

THE EUROPEAN COMMISSION AND REGULATION OF THE MEDIA INDUSTRY

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I. INTRODUCTION

Rapid advances in media technologies coupled with the liberalization of media markets in the 1980s have produced dramatic changes in the structure of the European media industry. Market liberalization at the national level has resulted in the appearance of numerous commercial broadcasting operations. Due to the large financial investments required by new broadcasting technologies, media companies have engaged in mergers and acquisitions to amass the necessary financial capital.¹ National governments have aided industry concentration by relaxing media ownership rules, including those restricting cross media ownership.

In an attempt to improve their market positions, media companies have combined merger and acquisition strategies with those of internationalization and diversification. The main players in the media sector now operate at the European level and define their policies accordingly since the "domestic" market has transformed into the European market. This transformation of national mono-media markets into one European multimedia market has been documented by economic analyses.² Thus the regulation of media ownership has become a European issue, which is now being tackled by the European Commission ("EC").

As media companies are also expanding into adjacent communications markets, the definition of media markets is becoming more difficult, making regulation problematic for the Directorate General IV of the European Competition Taskforce ("DG IV").

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¹ For further explanations of media mergers, see PETER HUMPHREYS, *MASS MEDIA AND MEDIA POLICY IN WESTERN EUROPE* (1996).

² See ANTONIO PILATI ET AL., *MEDIA INDUSTRY IN EUROPE* (1993); SANCHEZ-TABERNEO ET AL., *MEDIA CONCENTRATION IN EUROPE: COMMERCIAL ENTERPRISE AND THE PUBLIC INTEREST* (1993); BOOZ-ALLEN & HAMILTON, *STUDY ON PLURALISM & CONCENTRATION IN MEDIA-ECONOMIC EVALUATION* (1992); *COMPREHENSIVE STUDY ON THE GLOBALIZATION OF MASS MEDIA FIRMS*, NATIONAL TELECOMMUNICATIONS INDUSTRY ASSOCIATION (1990).

Without specific rules for the media industry, the European Commission is often accused of unreasonable arbitration, and competition decisions in the media industry are often appealed. Furthermore, the sheer volume of media merger decisions presented to the European Competition Taskforce is becoming overly burdensome.³

Consequently, a debate regarding legislation specifically for media ownership has emerged within the EC. Positions range from the harmonization of national media ownership laws (designed to protect pluralism and public interests from multi-media concentration) to the encouragement of a "natural" emergence of a competitive European media market. Attempts to propose harmonization have been delayed by the lobbying efforts of media companies and are contested by national authorities as to their legality. It seems that the platform for full liberalization is succeeding in the Commission which now appears to be moving towards complete deregulation of media markets under an initiative based on convergence.

This Article examines the development of the Commission's policy on media ownership. It first provides an overview of national regulation which would be either harmonized or liberalized by any future Commission initiative. Section Two details the politicization of media concentration as a European issue by the European Parliament. Section Three discusses the Commission's response to Parliament, describing the policy process leading to an initiative for harmonization of national regulation. The Commission's recent initiative on convergence is discussed in Section Four. Section Five reviews the role of DG IV's merger taskforce. Section Six concludes with a discussion of the Commission's approach.

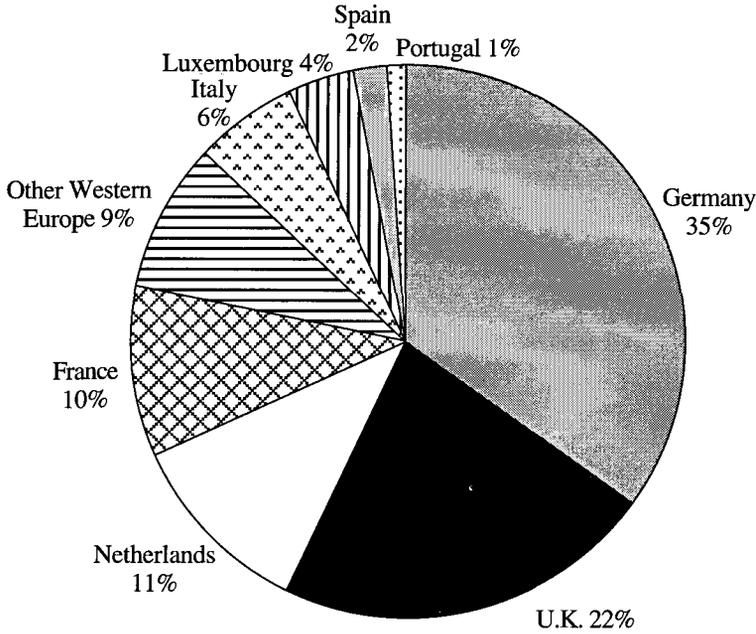
II. NATIONAL LEVEL LIBERALIZATION, REGULATION AND DEREGULATION

Of the fifty largest European media companies (by turnover), 90% are presently located in the following countries: France, Germany, Italy, Luxembourg, the Netherlands, Spain, and the United Kingdom (see figure 1 and table 1). Of the media companies operating Europe-wide, the majority of larger players are dominant in their home markets (see table 2). Securely seated at the national level, these companies have been able to mature and grow into multinational companies with varied media interests. Likewise,

³ Karel Van, Comments at the International Bar Association Committee C (Antitrust and Trade Law) Future of Merger Control in Europe Conference (Sept. 26, 1997).

with liberalization, large non-European media conglomerates with similarly secure home bases have accessed the European market.

FIGURE 1. BREAKDOWN OF THE 50 LEADING EUROPEAN MEDIA COMPANIES BY NATION (BASED ON TURNOVER)



Source: Statistical Yearbook, European Audio-visual Observatory 1997

TABLE 1. EUROPE'S TOP TEN MEDIA FIRMS (BY MEDIA TURNOVER \$ BILLION)

Company	Country	Media turnover
1 Bertelsmann	Germany	7.9
2 Havas	France	7.3
3 ARD	Germany	5.44
4 Reed-Elsevier	UK-Netherlands	4.25
5 BBC	UK	3.66
6 Fininvest	Italy	3.57
7 Matra Hachette	France	3.58
8 RAI	Italy	2.99
9 CLT	Luxembourg	2.6
10 Axel Springer	Germany	2.4

Source: Media Map Monitor, CIT Publications 1996

TABLE 2. SUMMARY TABLE OF LARGEST EUROPEAN MEDIA FIRMS IN
SELECTED EU MEMBER STATES

Country	Publishers	Broadcasters
France	Hachette Havas*+ Hérsant*+	Canal Plus*+ TF1
Germany	Bauer* Bertelsmann*+ Burda Springer*	Kirch*+
Italy	Benedetti Monti Rizzoli+	Cecchi Gori Communications Mediaset*+
Luxembourg		CLT*+ SES
Netherlands	Reed Elsevier+ Reuters+ VNU+ Walters Kluwer+	NetHold+ Polygram+
Spain	Editorial Planeta Grupo Prisa*+ Prensa Espanola	Antena
UK	News International*+ Pearson*+ Reed International Plc+ United News & Media*+	BSkyB*+ Cable and Wireless Capital Radio+ Carlton EMAP+ Granada Thorn EMI Plc+ Virgin+

* Those with national cross-media interests.

+ Those with substantial foreign media holdings.

The first wave of national liberalization, coinciding with the EU's 1986 Single European Act, saw the introduction of private operators in terrestrial, cable, satellite television, and radio broadcasting (up until the mid-1980s, only Italy, Luxembourg, and the United Kingdom had private television broadcasting). National regulatory measures accompanying liberalization, particularly those in European countries with the largest liberalized markets (the United Kingdom, France, and Germany), attempted to restrict media ownership in the interest of retaining pluralism (see table 3). These regulatory efforts were very quickly outflanked by pressures for further liberalization: technological advance, domestic lobbying, international activities of national media operators, and initiatives by the EC.

TABLE 3. REGULATION OF MEDIA OWNERSHIP IN SELECTED EU MEMBER STATES⁴

	1986-1989	1990-1994	1995-1998
France	1986 Law No. 86-1210 of November 27 relating to media concentration	1994 Carignon Law amends 1986 Act on media concentration	1996 Law No. 96-299 on Information Superhighways (which includes regulation of digital transmission)
Germany	1987 Inter-State Agreement on the Regulation of Broadcasting	1991 Amendment of the Interstate Agreement on the regulation of broadcasting	1996 Amendment of the Interstate Agreement on the regulation of broadcasting (Landesmedienanstaltenvertrag)
Italy	1981 Act No 416 on regulating dominant position in publishing (amended in 1984 and 1987)	1990 Act No. 223 Broadcasting Act	1997 Act No. 249 New Media Act (establishing new authority for convergence in 1998)
Luxembourg	1989 Act on Electronic Media (Chapter IV of which implements <i>TWF</i>)	Law of July 27, 1991 establishes content monitoring committee	
Netherlands	1987 Media Act of April 21, Stb. 249 regulating radio and television licenses and support for press	1990 Media Act introducing private television and ruling cross-media ownership	1996 Rules to license digital television
Spain	1988 Law of May 3, 1988 de Televisión Privada	1992 Law 35/92 applying Law 10/88 to satellite licenses	1997 Rules to license digital television
UK		1990 Broadcasting Act	1996 Broadcasting Act

Thus, a second wave of deregulation ensued in the early 1990s, with member states complying with the EU's 1989 *TWF* Directive. Many countries experienced a consequential consolidation of ownership in mono-media sectors (television,

⁴ For a detailed listing of present media concentration law in European countries, see the Comparative Table of National Legislation of Relevance in the Area of Media Concentrations. Council of Europe Committee of Experts on Media Concentrations and Pluralism (July 25, 1996).

press, and radio). A third wave taking place in the late 1990s, this time following a relaxation in cross-media ownership rules, has resulted in increased horizontal and vertical concentration across media sectors.

The present-day map of the national media markets therefore shows high levels of concentration in mono-media sectors and increasing concentration in cross-media ownership. New instruments of regulation introduced from 1996, such as the restriction of media reach based on audience share,⁵ may become ineffective as media markets continue to fragment and media companies act increasingly at the European level. In the United Kingdom, the interpretation of the government's 1996 new rules on cross-media ownership by the regulatory authorities such as the Independent Television Commission ("ITC") and the Radio Authority is proving difficult. In Germany, Länder (state) legislators often disagree over interpretation of the 1996 changes to ownership rules, and media operators doubt the legality of defining a channel's audience share.

1. France

The press, television, radio, and satellite sectors are regulated separately in France. Since the 1986 Act on media concentration, limitations on the activities of media operators have been set according to media reach and share ownership. Newspapers shall not exceed a circulation of over 30% of the national market. In 1994, rules on broadcast ownership were relaxed to allow any one company to have 50% ownership of one station, 15% of a second station, and 5% of a third station. Cross-media ownership is permitted, but regulated according to different combinations of media reach and ownership limits. Special rules still apply in France to public and private broadcasting, which secure a balanced reporting of political parties. There has been a long standing tradition of government subsidies for media firms.⁶ French groups have benefited from a strong national base from which to Europeanize.

2. Germany

Germany represents the largest media market in Europe. Since there have been virtually no cross-media restrictions in Ger-

⁵ This has been perceived as the best way to regulate media ownership by the EC, which was subsequently introduced by the British and German governments.

⁶ ANDRÉ LANGE & AD VAN LOON, *INSTITUTE FOR INFORMATION LAW* (1990); BERT STUBBE OSTERGAARD, *THE MEDIA IN WESTERN EUROPE* (Euromedia Research Handbook 1992).

many, major publishers have been allowed to own both television and radio interests. As a result, the national market is a complicated web of cross-media ownership with each media market regulated separately. Although media companies operate nationally, regulation is further tiered at the regional level. For radio and television, fifteen state regulators (*Medienanstalten*) regulate frequencies, and broadcasters must apply separately to each Land for licenses. As Humphreys argues,⁷ the national media market has long been characterized by *Standortpolitik* by which the German Länder have only further liberalized the market or supported the status quo, in order to encourage sector growth in their geographic area. Therefore concentration in this sector has ironically been supported by successive Länder treaties which promoted consolidation over competition, resulting in a comparatively lax regulatory structure. Indeed, the only legal limit imposed by the 1996 interstate treaty is the restriction of broadcasters to 30% of audience share. Previously, Länder could prevent a private broadcaster from owning 49.9% of a general programming channel, and from controlling two additional specialized channels. This liberal regulatory framework has both strengthened national media companies for investing abroad and has made Germany very attractive to outside investors.

3. Italy

Local cable broadcasting was liberalized in Italy as early as 1975, and terrestrial broadcasting as early as 1976,⁸ but legislation on dominant positions in broadcasting did not appear until the 1990 Broadcasting Act (following substantial concentration in television during the 1980s). The 1990 Act limits a company to owning 25% of the number of all national channels, but does not limit audience share. The Act also restricts cross-media ownership, preventing publishers with a circulation of over 16% from owning television stations, or those with a circulation of 8% from owning more than one station. Dominant position in the press was legislated in 1981, with limits of 20% circulation imposed at the national level, and 50% at the regional level. In July 1997, the Prodi Government drew up proposals allowing telecommunications companies to compete with broadcasters and proposing new limits on ownership which resulted in the 1997 New Media Act. A new en-

⁷ Peter Humphreys, *Power and Control in the New Media*, Address Before ECPR New Media and Political Communication Workshop (Feb. 27, 1997).

⁸ LANGE & VAN LOON, *supra* note 6, at 218; OSTERGAARD, *supra* note 6, at 132.

forcement agency is presently being established in Italy to regulate the telecommunications and media markets jointly.

4. Luxembourg

Luxembourg has long pursued a non-interventionist media policy in the name of freedom of the press and broadcasting. Luxembourg has no anti-concentration rules and no media ownership rules (with the small exception that the 1989 Act on Electronic Media imposed some ownership restrictions upon firms that broadcast within Luxembourg). This liberal framework has been attractive for investors and media has become an important sector of the Luxembourg economy.

5. The Netherlands

The Netherlands did not permit private terrestrial broadcasting until as late as 1990. Prior to 1990, private broadcasting companies existed but were contracted to provide public service programming. The 1990 Media Act allowed private broadcasters for the first time, but restricted broadcasting to cable transmission, since all terrestrial frequencies were reserved for the public stations. The Act contains some provisions on cross media ownership, stating that any publisher with more than 25% circulation is not permitted to own more than 50% of a broadcaster.

6. Spain

Spain has comparably strict media concentration rules for radio and television, but not for the press or cross-media ownership. The Private Television Act of 1988 limits ownership to only one television company and to 25% of shares therein. Under a 1992 amendment, companies holding a license for a satellite television service are subject to the same rules. The Telecommunications Act of 1987 sets the same limits for private radio stations. At the end of 1997, the Spanish government was drawing up a package of measures designed to ensure a total transition to digital transmission by the year 2001 (linking the measures to a renewal of the broadcasting licenses of the country's commercial terrestrial channels).⁹

7. The United Kingdom

Cross-media ownership has traditionally been regulated more in the United Kingdom than in the rest of Europe. With the 1996

⁹ EXPANSION, Spain, Oct. 23, 1997, at 10.

Broadcasting Act, rules governing cross-media ownership were relaxed, permitting national newspapers with less than 20% market share to own one private broadcaster (radio, television, or satellite) and have full control of non-domestic satellite broadcasters. Although this allows News International continued operation of BSkyB for the time being, BSkyB will need a licence from OFTEL when it goes digital. A new market measurement was introduced in the Act to limit audience share of broadcasters to 15%. The measurement is based upon the ownership of companies and their corresponding audience share, not on channels (as in Germany and France). This has made the United Kingdom's acceptance of EU proposals for audience share difficult as ITV channels in particular have complicated ownership structures created by past United Kingdom legislation (limiting ownership of more than one license holder to 20% in another). ITV, the channel with the largest audience share, is separated into regional divisions which are licensed to eighteen companies.¹⁰ These ITV companies in turn are owned by other investors in a complicated arrangement of cross-holdings. A new broadcasting bill is anticipated in 1998, which may allow competition between broadcasters and telecommunications operators. Except for a rule stating that the transfer of ownership of a newspaper with more than 500,000 copies in daily circulation must be approved by the Secretary of State for Trade and Industry, there has never been a limit on newspaper circulation or provisions against press concentration.

8. European Union

Following the liberalization of the European market with the Single European Act, the late 1980s witnessed a growth in the international activities of media companies across Europe. The 1989 *TWF* Directive accelerated this growth, fostering a number of cross-national mergers and acquisitions. During the 1990s, this merger and acquisition activity has continued and has been accompanied by the formation of several transnational joint ventures between large European media operators. Indeed, it seems possible to identify camps of alliance between the large firms, particularly in

¹⁰ These companies are Border Television PLC, Carlton UK Holdings, Channel Islands Communications Ltd., Channel 5 Broadcasting Ltd., Data Broadcasting International ("DBI"), GMTV, Grampian, Granada Television Ltd., HTV, ITN, Meridian Broadcasting Ltd., Scottish PLC, Simpleactive Ltd., Teletext Ltd., Ulster Television PLC, West Country, and Yorkshire-tyne Tees Television Holdings PLC. For an explanation of the United Kingdom's extremely complicated licensing system, see *The Information Paper, Who Owns What*, ITC, Apr. 1997.

the case of digital-TV where joint ventures have been justified by the large financial investment needed to enter the new market.¹¹

III. POLITICIZATION BY THE EUROPEAN PARLIAMENT LEADING TO AN INITIATIVE BY THE EUROPEAN COMMISSION

The issue of media concentration was placed onto the agenda of the European Commission by the European Parliament ("EP"). In 1984, shortly after the release of DG III's *TWF Green Paper*, the EP produced a number of requests for media concentration legislation which could accompany the liberalizing *TWF* Directive. The EP did not see media concentration as a problem of market inefficiency; rather it was viewed politically as a threat to democracy, the freedom of speech, and pluralist representation. Along these lines, the EP produced three demands to the European Commission during negotiations leading up to the 1989 *TWF* directive: (1) a 1985 Resolution;¹² (2) a 1986 official request to the Commission; and (3) the 1987 *Barzanti Report*.¹³ *Each time it was requested that the Commission be granted the legal resources to safeguard media pluralism within TWF.*

However, when the *TWF* was ratified by the Council in 1989, it contained no provisions for anti-concentration measures. The Directive contained only one very limited technical measure which indirectly affected media concentration.¹⁴ In response to the calls for legislation on pluralism, the Commission argued that the liberalization of the media industry would automatically produce pluralism and diversity.

The 1989 *TWF* Directive typifies a single market regulatory policy. The Directive establishes a legal framework for the cross border transmission of television programs, thereby creating a single audio-visual market. A media company may only be regulated in the country of transmission, not reception. Herewith the Commission aims to make the national media industries more competitive, thereby strengthening the European market against wider forces in the international market. However, the *TWF*'s depoliticization during the policy process was hard won by the Commission, and its effects of fostering European level mergers,

¹¹ Matthias Lang, *Entering the Digital Age. The Promise of Pluralism and the Danger of Monopoly Control*, Address Before the ECPR New Media and Political Communication Workshop (Feb. 27, 1997).

¹² PE Doc. A2-102 (Sept. 30, 1985).

¹³ PE Doc. A2-246, (Dec. 8, 1987), in which the EP suggested two 1987 amendments for media concentration to the draft Directive *TWF*.

¹⁴ Broadcasters must reserve 10% of their transmission time, or alternatively, at least 10% of their programming budget for European works by independent producers.

acquisitions, and joint ventures¹⁵ prompted further political demands for concentration control from the EP.

Immediately following the *TWF* ratification, the EP again took issue with the Commission over media concentration. No less than two Resolutions and two working papers¹⁶ were put out by the EP between 1990 and 1992. In response, the EC released its first *Green Paper* on the issue in 1992.¹⁷

In the 1992 *Green Paper*, the Commission, as it had with *TWF*, framed media concentration as an issue of the internal market. Acceptance of the issue on these terms was not immediately attained. For this reason, the Commission sought support for the initiative from the other EU institutions and from interest groups.¹⁸ Official opinions were sought and given by the EP,¹⁹ the Economic and Social Committee,²⁰ member states, national interest groups, national government departments, and European federations.²¹ In the *Green Paper*, the Commission called for consultation papers from interest groups to consider three possible courses of action.²² This wide consultation on the initiative (culminating in an April 1993 public hearing) served only to enmesh the Commission in a wider debate of EU legislative competence in matters of democratic concern.

By 1994, no further action had been taken by the Commission, so the EP continued lobbying for legislation. In the 1994 *Fayot/*

¹⁵ See *supra* note 11.

¹⁶ The 1990 De Vries Report, Resolution on Media Concentration, 1990 O.J. (C. 68), called for the Commission to counteract the growing trend towards media concentration in Europe, PE Doc. A3-293/294 (Feb. 15, 1990). In February 1990, the EP presented a related Resolution on freedom of the press. In September 1991, the EP released a working paper, *Media Concentration and Diversity of Opinion in Europe*, which concluded that "competition law is not a substitute for media law" and suggested laws for concentration, a European monitoring body, and a media code. A further *Resolution on Media Concentration and Pluralism of Information*, in 1992, called for harmonization of national media regulations and the protection of pluralism. PE Doc. A3-153 (Sept. 16, 1992).

¹⁷ Pluralism and Media Concentration in the Internal Market, COM(92)480.

¹⁸ Francesca Beltrame, *Creating a Directive on Pluralism and Media Concentration: A Case Study of the European Union Legislative Process*, 7 UTIL. L. REV. 211 (1996).

¹⁹ Commission Resolution, Pluralism and Media Concentration, A3-0435/93, 1994, was in favor of harmonization.

²⁰ THE ECONOMIC AND SOCIAL COMMITTEE, OPINION ON COMMISSION GREEN PAPER, 93/C 304/07, 1993, was also in favor of harmonization.

²¹ This deliberately wide consultation was in line with the policy of encouraging greater transparency within the Commission, which was agreed upon at the 1992 Edinburgh summit before the transparency policy. However, the Commission only officially invited European federations to place their views. Moreover, as organizations and groups are now represented both nationally and at the European level, they could be represented two or more times.

²² These were simply: (1) no action; (2) transparency action; and (3) harmonization action.

Schinzel Resolution,²³ the EP voted in favor of strict restrictions on European media ownership. The Resolution urgently called for legislation to prevent European media companies from controlling too many media outlets and for measures to insure pluralism and diversity.

In October 1994, DG XV published a second Green paper entitled *Follow Up to the Consultation Process Relating to the Green Paper on Pluralism and Media Concentration in the Internal Market—an Assessment of the Need for Community Action*.²⁴ In this paper, the Commission reiterated the internal market argument. The paper stated that the responses to the 1992 paper were supportive of future legislation on media concentration.²⁵ In line with internal market logic, the Commission pointed out that this opinion in favor of European regulation is due to the industry's legal uncertainty on European media concentration law, which it considered a disincentive investment in the European market.

The second *Green Paper* differed from the first in that it noticeably concentrated on the information society. In particular, it argued that national restrictions on media companies constrict the growth of *the information society* within the single market. Along with indicating the differing national regulatory systems for media concentration, the second *Green Paper* also referred to shortcomings in national laws for *new technologies* which were also leading to fragmentation of the internal market. In this respect, the Commission linked media concentration to its more popular *information society* initiatives. However, later drafts do not include provisions for *new technologies*.

Indeed, the *Paper* described itself in its opening pages as both a follow up to the 1992 Commission *Green Paper* and an initial response to the *Bangemann Report*.²⁶ In anticipation of the Green paper, the *Bangemann Report* offered support for the media concentration initiative by referring to national media ownership rules as "a patchwork of inconsistency which tends to distort and

²³ PE Doc. A3-435 (Jan. 5, 1994).

²⁴ *Follow Up to the Consultation Process Relating to the Green Paper on Pluralism and Media Concentration in the Internal Market—an Assessment of the Need for Community Action*, COM(94)353 final.

²⁵ Responses to the questionnaires are compiled in a five volume Commission document; XV/9555/94.

²⁶ The *Bangemann Report* was a report of the Council of Ministers Higher Level Group (Bangemann chaired), entitled *Europe and the Global Information Society: Widely known as the Bangemann Report*, and was submitted to the European Council for its meeting in Corfu, June 24-25, 1994.

fragment the market,"²⁷ thereby reiterating internal market concerns stated in the first *Green Paper*.

The 1994 *Paper* concludes with a detailed discussion of policy instruments with particular emphasis on the use of audience share to measure media concentration. A questionnaire was sent out following the 1994 *Paper* to interest groups which had responded to the 1992 *Paper*. Along with the questionnaire, two technical studies on possible policy instruments were sent for comment; one on audience share measure, from a United Kingdom ad-hoc consultancy group Goodhall, Alexander, & O'Hare ("GAH"),²⁸ and the other on the definition of the controller from the European Institute for the Media ("EIM").²⁹

Due to the high political sensitivity of the issue of media concentration and the fact that the EP had increased its powers following the 1992 *Maastricht Treaty*, the Commission thought it important to gain the support of the EP's Committee on Culture, Youth, Education, and the Media, the largest supporter of the pluralist argument. At first, the Commission attempted to gain support informally for its initiative, reasoning to the committee that, after consideration of the limited competencies of the EU, internal market logic offered the only way in which a directive could be proposed.³⁰

In return for its support of the internal argument,³¹ the Parliament wanted public commitment from the Commission for pluralist concerns. Accordingly, in September 1995, Commissioner Monti gave a speech before the Cultural Committee in which he declared himself to be personally in favor of an initiative which would seek to "safeguard pluralism." The Commission repeated this view in a Commission communication to the EP in October 1995. The Cultural Committee remained quiet on the issue of media concentration until the October 1996 *Tongue Report*.

Confident of its support from the other EU institutions, after four years of consultation, a proposal for a directive on media concentration was submitted to the College of Commissioners by Commissioner Monti on July 24, 1996. The draft was widely agreed

²⁷ Commission Higher Level Group Report Recommendations to the European Council: Europe and the Global Information Society.

²⁸ Alexander, Goodhall, & O'Hare, *Feasibility of Using Audience Measures to Assess Pluralism* (Nov. 1994) (prepared for DG XV/E/5).

²⁹ EUROPEAN INSTITUTE FOR THE MEDIA, *LA TRANSPARENCE DANS LE CONTRÔLE DES MÉDIAS* (1994) (prepared for DG XV/E/5).

³⁰ Beltrame, *supra* note 18, at 4.

³¹ This informal acceptance of the Commission's internal market argument was confirmed by members of the Cultural Committee at that time during interviews with the author.

upon in principle, with objections only addressing policy instruments. Stronger objections came from Commissioners Brittan and Bangemann who found the draft too strict. Dissent from these two Commissioners was anticipated by the Monti cabinet.³² The draft was reconsidered by the Chefs du Cabinet and resubmitted on September 4, 1996. An unexpected objection was raised during the September 4th meeting by Commissioner Oreja on the grounds of pluralism.

The reasons why the pluralism argument reappeared were political. The submission of the media concentration draft was poorly timed as it coincided with the renewal of the 1989 *TWF* Directive. The 1996 ratification of the *TWF* Directive became so politically loaded as it went through the new Maastricht-established codecision procedure that it took one year of negotiation between the Council and the EP before an agreement was reached. The EP had made forty-four amendments to the Directive in February 1996. All of the EP amendments were rejected by the Council of Ministers in its summer 1996 sitting.³³

Significantly, the amendments were mostly linked to democratic issues: content of programming, protection of minors against harmful programs, advertising rules, and the extension of the scope of the Directive to *new services*. Commissioner Oreja, who held the *TWF* portfolio, was in agreement with the Cultural Committee regarding amendments to the Directive. The rejection by the Council of the inclusion of these provisions seriously drew into doubt the ability of the Commission to commit itself, as promised, to pluralist objectives. Accordingly, Commissioner Oreja objected to the September draft because the directive would not be based on principles of pluralism, but on the internal market. Soon afterwards, in October 1996, the EP published the *Tongue Report* on Pluralism and Media Ownership which seriously criticized the Commission's submission to the College. In particular, its suggestion of audience share was denigrated as "fail[ing] to take into account of pluralism content controls."

The summer rejection of *TWF* led to a second reading in November 1996 by the EP, at which 314 votes were needed to modify the Council's decision. Only 290 votes were attained and *TWF* was eventually ratified with only a fraction of the original changes sug-

³² EUROPEAN VOICE (Jul. 97).

³³ See *Council Explains its Rejection of Parliament's Amendments to its Common Position on Television Without Frontiers*, AGENCE EUR., Sept. 17, 1996.

gested by the EP.³⁴ Again, through this issue, the Commission was drawn into a wider debate of EU democratic concern. The loss of the vote drew attention to the problem of a lack of democratic legitimacy in the EU. The EP, as an elected body, even with a large majority, was unable to influence the decision of the Council. Particularly because the amendments to the *TWF* had involved issues of democratic relevance, the reality of the near miss horrified MEPs on the cultural committee. For this reason, support by the EP for a media concentration initiative based solely upon internal market principles is highly unlikely.³⁵

Shortly afterwards, on December 18, 1996, Monti resubmitted the media concentration draft to the College of Commissioners. The same objections were made by Commissioners Bangemann, Brittan, and Oreja. Since the initiative was not going to go through as it stood, a coalition contract was sought. Consequently, Commission Monti organized a special forum in January with himself, Bangemann, and Oreja to discuss the issue.³⁶ At this forum, Monti succeeded in consolidating support for his initiative from the two Commissioners.³⁷ Bangemann's support in particular came as a surprise to a number of special interest groups.

The *Draft Directive* was confidently resubmitted to the College on March 12, 1997 (with the word "pluralism" omitted from its title). This time, Bangemann and Oreja supported the draft and for the first time, the necessary majority of eleven out of twenty approved the draft. Three substantial objections were raised, however, by Commissioners Brittan, Papoutsis, and one, unexpectedly, from Santer's cabinet.³⁸ Although possessing an unrelated portfolio, Papoutsis expressed his concern over the liberalization of the Greek print market. The objection by Santer's cabinet was due to intense lobbying against the initiative, in particular by News International, Springer, ITV, and CLT. The president made a signifi-

³⁴ The decision went to conciliation stage and resulted in the Television Without Frontiers, Council Directive 97/36, 1997 O.J. (L 202).

³⁵ Media companies were aware of this fact, and even though the EP is a weak institutional power, they feared that any proposal on media concentration may have been altered significantly by the EP. Perhaps this fact and the embracement by interest groups of the Commission's new convergence initiative meant that interest group support for the initiative after the 1996 submissions began to wane. However, although similar to national levels, it is not necessarily needed.

³⁶ For discussion see *EUROPEAN VOICE*, Dec. 18, 1996-Jan. 8, 1997, at 1.

³⁷ The details of the meeting are unknown. It seems that the Commission's bureaucratic competence was delineated on a number of media issues. In any case, the Commission seems to now have very clear lines of bureaucratic responsibility. Shortly afterwards, DG X began drafting a green paper on new services. Monti's cabinet has shown support for XIII's *Green Paper* on convergence, which was published in November 1997.

³⁸ However, not by Commissioner Santer himself.

cant objection. Although Monti had enough support in the College for the initiative, he was convinced he had to withdraw the draft. Resubmission to the College has not yet been rescheduled: at present there has been no proposal from the EC for the harmonization of national media ownership laws.³⁹

Typical of single market initiatives, the harmonization initiative has relied heavily upon technical arguments, policy instruments, and the logic of the internal market, in an attempt to distance broader concerns of democracy. Unavoidable politicization of the issue by the EP as one of fundamental importance to the destiny of democracy and of primary interest to the ordinary citizen, has irretrievably slowed the initiative. Lacking an adequate, wider address of these issues by the EU, it is easy for lobbying groups to pick holes in the initiative based upon the principle of subsidiarity. Indeed, this politicization could prove a significant impasse for the Commission later in the policy process, if not at the stage of proposal.

It is evident from national levels that the more liberal media ownership legislation, the smaller the number and the greater the size of media players. As it stands now, national legislation is limiting concentration to a few players at the national level, but cannot prevent concentration on a European scale. As the *TWF* liberalized European markets without concentration measures, large media operators have been free to form alliances at the European level. The Commission draft proposal seeks only to harmonize national laws in Europe. The limits proposed by the draft of 30% audience share are designed to provide for four large media players and one small player at national levels. Considering the recent increase in cross-national media holdings, this proposal means very few players at the European level, if large players are allowed to continue to invest in each others' companies. Therefore, if the directive is adopted, the EU can, at best, only ensure the growth of players across Europe rather than the diversity in media ownership at national levels.

³⁹ There has been some confusion in the press about the status of the Commission draft proposal. Often the word "proposal" is used in an official sense. However, the Commission has not as yet had any *official* proposal on media concentration. Up until now, drafts have only constituted ideas for policy proposals. This has been true for both the draft proposals on harmonization and convergence. If a proposal is adopted by the College, it could take as long as two to three years to go through the policy process, and even then it may not be adopted.

IV. TECHNOLOGICAL AND REGULATORY CONVERGENCE: THE COMMISSION'S INTERNATIONAL COMMITMENTS

With the issue of bureaucratic competence resolved, the Commission's media ownership policy has been firmly placed under the protective umbrella of the *information society* framework.⁴⁰ Under this umbrella, DG XV (internal market) is responsible for the initiative on media ownership, DG X (cultural policy) for new services, and DG XIII (telecommunications) is responsible for the initiative on convergence between telecommunications and media policies.

DG XIII (Telecommunications, Information Market, and Exploitation of Research) has an interest in media policy due to its legislative authority in the area of communications technologies. This is a particularly successful DG, having produced a number of directives dealing with telecommunications (leading up to full EU liberalization in 1998) and satellite communications during the last ten years. It is also well-funded in comparison to the other DGs and therefore able to support more experts to deliberate on the future of Europe's communications industries.

It is clear that Commissioner Bangemann, who holds the portfolio for DG XIII, considers the media industry to be an essential part of Europe's *information society*. For the last twenty years, development in information industries is depended upon by the Commission and national government to provide jobs to ease Europe's growing unemployment. There is pressure on Bangemann, not only to achieve a European *information society*, but also to aid in the realization of the *Global Information Society* to which he promised his commitment at the 1995 G7 meeting in Brussels. During this meeting, the issue of convergence between media and telecommunications industries (driven by technology) was a high priority. Significantly, UNICE, the federation representing European industry, declared at the meeting that "distinctions between broadcasting and information services will become irrelevant."

International pressure for liberalization and a European policy on convergence has come in particular from the United States, WTO, and OECD. The Commission met with strong opposition to the small European programming provision included in the 1989 *TWF* Directive by U.S. broadcasters, and the U.S. government took the issue to GATT. When the Uruguay Round eventually ended in

⁴⁰ As originally outlined in the 1994 *Information Society White Paper*, it provides a general policy framework for a significant number of Commission policy initiatives. See also the Commission Communication on Europe at the Forefront of the Global Information Society, Rolling Action Plan, COM(96)607 final.

1994, the EU managed to obtain an opt-out provision for audio-visual products. However the United States is continuing to protest against this provision.⁴¹ Revisions to the agreement are expected particularly with the EU's offer to liberalize telecommunications.⁴² The United States is also exerting indirect pressure on Europe with its 1996 Telecommunications Act. European media companies are demanding similar deregulation on convergence in Europe. The companies argue that they may be left behind U.S. firms if they are not also allowed to compete in adjacent markets. The OECD has also been promoting convergence.⁴³ At a recent conference, an OECD representative stated that with technological convergence "there will be no need to have separate broadcasting and telecommunications regulators."⁴⁴ Similar views were expressed by a WTO representative.

Accordingly, DG XIII has set up an internal ad-hoc working committee dealing with the issue of policy convergence. The Bangemann Group II, a forum of large European and American firms, is also considering issues of convergence. From mid-1995 onwards, DG XIII began to publish studies and policy papers on convergence between telecommunications and audio-visual policies, to which media ownership is an integral part. The issue of convergence was first publicly raised by DG XIII in an academic paper written by two DG XIII officials.⁴⁵ The authors stipulate that EU policy must soon address the issue of convergence which was at the "heart" of the information society. They argued that the information society requires a policy framework which encompasses all communication technologies and seeks to eradicate inconsistencies between policies in different media sectors. A similar paper, *Regulating the Convergence of Telecommunications and Broadcasting*, was

⁴¹ The TWF provision for European content has been consistently bombarded by U.S. representatives to the WTO table and Brussels as a barrier to trade. In an interview with *European Voice* in July of 1996, U.S. representative Vernon Weaver stated to the E.U., "I will not be shy about defending key U.S. industries, such as the audio-visual industry, against new protectionist measures, however packaged."

⁴² See *Resumption of WTO Negotiations is Positive but Several Problems Remain to be Solved - Clarification of EU Position on Audio-Visual Services*, AGENCE EUR., Jan. 18, 1997. The WTO/GATT agreement on basic telecommunications reached on February 15, 1997, set dates for liberalization of telecommunications, but still excludes broadcasting ("content services").

⁴³ T.R. FENOULHET, *THE REGULATORY DYNAMICS OF THE INFORMATION SOCIETY IN THE ECONOMICS OF THE INFORMATION SOCIETY* (A. Dumort & J. Dryden eds., 1997); *Webcasting and Convergence: Policy Implications*, OECD Doc. DSTI/ICCP/TISP/6 (Dec. 1997).

⁴⁴ Dimitri Ypsilanti, *The Aftermath of Liberalization: Multi-level Governance in the Regulation of Telecommunications*, Address Before the EUI Working Group on Telecommunications and the Information Society Workshop (Nov. 14, 1997).

⁴⁵ Johannus Schoof & Kevin Brown, *Information Highways and Media Policies in the EU*, 19 TELECOMM. POL'Y 325-38 (1995).

presented by Commission official Marcel Haag at the International Conference "The Social Shaping of Information Highways," a DG XIII sponsored workshop in Bremen in October 1995.

In September 1996, DG XIII published a report entitled *Public Policy Issues Arising from Telecommunications and Audiovisual Convergence* commissioned by KPMG. The report suggested radical change to member states' media ownership laws. It made no distinction between telecommunications and distinct media markets, and deemed public service enterprises monopolistic or unnecessary. The KPMG report produced a fair deal of political backlash in the national press and from the EP.⁴⁶ The attack on public broadcasters prompted the EBU to seek a protocol (no.32) in the June 1997 Amsterdam Treaty guaranteeing their continued existence. The protocol 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."

In November 1997, DG XIII published its *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation*.⁴⁷ The Paper was much more thorough than the KPMG report, and shows evidence of wide consultation. Its fundamental recommendation was the convergence of national telecommunications and media policies so that they would be governed by one regulatory authority. The paper foresees competition between the sectors, predicting what it terms a "struggle between computer, telecommunications and broadcasting industries for the control of future markets."⁴⁸ It calls for the liberalization of national markets to allow media operators to enter the telecommunications market and vice-versa. Ownership is mentioned infrequently, the issue "already being dealt with in Community initiatives," but the paper cautiously states:

Current restrictions in some Member States (and not others) regarding what types of services can be carried on different infrastructures could make it difficult for operators to formulate unified strategies addressing pan-European markets. It may also prevent economies of scale being realized. The result

⁴⁶ In particular, EP concern about the report was expressed in a letter to the EU Commissioners.

⁴⁷ Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, COM(97)623.

⁴⁸ *Id.* at 10.

ing higher unit costs, and hence tariffs, could hold back the delivery of innovative services.⁴⁹

Regarding new services, the paper states:

Any use of licensing or any regulatory limitation on market entry represents a potential barrier to the provision of services, to investment and to fair competition and should therefore be limited to justified cases. In particular, the trend should be towards limiting regulation where potential barriers exist, rather than extending heavier regulation to more lightly regulated sectors in order to equalize market conditions.⁵⁰

Public service broadcasters are not condemned, but it is suggested that private broadcasters could increasingly fill public service roles:

Future developments may impact on the fulfilment of the public service mission. First, as the pay-TV market matures, operators may need to increase their investment in local content to maintain quality and product differentiation. For example, British satellite pay-TV operator, BSkyB, is now a major investor in the United Kingdom film industry, and Canal+ is acquiring rights in French cinema libraries.⁵¹

Unsurprisingly, the convergence *Green Paper* has found support from large media conglomerates which favor greater liberalization of media markets, and has been met with opposition from public broadcasters such as the BBC and ARD. News International, Springer, and ITV would be worst hit by XV's harmonization initiative due to the draft's extension of audience share to the press (for which many member states have no rules, including the United Kingdom and Germany), and its measurement of media reach by channel (instead of by company ownership which would affect ITV).

V. COMPETITION POLICY AND THE SINGLE AUDIO-VISUAL MARKET

Under competition policy, the EC has direct authority to make decisions which are not subject to approval by the Council of Ministers or the EP, only to review by the European Court of Justice. Within the Commission, Directorate General IV ("DG IV") has responsibility for competition decisions and houses the Merger Task Force. Due to the special status of media falling under cultural

⁴⁹ *Id.* at 27.

⁵⁰ *Id.* at 29.

⁵¹ *Id.* at 21.

policy at the level of the member state, DG IV has developed a special policy towards Europe's media industry. Most importantly, cultural as well as economic concerns are taken into consideration in DG IV media decisions.

Since the 1989 *TWF* Directive, a significant number of cross-European media mergers have been officially decided under EU competition policy.⁵² Many recommendations have been made informally, directly with media companies, and national government decisions are often influenced by the European Commission. This occurred for instance when the DG IV suggested to the ITC that BSKyB be excluded from British Digital Broadcasting ("BDB") when the United Kingdom issued its license in 1997. Informal negotiations were attempted to deal with the Premiere/DF1 digital platform until the case was officially registered with the EC in December 1997.

DG IV first applied competition law to the broadcasting industry according to articles 85, 86, and 90 as defined under the Treaty of Rome. This occurs when agreements between companies are seen to come into conflict with the creation of a single market or there is generally a perceived threat to competition through cartels, monopolies, or mergers. Article 85 prohibits private sector anti-competitive agreements and article 86 prevents the abuse of dominant position. Articles 85 and 86 are applied to the public sector by article 90. DG IV's main concern when applying these articles is that markets remain open and identifiable entry barriers are removed.

⁵² These denied media mergers include: ARD Decision, 1989 O.J. (L 284); UIP Decision, 1989 O.J. (L 226); Matsushita/MCA [Jan. 10, 1991]; Screensport Decision, 1991 O.J. (L 063); Eurosport Decision, 1991 O.J. (L 063/32); BSKyB/SkyTV Decision [1991]; ABC/Generale des Eaux/Canal+/WH Smith [Sept. 10, 1991]; Ericsson/Kolbe, 1992 O.J. (C 27); Northern Telecom/Matra Communication [Aug. 10, 1992]; Eurovision Decision, 1993 O.J. (L 170); Sunrise Decision, 1992 O.J. (C 18), IV/H176, Jan. 1, 1993; JCSAT/SAJAC, 1993 O.J. (C 219); British Telecom/MCI, 1993 O.J. (C 259); RWE/Mannesmann, 1994 O.J. (C 68); BS/BT, 1994 O.J. (C 134); Kirch/Richmont/Telepiu Decision, 1994 O.J. (C 225); Bertelsmann/News International/Vox Decision, 1994 O.J. (C) 57, (Oct. 1, 1994); MSG Media Service, 1994 O.J. (L 364); Vox II, 1995 O.J. (C 57); Securicor/Datatrak, 1995 O.J. (C 82); Omnitel, 1995 O.J. (C 96); Blockbuster/Burda, 1995 O.J. (C 129); Kirch/Richmont/Multichoice/ Telepiu 1995 O.J. (C 144); CLT/Disney/Super RTL, 1995 O.J. (C 144); RTL/Veronica/Endemol, 1995 O.J. (L 134); Seagram/MCA, 1995 O.J. (C 149); Cable&Wireless/Vebacom, 1995 O.J. (C 231); Albacom (BT/BNL), 1995 O.J. (C 278); Bertelsmann/Telemonti Carlo Decision, 1995 IP 1335; Unisource/Telefonica, 1996 O.J. (C 13); Canal+/UFA/MDO, 1996 O.J. (C 15); British Teleco/VIAG, 1996 O.J. (C 15); Channel Five, 1996 O.J. (C 57); Nordic Satellite Distribution, 1996 O.J. (L) 53/20 [July 19, 1995]; ESPN/Star [Nov. 11, 1996]; DBKOM [Oct. 23, 1996]; Bertelsmann/CLT [Oct. 7, 1996]; N-TV [Sept. 16, 1996]; RTL/Veronica/Endemol (HMG), 1996 O.J. (L 134); Viacom/Bear Stearns [Mar. 25, 1996]; Hermes Europe Railtel [Mar. 5, 1996]; ADSB/Belgacom [Feb. 29, 1996]; Case No IV/M.972 Bertelsmann/Burda/Springer Hos MM [Sept. 15, 1997]; Case No. IV/M.973 Bertelsmann/Burda Hos Lifeline [Sept. 15, 1997].

Previous to 1990, all Commission competition decisions were made under articles 85 and 86 of the Treaty of Rome. From 1990 onwards, merger decisions were made under the 1989 Merger Regulation,⁵³ although joint venture decisions continued to be made under articles 85 and 86. The Merger Regulation required proposed mergers with global sales revenues totalling over five billion ECU to notify DG IV for permission. Notification allowed companies to receive a quick decision from the Commission (within one month). In April 1997, the Merger Regulation was amended to include joint venture decisions, and thresholds were lowered from five to two and a half billion ECU.

Under the Merger Regulation, DG IV made a first attempt to accommodate the special status of the media industry within existing EU competition law. Member states were permitted under article 21 of the Merger Regulation to enact national legislation to preserve media pluralism. DG IV regards these pluralism cases as originating either when separately defined markets are involved in multi-media transactions or when media mergers, which are not viewed as a threat to competition, are perceived as a danger to pluralism.

Following the Commission's 1989 *Television Without Frontiers* Directive, there was a significant increase in European media mergers.⁵⁴ In anticipation of a corresponding increase in media-related competition decisions, DG IV sought better definition of its policy towards the sector. Accordingly, in February 1990, DG IV conclusively clarified its position towards the audio-visual industry in the *Communication to the Council and European Parliament on Audio-visual Policy*.⁵⁵ The *Communication* identifies the audio-visual sector as being different from other sectors due to a number of "specific economic and cultural considerations."⁵⁶ It is stated that EU competition rules would continue to apply equally to the audio-visual sector as they do to other sectors, but a list of factors relevant to the audio-visual sector would be taken into consideration when media competition decisions were made. In the *Communication*, DG IV first defines three distinct audio-visual markets: (1) production and distribution of cinema and television films; (2) the market for television broadcasts; and (3) the market for satellite broadcasting services. Second, further *separate* product markets are then speci-

⁵³ Commission Regulation 4064/89; 1989 O.J. (L 395), amended by 1990 O.J. (L 257) 14.

⁵⁴ See *supra* notes 7, 11.

⁵⁵ COM(90)78 final.

⁵⁶ These, the *Communication* claims, relate to the structural weakness of the audio-visual sector and to the high level of intra-sector co-operation.

fied: free access television (advertised); free access television (non-advertised); pay television; cable television; satellite broadcasting (general); and satellite broadcasting (wholly dedicated to sport).

The 1991 *Communication* discusses exclusive programming rights. It notes that although DG IV did not look negatively upon co-operation between European media companies, it ensured that programming material was not withdrawn from the market as a result. It further expresses concern that media companies may fix prices in the purchase of programming from third parties.⁵⁷ Based upon article 85, the Commission is also opposed to the joint acquisition or distribution of programming rights (although exemptions could be granted). Where exemptions were to be granted, and a multinational organization were to achieve joint exclusive rights for its members (such as the EBU, ACT), non-members must be allowed access to programming. When exclusive programming rights are obtained, they cannot be of "excessive" duration and later conditions cannot be added to the contract. These considerations are to apply to both public and private media companies.

At a recent conference, Commissioner Van Miert remarked: "As a direct result of the Single Market there are many, many more cases, particularly in multi-media" ⁵⁸ Indeed, faced with a growing number of media decisions, the European competition taskforce (DG IV) is understaffed. With media companies expanding into adjacent markets, the definition of media markets is becoming increasingly difficult, making judgments controversial. With or without a Commission directive on media concentration, the work of DG IV will continue to increase in the area of media. However, with a directive stating the Commission's position clearly, the justification of DG IV media decisions may become easier. When asked if he were in favor of a draft harmonizing media concentration, DG IV Commissioner Van Miert stated:

My personal opinion is that I am convinced of a need for European legislation on media concentration. From a democratic point of view, it is necessary. When we said no to the Nor-

⁵⁷ This is the DG IV's concern during the present *Premiere DF1* case. Universal Studios, Disney and Warner Brothers wish to file an official complaint with the EC if the merger of German pay-TV services DF1 and *Premiere* goes ahead, as the enlarged digital platform would allegedly fail to provide non-discriminatory access to third-party channels. There is little doubt that U.S. studios wish to block the merger to ensure a continued competitive market for their programming in Germany. For a further discussion see *Universal May Oppose DF-1 Premiere Pact Germany*, NEW MEDIA MARKETS, NOV. 20, 1997, at 1.

⁵⁸ See *supra* note 1.

dic satellite case, the ruling was considered to be difficult. We cannot use competition rules to govern democratic issues.⁵⁹

VI. CONCLUSION: EUROPE AS A SPECIAL CASE?

For historical and cultural reasons, Europe has been a special case with its tradition of public service broadcasters and highly regulated media markets. The WTO has so far recognized this by allowing Europe an opt-out for media policy under the Uruguay round on "cultural" grounds. Similarly, national media markets have been exempt from European competition law under article 21 of the Merger Control Regulation (to protect cultural interests) and under the principle of subsidiarity. However, as shown in this article, pressure for market liberalization from international and domestic sources is challenging the way in which Europe regulates its media. The EC is therefore left with the difficult task of pursuing liberalization to produce large European companies, fending off foreign competitors, and creating rules to ensure media diversity at national levels.

The EC debate is a tricky one. As it has been very difficult to conceptualize media ownership policy solely in terms of the single market, it has now been absorbed into the *information society* framework. Accordingly, the harmonization initiative is meant to complement the parallel *information society* initiative on convergence. However, the Commission faces a difficult task of amalgamating the two policies. One fundamental difference is that harmonization of media ownership policy guarantees the continued existence of media regulatory authorities at the national level, whereas convergence policy requires the abolishment of these authorities which are accounting for "overregulation." The convergence *Green Paper* delineates bureaucratic competence for media ownership and new service policies, delegating them to other agencies (ie.: DG X and XV). However, this contradicts the basic idea of the *Convergence Paper* which is to regulate all media equally. Similarly, the harmonization initiative distinguishes between telecommunications and media industries, defines print, radio, television broadcasting, and new service markets separately, and distinguishes between public and private companies. It does not attempt to regulate new entrants to media markets from external industries (such as telecommunications or new services). The Commission's long term aim could be to first liberalize national media markets with its

⁵⁹ In response to a question by the author at the Future of Merger Control in Europe Conference, *supra* note 3.

harmonization proposals, then follow some years later with convergence legislation once telecommunications companies have lost market power due to introduced competition, and new services have been allowed to grow through lack of legislation.

If this is the case, it is relevant to consider how the Commission initiatives could work in practice. Joint ventures between media and telecommunications firms are increasingly being formed as convergence between communications technologies necessitates. If the EC succeeds in liberalizing access between these markets with a directive on convergence, these joint ventures would most probably develop into mergers (as the draft proposal assumes convergence in technology means also convergence in ownership). The earlier convergence legislation is proposed, the more precarious the market for media firms. Considering the sheer size of telecommunications operators in comparison to media companies (in the United Kingdom, BT dwarfs the largest media company in terms of turnover),⁶⁰ there is little doubt that earlier legislation would mean the absorption of media companies by telecommunications firms. Later legislation would allow time for the media companies to bulk up following further liberalization of national ownership rules. Whether the formerly state-owned European telecommunications firms will lose their monopoly positions in home markets has yet to be seen following the 1998 EU telecommunications liberalization.

⁶⁰ BT, in 1995, had a turnover of £14,446,000 compared to the largest United Kingdom media company, Thorn, which had a 1995 turnover of £5,055,600. The next largest was Reed International with a 1995 income of £3,649,000. These statistics are based on the author's review of 68 United Kingdom media company reports.