Venezia, Marsilio, 2002, p. 76-77. Notably, the author justifies the need of such a licence with the same argument raised by Sartori, that is the quality of television programmes lowered by too many stations competing for mass audiences (p. 71).

about an internal disciplinary commission, similar to those assessing medical responsibility. Such a body would serve the aim of not constraining TV producers under the control of external bodies, in the author's view, but in the meanwhile one cannot see how this commission could have the power to limit a constitutional right: it is very likely that any of its decisions would be easily quashed down by a Constitutional court or any other judicial body in charge for the assessment of individual rights according to national legislations.

In lack of these more severe means, the most common way to fulfil internal pluralism is the fairness doctrine. The concept of fairness doctrine has already been introduced above, while discussing the case for print media. It has been already explained also as it was originally developed to impose on TV outlets the duty to deal with controversial topics of public importance in an honest, equitable and balanced manner, offering visibility to all the relevant positions involved; moreover, the stations bare the legal responsibility for any violation of these duties.

Similar provisions can be found in nearly all the European Countries. Most of them only apply the public broadcasters[330] while in some other Countries private

[330] Austria, *ORF-Gesetz*, art. 4 (1), providing the public broadcaster ORF to yield comprehensive information on political matters and public affairs; Czech Republic, Act No. 483/1991, art. 2.2; Estonia, RTI, 06.02.2007, 10, 46, par. 6; France, *Loi n° 86-1067* art. 43-11; Greece, Law 1730/1987 art. 14 par. 2 (notably, the requirement of programmes for special social groups irrespectively of their audience share is also mentioned); Hungary, Act 1 of 1996; Ireland, Broadcasting Act 2001 Sec. 28(2); Lithuania, Act on Provision of Information to the Public and Radio and Television Act; Portugal, *Lei da Televisao*, art. 51, *Lei da Rádio*, art. 47; Romania, Law no.41/1994 Art. 3; Slovakia, Act No. 308/2000 Coll. of 14 September, 2000 (as last amended) art. 18 (1); Slovenia, RTV Slovenia Corporation Act, Art. 4 (1); Spain, *Ley 17/2006* Art. 2.1; United Kingdom, Communications Act Sec. 208, 264-265. Slightly different cases can be found in Denmark, Sweden and Italy, where the obligation arises from the Public Service Contract or the relative authorisation rather than being provided by law; in Bulgaria, public radio and TV channels must offer coverage of relevant events for the society, according to a specific list of them approved by a commission (Prom. SG. 138/24 as last amended, art. 32 (3); in Germany the provision is significantly more loosened (public broadcasters must only required to offer a basic provision also considering minority tastes) and originates from a decision of the Constitutional Court (4.11.1986, *Vierte Rundfunkentscheidung; Landesrundfunkgesetz Niedersachsen*, 73, 118; ZUM 1986, 602; NJW 1987, 239).

broadcasters face likewise obligations, sometimes strict as well[331], some other times more loosened[332].

The fairness doctrine cannot be considered as an efficient way to achieve the goal of internal pluralism, as it could even undermine it. Two issues are involved here: first, such a regulation can easily be an incentive to disregard topics related to minority issues, as, since they are by their own nature controversial, they are also more difficult to deal in the way required by this doctrine, thus editorial boards could decide to exclude them rather than expose them. Second, a more generally implication, since penalties arise from any breach of this doctrine, also with costs of litigation to be beard for the hearing of the case, there is a significant incentive in ignoring rather than presenting in a complex and pluralistic way controversial issues[333].

Nonetheless, as seen above similar provisions are widely applied all over the EU Countries, with slightly different wordings from case to case but with a common rationale. The major difference from the U.S. case – and the related critiques – relies on the scope of application, as in Europe public broadcasters face this obligation rather than private ones as in the U.S. The difference in the scope can make the provision more efficient and workable as public broadcasters have a less market-orientated approach[334] and thus also the incentive to disregard public issues arising from the Fairness Doctrine can be significantly lower. Nevertheless, similar provisions can still constitute a negative incentive for the managing boards of public

[331] In Poland a harshly strict provision prevents any broadcaster from producing programmes likely to encourage actions contrary to law and Poland's *raison d'Etat*, moral values and social interest, or discriminating on grounds of race, sex or nationality. Broadcasting Act 1992, art. 18.

[332] Belgium, FLRTA art. 6, requiring the Flemish broadcasters to provide high-quality and differentiated information; RTBF art. 3, interestingly adding to a similar provision the apparently market-oriented requisite that such programmes should also be attractive for the widest possible audience; Latvia, Radio and Television Act Sec. 53-56.

[333] See B.M. Owen, *Economics and Freedom of Expression*, cit., p. 114 and 116-118.

[334] See also B.M. Owen, *Economics and Freedom of Expression*, cit., p. 108: 'The ability of regulators to require broadcasters to provide programming other than that programming which maximizes profit depends on the extent to which broadcasters are protected from competition'.

broadcasters when they involve some legal responsibilities which the boards themselves could try to escape avoiding sensitive matters rather than covering them in the way predicted; moreover, the lack of any provision in regards of plurality issues would mean totally undermining the rationale itself of the public services. The application of the Fairness Doctrine to the public broadcasters appears reasonable under condition that the aims are defined as clearly and possible, requiring a wide coverage of different contents and opinions (a specific list of matters, to be filled on regular basis by an independent board, would probably perform even better); in the meanwhile, the editorial boards should not be encouraged to getting around this obligations, through strict provisions, loosen liability rules and eventually the imposition of further content provision when any programme was found to be faulty under the relevant regulation.

Notably, in June 2008 the then U.S. presidential nominee Barack Obama expressed his adversity towards fairness doctrines[335]. If this position will be further confirmed, since U.S. policies traditionally are seen as examples to imitate, there could be room for similar choices to be made also in Europe.

A market in spectrum? – The starting point of the whole discussion – the spectrum scarcity from which the limited number of channels and thus voices arose – is at a certain extent considered to be a wrong premise. There are dating arguments that the system for allocation of frequencies – that still nowadays commonly grants rights to exclusive use of the frequencies for free – gave rise, rather than dealing with, to the problem of scarcity, while better results would have been achieved if Governments had decided to set up a free market for frequencies[336].

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[335] See www.broadcastingcable.com/article/114322-Obama_Does_Not_Support_Return_of_Fairness_Doctrine.php.

[336] The most relevant pieces of literature on this topic, *ex multis*, are: L. Herzel, 'Public Interest and the Market in Color Television Regulation', (1951) 18 *U. Chi. L. Rev.* 802; R.H. Coase, 'The Federal Communications Commission', (1959) 2 *J. Law & Econ.* 1; A. De Vany et al., 'Property System for

The underlying rational of this assumption is that, considering the spectrum a scarce resource and trying to provide free use of it as a mean for the fulfilment of free speech, a solution was found that is not at all economic efficient and even worsened the possibilities for a spread use of it[337].

So far, the only way to "buy" a frequency is effectively buying the firm that holds it; thus there is a sort second-hand market for them; this not really what those who used to claim for a market for frequencies meant. According to those dating opinions, such a market would have the double impact of implementing competition through property rights and constituting an incentive for the owners of the transmission net to further develop the net and the relevant technologies.

The debate about property rights as a mean to implement pluralism may look a bit out of date nowadays. Now that different technologies are available, it is clear how such a market would probably not bring to that degree of pluralism that would be an optimum. Economies of scale would still lead to a concentrated market as this is the kind of efficiency for this kind of market.

Nevertheless, as ether transmission has not been replaced, but only joined by different systems, it still makes sense to wonder how licenses should be regulated.

The idea of using lotteries can be easily rejected as it obviously lacks of any ground to promote pluralism[338]. The argument for auctions looks more appealing. By

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Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study', (1969) 21 *Stan. L. Rev.* 1499. While all these authors contest the system in the way it was set up, they have different approaches one each other: Herzel just proposed that licenses should sold rather than assigned for free, while Coase's proposal was more elaborated and also comprised effective property rights and a market for them. The subsequent literature mostly walked in their footsteps, reasoning about the sell of licenses and a market for them.

[337] It has been argued indeed that 'the spectrum is not a limited resource in any sense beyond the sense in which other economic resources are limited. Indeed, physically the spectrum is infinite, although only parts of it are usable for communication under current technology. The spectrum can thus be used more or less intensively'. B.M. Owen, *Economics and Freedom of Expression*, cit., 91.

[338] 'If it is desirable to take into account public interest factors like diversification or promotion of minority ownership [...] a lottery is a poor way to accomplish this. [...] More important, it does not take into account the public interest'. H. Geller, 'The Role of Future Regulation: Licensing, Spectrum Allocation, Content, Access, Common Carrier, and Rates', cit., p. 289.

using auctions, the licenses would be allocated to the bidders that value them the most and would be likely to use them in the most efficient way[339]. Moreover, the State could even some revenues from the allocation procedure rather than granting the use of the frequencies for free[340].

A counter-argument is that in this way the bidders most likely to win would be large-size companies and the minor ones would have much fewer chances to obtain a licence than if other methods were used, like comparative hearing processes (where different elements than a solely economic bid have to be evaluated) or lotteries (where all the participants have by definition the same chances). While this is undisputed, it has been already demonstrated above how company sizes do not have a strong influence on the provision of differentiated contents and biases. Thus a different method offering more chances for small companies would not necessarily offer more chances for diversification. More over, a pure marketplace approach in this case appears to be more efficient; as ether transmission is solely funded on advertisement, it is indeed more reasonable to authorize their use by those companies who can raise larger revenues thanks to their larger sizes, provided that there is no evidence that they will provide different contents to the public.

3.3. New media and the Internet

The current revolution: the digital media industry – In contemporary times, the media industry is passing through a revolutionary development, which appears to bring to unknown scenarios, in terms of public debate, content provision and information consumption. Once again, as it has already been since Gutenberg's

[339] See D.W. Webbink, 'Frequency Spectrum Deregulation Alternatives', *FCC Office of Plans and Policy Working Paper No. 2*, 1980.

[340] As it happens most of the times. The rationale for it definitely appears outdated nowadays: 'The reluctance to charge broadcasters for frequencies in the 1920s reflected solicitude for an infant industry. Congress wanted to promote not burden the new art. Television today may be a gold mine, but broadcasting then was a struggling business uncertain of its future'. I. de Sola Pool, *Technologies of Freedom*, cit., p. 140.

times, technology is driving the change. The barrier-breaking innovation of these days is digital media; technically, the innovation consists of the possibility to convert data into numerical form and then reproduce, transmit and share it in immaterial ways – that means, via Internet.

For the purposes of this study, one of the major implications of this new technology is the shift in firm organisation currently taking place world-wise. "Convergence" and "multiplatforming" are the keywords of this shift. The latter means that the same media content can be now distributed through different means – newspapers, TV, websites and so on. It is not a brand new phenomenon itself, as it was already known before the digital era, when it just used to involve analogue media. The very novelty is the scope at which convergence is now taking place, and the fact that through one single machine – a computer with an Internet connection – users are now able to access all the different media sources. Convergence is a close concept, which appears to be both a cause and an effect of multiplatforming at a certain extent. It involves different media outlets merging and making all their contents available on-line. In practice, it is something that nearly everybody has already experienced – reading a newspaper website (and finding there the same stories printed on the paper edition), for instance, or watching on-line a TV programme in its streaming version. In economic terms, this is a case for vertical integration, as it involves the same proprietor owning a newspaper / TV station / radio station *and* a website where the contents of the other medium are also made available for the customers.

There is quite an obvious rationale, linked to economic efficiency, beyond this trend: the Internet, as a mean of distribution, is cheap as nothing else had ever been. Discussing in the implications of digital media for pluralism thus requires a background question to be answered first: should the Internet be considered as a

way to distribute or create contents? It could be both, at different extents, and policy implications would not be the same for each side of the coin.

The Internet as a distribution network – Some believe that the Internet should be considered mostly as a mean for distribution[341]. It is indeed one of the ways in which the "traditional" media can now be accessed; from this point of view, the Internet sits next to the traditional media rather than substituting them, playing more or less the same role as cablecasters for the transmission of analogue TV. If one wants to watch a newsreel on TV, cables (or ether transmission, and so on) are needed to deliver the signal to their TV set; if one wants to watch the same content on their computer or web-enabled TV, the Internet is needed for the same purpose. Approaching the matter from this point of view means that the issue at the stake is the same for the other gatekeepers: 'the consequences of convergence are control and flexibility'[342].

The gatekeeper role of the Internet might even sort out more severe effects than in traditional media, due to what Baker defines the 'concentration effect'[343], which basically means that, as distribution costs decrease, there are economic incentives to increase the expenditure on first copies, making the product more appealing for the audience. It follows that those companies that have more resources will attract more customers. While this is the very common functioning of free competition – customers will choose the products they consider better than others – it could eventually have a bottleneck effect, pushing small content creators

[341] Baker, for instance, draws a sharp parallelism between the Internet and mass chain distribution in superstores: 'Internet-generated media convergence is somewhat analogous to retailing convergence within ubiquitous Wal-Mart superstores. There, a customer might be able to buy either a winter coat or a country ham. The superstore itself normally creates neither. Nor does the existence of Wal-Mart make winter coats the equivalent of or a substitute for country hams even if it is the place one goes for either. Moreover, the existence of Wal-Mart does not assure the creation of (good) country hams'. C.E. Baker, *Media Concentration and Democracy,* cit., p. 100.
[342] S. Lax, *Media and Communication Technologies*, London, Palgrave-MacMillan, 2009, p. 176.
[343] C.E. Baker, *Media Concentration and Democracy,* cit., p. 102.

out of the market as they cannot commercially compete with larger companies. Moreover, due to the "experience good" nature of information, branding has a strong role in attracting large shares of the audience towards those websites whose names are already well-know: these two reasons possibly explain why, out of the whole information available on-line, the most-surfed websites are those owned by famous brands in the analogue landscape[344].

If worries are worth concerning about this concentration effect, it might be reasonable to apply some ownership restrictions. Similar rules have already been told to be considered potentially dangerous for a basic constitutional right as freedom of expression and not even satisfactory for the achievement of the aim of pluralism – but if the Internet has to be considered as a mean for delivery rather than as a medium itself, at least the constitutional objections would be weaker in this regard. Some cross-media ownership restrictions could thus be provided, preventing a newspaper, TV or radio outlet from owning a website where the same contents might be spread.

All over the EU Countries similar legal provisions exist, but usually they do not refer to the case for the Internet. In Austria[345], Czech Republic[346], Estonia[347], France[348], Germany[349], Hungary[350], Ireland[351], Italy[352], Latvia[353], the Netherlands[354]

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[344] L. Dahlberg, 'The Corporate Colonization of Online Attention and the Marginalization of Critical Communication?', (2005) 29 *Journal of Communication Inquiry* 160.
[345] PrTV-G Art. 11 (2), fixing the level of acceptable threshold of cross-ownership up to 30% of any market.
[346] Act No. 231/2001 Art. 5, which anyway only provides the Council to be notified about similar concentrations.
[347] Broadcasting Act §40 (4).
[348] Law 86-1067 Art. 41-1, 41-2.
[349] *Landesmediengesetz Nordrhein-Westfalen* Art. 33 (3), which as a regional statute applies only the relevant area, providing that a publisher that has a 'dominant position' in the local market cannot hold a licence.
[350] Act 1 of 1996 Art. 125.
[351] Radio and Television Act 1988, that allows publishers to hold only one licence.
[352] Law 223/1990 Art. 15 (1). Publishers that hold more than 16% of national circulation cannot hold licences, publishers that hold between 8 and 15% of national circulation can hold only one licence, publishers that control up to 8% of national circulation can hold two licences.

Slovakia[355], Slovenia[356], Sweden[357] and the UK[358] print publishers cannot hold a licence for broadcasting and nothing is said about the Internet (while the most flexible of these pieces of legislation could be also applied to it by the courts, of course), the only notably exception being Greece[359].

As for now, there are no tailor-made provisions for preventing the traditional media from accessing the Internet. And such a rule should probably never exist. The shift towards new technologies is happening irrespective of what the law provides, it is more a matter of cultural habits than of legal provisions. Especially young generations find information in this way rather than on TV or, moreover, in the press. It happens because information via Internet is easier to consult, can be accessed in any place through technological devices as mobile phones, is more targeted, and moreover is usually free. Platforming and convergences are the ways in which the traditional media are trying to cope with these changes. Trying to face the competition from the Internet would be a losing game for radio and TV and even more for newspapers: the appeal and the ease of the new devices (and the lowest costs they bare) cannot be compared with the old media. In a few years, newspapers would just disappear as there would be no more readers for them[360] and

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[353] Competition law Art. 15; Radio and TV Law Art. 8,5. The sole proprietor of a newspaper cannot hold more than 25% of capital share in a broadcasting company.
[354] Broadcasting Act Art. 16 (1) which anyway only provides the Broadcasting Authority to be notified about similar concentrations.
[355] Act No. 308/2000 Art. 42 (1)-(2).
[356] Mass Media Act, Art. 56 (1), providing that any person holding 20% of capital share in a publishing company is excluded from the possibility to hold a broadcasting license.
[357] Radio and TV Act Ch. % Sec. 8.
[358] Communications Act Par. 1 Sc. 14, providing that any person holding 20% of capital share in a publishing company is excluded from the possibility to hold a broadcasting license at the same level (national or local) in which they pursue their other activity.
[359] Law 3592/2007 Art. 5 par. 8, 9, providing different thresholds: 35% of market share in one industry, 32% in two industries, 28% in three industries, 25% in four industries.
[360] See for instance P. Meyer, *The Vanishing Newspaper. Saving Journalism in the Information Age*, Columbia, The University of Missouri Press, 2004, arguing that from 2040 on there will be no more printed newspapers.

thus new technologies should be used rather than opposed: this is 'the millennial clash of old and new media models: the content economy vs. the link economy'[361].

So far the Internet offers visibility to the traditional media outlets and a way to survive in the market; as time goes by, new organisational models are likely to appear, and the same companies will shift towards different market structures. Rather than targeting mass audiences, they will probably seek for niches and link one each other in information networks offering a widespread of targeted information. It would probably mean, if not more, at least not less available information than before.

In the other way round, making the Internet not accessible for traditional media companies would only mean sentencing them to death. They would be kicked out of the market by their digital competitors. And this would be decreasing, rather than increasing, the whole number of voices.

The Internet as a content provider – The digital revolution implies much more than a new mean for delivering information – it is also a chance for more contents to be provided.

The keyword, in this case, is "decentralisation"[362]. Also this shift is linked to the lower costs of the new technologies. An Internet connection and a computer (or even a mobile phone) are all is needed to upload contents on-line. While once expensive capitals were required to start a publishing enterprise or a broadcasting station, nowadays practically anyone can spread information. Saying that this is the real implementation of pure spirit of free speech might sound bombastic but truly it is not.

The new media imply a much higher degree of interactivity than the traditional ones, as people can have an active role in expressing their opinions. Many

[361] J. Jarvis, *What Would Google Do?*, New York, Collins Business, 2009, p. 124.
[362] M. O'Shaughnessy, J. Stadler, *Media & Society*, Oxford, Oxford U.P., 4th ed., 2008, p. 117.

newspapers' websites offer nowadays the possibility to add readers' comments to their stories. Moreover, the novelty of blogs (websites where people can write personal opinions or whatever) is not irrelevant here as the boundaries between communication and information get thinner and thinner. While often disregarded, blogs and other non-mainstream sources of information really constitute alternative journalistic outlets, possibly the major novelty in terms of content provision brought by the Internet. The new media have been defined as a way to 'facilitate a politics beyond the formal political spere'[363] and it can be easily seen how this true also in regards of blogs if one thinks about the role they had in the election outcome after the 11 March 2004 Madrid train bombings. The day after the terrorist attack, the Government then in charge gave a press conference trying to point at the local terroristic organisation ETA as responsible for the attack. The day after, all the major newspapers, TV and radio stations, whose reporters had attended the conference, reported about the wrongly alleged implication of the ETA in the bombings. Alternative sources of information, as blogs and free press, were the first to spread the right information about the Islamic terrorism involvement in the attack; as nationwide protests took place, the Government coalition, that according to most of the polls was about to take an easy win, surprisingly lost, as a consequence of their false representation of the attack after the "alternative" media had unrevealed it.

A wise legislation should try to create the better conditions for a full development of the outstanding possibilities offered by this new technology, and thus a light regulation should be provided. A basic legal framework as prohibition of hatred speech, defamation and libel as well as copyrights should certainly be provided; apart from it, almost else should be done.

[363] T. Flew, *New Media*, South Melbourne, Oxford U.P., 2nd ed., 2005, p. 57.

Maybe there could room for trying to cope with the 'abundance effect'[364] of too much information available. If feasible, internal pluralism could theoretically even assure better results than external pluralism. Rather than trying to detect the information they value the most all over a widespread of stories, people could find it easier to have different contents all accessible in the same (virtual) place. The most biased shares of the audience (the A and B segments in the A → N/B → N model abpve) are, as already noted, not likely to accede to pieces of news different from their likes or convictions. If different opinions and contents were spread through the same medium, larger numbers of people would be likely to enter in contact with differentiated information.

This approach implies the setting of some sort of "*par condicio*" rule that oblige any news provider to give account of different points of view, as it happens for TV channels obliged to grant some time to representatives of any political party in their talk shows. Another hypothesis is that news providers could have a duty to give space to certain kinds of piece of news.

In both these cases, the legal instrument to do so is the provision of some "must-offer" rules, which imply the imposition of some legal duties on media outlets to carry out some behaviour.

Lopatka and Vita consider the economic convenience of this kind of regulation and their conclusion is not in favour of this instrument. Their point of view is, once again, different from the one taken here, since in their paper they consider the imposition of a technical duty (cable television operators were required to carry a certain number of local stations, thus technically a "must-carry" rule) but with some wariness their reasoning suits this case as well, also as the Internet can be considered as a mean of transmission as seen before. The authors reject the call of presumed market failures as the *raison d'être* of must-carry rules. They propose, in

[364] C.E. Baker, *Media Concentration and Democracy*, cit., p. 101.

spite of it, an economic approach according to which these rules are acceptable only when they provide a greater value to the whole society than the value lost by those affected by the rules themselves (which is coherent with the potential Pareto efficiency theory). In the case of political programming, whose social value is informing the electorate, they suggest that the portion of the electorate that gains a better information should be considered as the marginal expected benefit, while the other term of comparison should be changed to suit the search for pluralism (in spite of the cost of carrying some stations on the cable, the cost of giving pieces of news potentially less "appetizing" than others). The authors argue that, when a must-carry rule involves the content of the news (and then, one should add, it turns into a "must-offer" rule, which is exactly what is being considered here), it is likely to have both a higher social value and a higher cost for the individuals affected[365].

The social-value test proposed by the authors and their considerations about it are sharable; it could be the case, anyway, that the proposed test is not easily feasible in practice. Weighing gains and losses of any rule could be particularly hard since the terms are of different nature and barely comparable.

A further concernment involves the constitutional layer of the matter. As Brenner stresses, 'the goals of behavioural regulation aren't the problem; its enforcement is'[366], since it involves an active role of the Government (or other branches of the political power) in deciding what contents are more valuable than others, thus possibly distorting the free debate within the society. Lopatka and Vita also stress the importance of content neutrality in this kind of regulation and the difficulty in discerning content-based regulation, viewpoint-based regulation and content-neutral regulation[367]. It should be also considered that different Constitutions and pieces of legislation in different Countries offer different levels of protection to

[365] E. Lopatka, M.G. Vita, 'The Must-Carry Decisions', cit., p. 117-119.
[366] D.L. Brenner, 'Ownership and Content Regulation in Merging Emerging Media', cit., p. 1015.
[367] E. Lopatka, M.G. Vita, 'The Must-Carry Decisions', cit., p. 84-85.

freedom of speech against Government's intrusions, and this makes even more difficult to provide a unique answer to the considerations above.

As the Internet should be let free as much as possible, codes of self-regulation and conduct might indeed be the solution for this problem. Sunstein considers the point but not in link with the case of must-carry rules, which he considers apart. According to the author, self-regulation would give the chance to promote democracy-linked objectives, like quality and diversity, and contrast some situations that he alleges to be negative effects of competition, like the decrease in the quality of news. Self-regulation would have the advantage to keep the Government out of the sphere of freedom of speech while obtaining desirably the same results[368].

Codes of self-regulation have known quite a remarkable spreading in the last years, in different legal systems. They are used in different spheres and they usually perform well. They are usually not legally binding but nevertheless reach satisfactory levels of accomplishment. This approach could be applied to must-carry rules as well. TV and radio broadcaster, press editorial boards, and so on, could be put in charge for drafting codes that "oblige" them to respect some norms of internal pluralism. They are indeed in the best position to evaluate the costs that they would be about to afford, thus would probably reach better results than the legislator facing a hard balance among different values. These codes could be even more effective if companies operating in the market for news were left free to assess the economic impact and their prospective losses, while the social values to achieve were set by a different subject (even better if representative, like the Parliament, or in any case not directly involved with any economic interest in the industry). The situation in which a different subject is in charge for drafting the general principles of the regulation and the same operators of the market set the details of it could be the best way to

[368] C. Sunstein, *Republic.com*, Princeton-Oxford 2001; Italian translation, Bologna, il Mulino, 2003, p. 190-192.

provide the needed must-carry rules with the lowest possible level of intrusion in the sphere of autonomy of media companies. An independent agency might also be created, and put in charge for the draft of the principles in order to grant the highest possible level of technicality and independence. Another advantage of the system is that it is neutral enough to be used in different legal and constitutional systems, where the respective constitutional and legal provision could be properly assessed by the subjects appointed for drafting the principles.

4 – "Strategies in action". Final remarks.

Various indexes of diversity have been set in different Countries in order to try to measure the level of diversification, the most acknowledged of them being the U.S. Diversity Index (2003), the Public Interest Test (also known as Plurality Test) in the UK (2003), the Integrated Communications Market (SIC) in Italy (2004), and the German KEK (2006).

They all seem to manifest the same fault, as for their profitability in this study, the major indicator for diversification being the degree of ownership concentration in the market. According to these studies, a national market is found to be the more pluralistic as many more competitors operate in the market. In the previous chapter it has already been demonstrated how this assumption, despite it seems certainly

enticing and convenient as a way to assess the degree of pluralism, is also just plain wrong. Using market shares and figures about how many competitors are in the market just tells something about how many competitors are in the market; it does not tell anything about pluralism itself. The spread of ownership has been stated above to be necessary but not sufficient. There might be, in theory, 10 nationwide newspapers in any given country, all of them owned by 2 proprietors or by 10 different proprietors. In the second case, any of those indexes would assign higher values than in the first case. But the figures about the proprietors only say that in that country there are better chances for diversification, not actually more pluralism. Nothing ensures that 10 newspapers with different owners would provide 10 different points of view or many different pieces of news, and this datum is not captured by any mean by ownership indicators. Not disregarding the inner value of existing indexes, it is really tough indeed to identify elements capable of assessing the degree of pluralism in a country.

The difficulties with indexes trying to approach this subject are not at all new. Since when the U.S. launched the first attempt in this sense, with the HHI (Herfindahl-Hirschman-Index) in the 1980s, many criticisms were raised about its incapability of providing a significant assessment of the market and eventually its difficulty in being interpreted[369] and the poor scope of it[370]. Despite all the efforts, media pluralism is difficult to asses due to the peculiarities of this specific market: namely, the usually non-competitive set of prices and the lack of clarity in the market definition[371]. Thus not only purely economic indicators are faulty to provide

[369] W.G. Shepherd, *The Economics of Industrial Organization*, New Jersey, Prentice Hall, 4th ed., 1997, p. 74.
[370] J. Heinrich, *Medienökonomie. Band 2*, Opladen, Westdeutscher Verlag, 1999, p. 230 (quoted in N. Just, 'Measuring Media Concentration and Diversity', see footnote below).
[371] N. Just, 'Measuring Media Concentration and Diversity: New Approaches and Instruments in Europe and the United States', *TTLF Working Paper No. 2*, 2008, p. 16.

significant measures of pluralism, but they are also particularly likely to fail in handling with their direct matters[372].

Among the most recent examples of index, none really satisfactory can be found. The U.S. DI mainly walks in the footsteps of the old HHI. As regards market definitions, the DI approaches the matter by assessing all the different media together (despite cable TV and magazines are not included in the assessment, a choice with which one could not totally agree with), thus considering them as substitutes for one another; further considering that not all the media have the same impact on the audience, different weights are assigned to each medium[373]. Once the weight of each medium in the whole market has been defined, the weight of each outlet in each sector market is considered, and then the market share of any proprietor is multiplied by its share of the total market. The shares of commonly owned properties are then added and squared; the DI eventually results from the sum of all the squared weighted ownership shares. This approach has been found faulty in considering all the different outlets in any market equal in size irrespectively of their actual ability to reach different shares of the audience, and thus missing to measure their actual spread within the society[374].

The single-market approach is also pursued by the Italian SIC. The relevant statute forbids any company to own more than 20% of the total market[375]. In this case, no specific weight is provided for the different sectors; therefore, while this technique shares the same issues about the excessively ownership-oriented approach with the DI, it is even less satisfactory in terms of a proper evaluation of the spread of information within the society through the different media.

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[372] M.-L. Kiefer, 'Konzentrationskontrolle: Bemessungskriterien auf dem Prüfstand', (1995) 2 *Media Perspektiven* 58, p. 58 (quoted in N. Just, 'Measuring Media Concentration and Diversity', cit.).
[373] The Index considers the weight of each medium in the whole market as follows: broadcast television 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9%, Internet 12.5%.
[374] C.E. Baker, *Media Concentration and Democracy,* cit., p. 76 ff.
[375] Art. 43 c. 9, 10.

The German KEK approaches the matter on a completely new ground. The original thinking is trying to apply the rationale of audience share for television as an indicator to be used for any medium. The unusual comparison is driven by using a set of criteria including the potential persuasiveness, the range of national coverage and the relevance of each medium. Despite the attempt of departing from the classic ownership-orientated approach should be positively valued, the idea of using audience shares is not totally convincing. As already stated, audience shares are a threatening indicator from a constitutional perspective, as freedom of speech (which by definition should encounter no quantitative boundaries in its scope) is at the stake. Measuring audience shares is obviously permissible, as well as drawing some conclusions from it; a bit more doubtful is using this indicator for the purposes of a policy development. In Germany this Index has been created to provide evidence of market power and eventually void undue market concentrations: this means that individuals may be prevented from accessing the content they prefer because too many people are already reading, or watching, or listening to it. It sounds like a baffling nonsense. The same approach being used to develop media policies would mean trying to reach the same result *ex ante*. Again, this makes no sense. The goal of a proper regulation should be offering the possibility of choosing among different contents and opinions, not forcing the audience to split among various titles or programmes.

The British Public Interest Test sounds way more reasonable. The current legislation[376] enables Ofcom to take into consideration, if the Secretary of State for Business, Enterprise and Regulatory Reform grants its permission, the value of pluralism and diversification while assessing cases of mergers in the media market. Criticisms about this approach have been raised in regards of the poor scope of its application, especially because of the necessary governmental approval for Ofcom to

[376] Enterprise Act 2002, Sec. 58.

intervene and the presumably little role it will have in media ownership future policies in the UK[377]. Furthermore, while it could be appreciated for its elasticity and the capability of dealing with practical cases arising from time to time, it is not a proper index that can be used to systematically check the degree of pluralism in a country.

A proposal from Plamondon about diversity indexes to be developed by assessing differences in contents and points of views really sounds interesting and should certainly be agreed[378]; unfortunately, a similar index has not yet been developed so far. The European Council is currently developing a new index to measure concentration and diversity[379] and a Communication about it is due in 2010. Since the approach traditionally taken by the Council Europe has shown a correct understanding of the non-economic layer of the issue of pluralism, and the index is announced as 'a monitoring tool for assessing risks for media pluralism in the EU Member States and identifying threats to such pluralism based on a set of indicators, covering pertinent legal, economic and socio-cultural considerations'[380], there is hope it will provide a suitable and successful device.

Within the currently available indexes, the most satisfactory one thus appears to be the one provided by the independent organisation, founded in the U.S. in 1941, Freedom House. Since 1980, this organisation provides an annual comprehensive report about the state of pluralism in any Country in the world. The methodology is appropriate as it encompasses different indicators than the sole ownership. The Freedom of the Press Index (FPI) utilises 109 indicators referring to three broad

[377] G. Doyle, D.W. Vick, 'The Communications Act 2003: A New Regulatory Framework in the UK', (2005) 11 *Convergence* 75, p. 85

[378] A.L. Plamondon, 'Proposed Changes in Media Ownership Rules: A Study of Ventriloquism', (2003) *Communication and the Law* 47, p. 93.

[379] *Methodology for monitoring media concentration and media content diversity*. Report prepared by the Group of Specialists on Media Diversity (MC-S-MD), November 2008.

[380] See the website http://ec.europa.eu/information_society/media_taskforce/pluralism/study/index_en.htm.

categories, the legal, political and economic environment. Each Country receives a score in each category according to its performances, the lower scores indicating better performances. While the legal indicators intuitively refer to the set of regulation in force in any Country, the political indicators estimate the degree of political control over the media and the economic indicators evaluate the degree of concentration and transparency in the ownership structure.

The set of legal indictors is particularly wide and encompasses both the constitutional and legislative level of the national systems; the set of political indicators significantly investigates if people have access to a variety of contents and opinions, which is exactly the kind of marker missing in the other Indexes considered above.

Over the 24 European Countries considered in this study, only three are considered to be 'partly free' (Bulgaria, Italy, Romania) while all the others are labelled as 'free' in the 2009 edition of the survey *Freedom of the Press*[381]. Apparently there is a lack of consistency between the values in the legal indicators and the other two areas. In Bulgaria the worst score is achieved in the political indicators (14), the legal and economic environments both being ranked at 11; in Italy the legal and political environments are both ranked at 11 while the economic indicators are slightly better (10); in Romania the legal indicators are better (13) than the political (15) and economic (16) ones. Therefore it is difficult to assess if a link can be found between the legal set of any of these Countries and their performances in the other sectors. As regards the legal sets of these Countries, anyway, different issues than the policies themselves appear to affect the whole picture: in Bulgaria, several cases of intimidation and pressure have affected the reporters' freedom; in Italy, an overburden of libel cases against reporters (many of them brought by politicians) as well as an over-politicised media landscape lowered

[381] See the website www.freedomhouse.org.

the scores; in Romania, the situation is even worse due to appalling attempts to silence media criticisms and to the passing of a statute that forces the outlets to devote 50% of their programmes to spreading “positive” pieces of news.

Excluding those considerations that go beyond the scope of this survey, some conclusions can nevertheless be drawn from these figures. The Bulgarian legal system has been found in lack of specific provisions dealing with cases of media mergers, and at a certain extent this can be interpreted as a further evidence of how these rules, despite their insufficiency, are necessary. The major legal issue with the Italian legal system appears to be the recently passes SIC, that weights all the different media the same and thus indirectly allows large concentrations in the most relevant, in terms of audience shares, sectors. It has been stated above that, as in the case for antitrust legislation, ownership control only creates a background requirement but is not sufficient to enhance pluralism; it has been even considered how the ownership structure affects the diversity of the media landscape even less than cases of mergers. The Italian example can be considered as an odd one due to the peculiarity of its uncommon links between politics and media. More significantly, this case demonstrates that the one-market approach of the SIC should also consider special weightings of the different media to perform satisfactorily. The example offered by Romania is even more interesting. That Country has severe rules for merger and ownership controls, and despite them it is found not to be completely ‘free’. These figures offer further evidence of the incapability of such rules to provide pluralism by themselves.

In the ‘free’ Countries the figures show a higher degree of consistency: the lower the scores for the legal environment are, the lower the scores for the political environment are as well. This could be interpreted as a link that undoubtedly exists between the two, when no external circumstances, as in the three cases considered above, break the link itself.

Some other lessons can be learnt from these data. The Countries receiving the best scores in the ranking for their legal environments are Denmark and Sweden; the Danish and Swedish legal provisions for media encompass a "light" regulation for mergers & acquisitions, usually there are no specific ownership constraints (in Sweden they are only provided for regional radio broadcasting), plus a strong economic support to the distribution of print media aiming to implement pluralism and diversity by avoiding the bottleneck effects of the distribution chain. The Netherlands have the same performance and a similar regulation; this case anyway should be considered as further evidence with some more caution as the legislation currently in charge is still transitional and will have soon to be assessed and possibly confirmed, or otherwise amended. It will be interesting to see how the Dutch legislator will consider the final results of this piece of legislation and if the positive evaluation of it, as for the aims of this survey, will be confirmed in practice.

Belgium and Finland are the runners-up in the table for legal indicators, closely followed by the Czech Republic, Estonia, Ireland and Portugal. The Finnish legislation appears quite similar to the "light" ones provided in Denmark and in Sweden. In Belgium, Czech Republic, Estonia and Portugal no specific antitrust regulation is provided for print media and a particularly elastic approach is used for concentrations in other sectors; a stricter regulation is applied to ownership control in the broadcasting industry. The Irish case is slightly different as while the relevant Authority has the same loosened boundaries in assessing cases of concentration in the broadcasting industry, while there is an *ad hoc* statute for assessing mergers in the press industry and the ownership limitations are stricter.

As the nine cases cited above are very close one another in the ranking (Denmark, Sweden and the Netherlands being valued 2, Belgium and Finland 3 and the Czech Republic, Estonia, Ireland and Portugal 4) they can all be assumed to offer evidence, at not very different degrees, that mergers and acquisitions should be

prevented either by the application of common competition law, or granting to the relevant authority a high degree of autonomy in case-by-case assessments. Ownership control is confirmed not to have a significant influence on the diversification of information if other policies (including distribution facilities) are in charge. This evidence match the theoretical assumptions developed in this study.

On the other way round, all the worst performances within the 'free' Countries show some departures from the "light-touch" approach of the best ones: in Austria (valued 8) a specific (and stricter than the ordinary one) antitrust legislation is provided for all the media industries, including the press, and cablecasters (an almost unique case) are prevented from operating in the sub-market for providing contents; in Poland (valued 8) ownership limits for the broadcasting industry are calculated by market shares in terms of audience; in Greece (valued 9) the strictest statutes in the European scenario can be found, applying to merger controls and ownership limits, while cross-media ownership limits even are provided to prevent different media companies from starting their own websites.

In summary, the survey has showed, at first, that regulation can really play a fundamental role in increasing the level of pluralism in any Country; despite the inner issues of the nature of information, like its "public good" character, pluralism is not simply doomed to be a hopeless aim due to market failures[382].

The evidence offered by these indicators should be carefully considered as different elements than the sole legislation can have great influences on the final performance for pluralism in any country; furthermore, proper indicators for diversification of contents and points of views not yet exist. But the available data shown above can still be considered significant, at least at a certain extent. They confirm the assumptions that rather than providing *ad hoc* rules for merger control and ownership limits, a better choice would be using the ordinary set of rules for

[382] As also stated by D. Goldberg, T. Prosser, S. Verhulst, 'Conclusions', in Id. (eds.), *Regulating the Changing Media. A Comparative Study*, Oxford, Clarendon, 1998, p. 308.

these purposes and having an authority that could evaluate single cases with a certain degree of elasticity once it has been put in charge for the general aim of enhancing pluralism. They confirm that other elements than pluralism of ownership and control are really significant, as assuring the possibility of spreading contents by avoiding bottlenecks in the distribution. In lack of more specific case studies about the Internet (the sole case of the relatively poor performance of Greece not being significant enough), the same underlying rationale can be assumed to justify and confirm the claims for the lightest possible regulation for it: thus cross-ownership limits should be avoided, and the spread of different contents through it can be propelled just putting the Government's hands off it.

Generally speaking, the information landscape in Europe appears quite satisfactory but still too much differentiated from one Country to another. Significant improvements from this side may come from the EU, if it will decide to play a more decisive role, thanks to the more explicit statement of the value of pluralism encompassed in the Charter of fundamental rights. Moreover, the EU should change its perspective and recede from a too much competition-oriented approach in favour of a broader, holistic one. A valuable example of a profitable approach already exists and comes from the policy instruments released by the Council of Europe. The most suitable legal instrument would probably be directives – more respectful of the national Constitutional principles at the stake – and legitimation for doing so is now stronger due to the recent incorporation of the Charter in the Treaty of Lisbon. All that lacks now is a political willingness, at European level, of engaging in this demanding challenge: time will say if this hope will not be deluded.

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