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# Media diversity in Europe

report prepared by the AP-MD

*(Advisory Panel to the CDMM  
on media concentrations, pluralism  
and diversity questions)*

Media Division  
Directorate General of Human Rights

Strasbourg, December 2002



Report on

# Media diversity in Europe

by

**Peter A. Bruck**, Institute for Information Economy and New Media, Salzburg

**Dieter Dörr**, Professor for Public Law, Johannes Gutenberg-Universität, Mainz

**Jacques Favre**, Competition Commission, Berne

**Sigve Gramstad**, Director General, Norwegian Media Ownership Authority,  
Oslo

**Rosaria Monaco**, Head of Legal Advice Department, RAI, Rome

**Zrinjka Peruško Culek**, Head of Department for Culture and Communication,  
IMO, Zagreb

Assisted by the Secretariat of the Media Division of the Council of Europe

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Directorate General of Human Rights

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The Advisory Panel on media diversity – AP-MD – is a Council of Europe working group which was established after the 6th European Ministerial Conference on mass media policy (Cracow, 15-16 June 2000) with a view to monitoring developments in the area of media diversity and pluralism. This report has been drawn up by the AP-MD and presented to the Council of Europe Steering Committee on the Mass Media (CDMM), which has approved it. This being said, the CDMM is not bound by the conclusions and information presented in the report, which is the full responsibility of its authors.

Media Division  
Directorate General of Human Rights  
Council of Europe  
F-67075 Strasbourg Cedex

<http://www.humanrights.coe.int/media/>

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## Executive Summary

Article 10 of the European Convention on Human Rights is the basic framework for media pluralism on the European scale. Under its effect, States are under a “duty to protect” and, when necessary, to take positive measures to ensure diversity of opinion in the media. The European Court of Human Rights has stated that without plurality of voices and opinions in the media, the media cannot fulfil their contributory role in democracy.

Thus, European States are under the obligation of safeguarding and promoting pluralism in the media.

This report examines factors and points to measures which are specific and sensitive to varying contexts.

Given the significant differences in culture, in the size and characteristics of media markets, and in legal and administrative traditions within Europe, no common or single regulatory model will be suitable for all European countries.

Given this, it is nonetheless clear that a competition law approach alone is not sufficient. Sector-specific media ownership measures and regulations are necessary and will contribute positively to media pluralism objectives.

Different indicators and thresholds are used in European countries to monitor and control media concentrations. This report recalls that the audience share approach is one of the possible models, which presents the advantage of reflecting the real influence of a broadcaster in a given market and at the same time is neutral on the number of licences which the broadcaster can hold and allows its international development. Whichever the indicator employed, permissible thresholds vary at around 1/3 of the audience, 1/3 of revenues or 1/3 of the network capacity, implying a general European understanding that controlling one third of the market is tolerable, but that going beyond that level could infringe upon freedom of expression and information.

Media ownership rules need to be complemented by other measures which favour media pluralism: public service broadcasting has an essential role to play in this respect and ensuring diversity at the level of sources is also important.

The development of digital technology poses new challenges to pluralism which results from, among others, the use of proprietary systems by operators. The trend towards media concentration is strengthened with digital convergence.

Liberalisation and globalisation of markets increase the pressures for concentration on the national scale.

States need to strengthen national regulators and authorities responsible for ensuring and protecting media pluralism. Constant monitoring and proactive policy-making by States are required.

## **PART 0: INTRODUCTION**

1. The important role which the media plays in shaping public opinion should be recognised and given particular attention when addressing questions of economic/market concentration in this sector.
2. Media enterprises, as economic units, are subject to market rules, and consequently, competition legislation can apply to this sector too. However, given the heterogenous nature of the media market, competition authorities often have difficulties in determining the “relevant market”, and furthermore it is generally accepted that competition law alone is not sufficient to ensure media pluralism.
3. Guaranteeing media diversity, in particular in the current trend of globalisation, requires an approach which separates media content questions from purely economic ones.
4. This report deals with different avenues to promote and ensure diversity in the media, focusing in particular on the broadcasting sector. It presents, for instance, examples of media ownership rules, and stresses the importance of having strong public service broadcasting and interoperable technical standards.

## **PART A: FREEDOM OF EXPRESSION AND INFORMATION AS A BASIS OF MEDIA DIVERSITY**

### **I. ARTICLE 10 OF THE ECHR - READING THE CONVENTION IN A NEW WAY: FROM FREEDOM OF EXPRESSION TO FREEDOM OF INFORMATION AND BEYOND**

5. Article 10 of the European Convention on Human Rights<sup>1</sup> is of crucial importance on the question of media diversity. In effect, it makes respect for the human right to freedom of opinion binding on all member States of the Council of Europe. The contents of this requirement have been narrowed down in the numerous judgements of the European Court of Human Rights. Furthermore, the Article concerns legally enforceable, individual rights, and since the entry into force of Protocol No. 11 to the Convention any citizen of a signatory State is entitled, after exhausting domestic remedies, to lodge a complaint alleging a violation of these human rights with the Court. Lastly, within the European Union, the rights guaranteed by the Convention, and therefore also by Article 10, qualify as general principles of Community law, as is now expressly acknowledged in Article 6.2 of the Treaty on the European Union (Maastricht/Amsterdam).

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<sup>1</sup> Article 10 of the European Convention on Human Rights reads: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

6. Article 10.1 first and foremost guarantees the individual right to freedom of expression. As indicated in the second sentence of the same paragraph, this includes freedom of information. However, no express mention is made to freedom of the media or to media plurality and diversity. Freedom of broadcasting and of the press as part of active and passive freedom of opinion is arrived at by an interpretation of the second sentence of Article 10.1. The European Court of Human Rights first construed Article 10.1 in terms of individual rights and regarded freedom of broadcasting as deriving from freedom of expression and as a form of freedom of enterprise, that is, freedom to pursue a private broadcasting activity<sup>2</sup>.
7. At first sight, this perspective differs clearly from the functional approach to media freedoms taken, for example, by the Constitutional Courts in Germany and Italy. Generally speaking, in European countries, freedom of broadcasting is perceived as a "purpose-serving freedom" or a functional basic right<sup>3</sup>. This approach is based on the assumption that freedom of broadcasting, like other media freedoms, is aimed at ensuring freedom of information and must therefore afford the public access to free, comprehensive information, in the interests of democracy. Freedom of the media accordingly implies that the public has access to a free media system, which provides overall balanced, full and varied information. The underlying idea is that a free system of this kind is an essential prerequisite for a functioning democracy. It follows that this concept of freedom of the media also guarantees media diversity. The State is moreover obliged to take positive regulatory measures ensuring the widest possible range of balanced private media, if for practical reasons such variety is not in fact achieved<sup>4</sup>.
8. The more recent judgments of the European Court of Human Rights clearly show that Strasbourg still regards freedom of the media as part of the individual right to freedom of expression enshrined in Article 10.1 of the Convention. The concept of the purpose-serving function of the media as a means of promoting freedom of information has nonetheless been taken up and applied elsewhere by the Court, namely in connection with Article 10.2. This has permitted the Court to take into account the social/cultural and political/democratic facets of the media and to introduce these into its decisions. For instance, it stressed in the judgment concerning the Austrian broadcasting monopoly<sup>5</sup> that the preservation of a plural, culturally diverse broadcasting offer was undoubtedly an aim that could justify restrictions to broadcasters' freedoms. Furthermore, such pluralism can be achieved by other means than a public service broadcasting monopoly, for example, through a dual broadcasting system.

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<sup>2</sup> See, above all, the European Court of Human Rights' *Lentia Informationsverein* judgment of 24.11.1993 in *Europäische Grundrechtseitschrift (EuGRZ)* 1994, p. 549; similarly, see the judgment delivered by the Court on 28.3.1990 in *EuGRZ* 1990, p. 255; for a commentary, see M. Stock, "EU-Medienfreiheit - Kommunikationsgrundrecht oder Unternehmerfreiheit?" (Freedom of the media in the EU - a fundamental right to communicate or freedom of enterprise?) in *Kommunikation & Recht* 2001, pp. 289 and 292 ff.

<sup>3</sup> See the leading decision of the Federal Constitutional Court (BVerfGE), No. 57, 295, 319 ff.; see also BVerfGE No. 83, 238, 295, and No. 87, 181, 197; for a detailed analysis, see D. Dörr, "Der Einfluss der Judikatur des Bundesverfassungsgerichts auf das Medienrecht" (The influence of the case law of the German Federal Constitutional Court on media law), in *Verwaltungsarchiv* 2001, 149, 153 ff.

<sup>4</sup> See the leading decision of the German Federal Constitutional Court, No. 73, 118, 159 ff.; see also BVerfGE No. 97, 228, 258 and 266 ff.; No. 95, 163, 172 ff.; No. 83, 238, 297 ff.; and No. 57, 295, 323.

<sup>5</sup> *Lentia Informationsverein* judgment, loc.cit.



9. The need to guarantee media pluralism in the context of Article 10 of the Convention has been underlined by the European Court of Human Rights in other judgments. For example, in the *Jersild* case, it emphasised the importance of the audiovisual media for a democratic society<sup>6</sup>. In the *Piermont* judgment of 27.4.1995<sup>7</sup>, the Court likewise referred to the media's important role in a democratic society and the related need for pluralism, tolerance and openness. Lastly, in the *Bladet Tromsø*<sup>8</sup>, *Fressoz and Roire*,<sup>9</sup> *Oberschlick*<sup>10</sup> and *Janowski*<sup>11</sup> cases, it stressed the special democratic role of the press as a public watchdog.
10. It can therefore be seen that the European Court of Human Rights has recently been giving increasing weight to the social, cultural, political and democratic role of the media, although this is done in the context of the restrictions under Article 10.2. It is also worth noting that the European Union follows this case law. The European Court of Justice considers that, in the light of Article 10.2 of the Convention, there is a compelling public interest in the maintenance of a pluralistic radio and television system, which justifies restrictions on fundamental freedoms<sup>12</sup>. Article 10 of the Convention accordingly not only enshrines an individual right to media freedom, but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy.

## II. DIVERSITY OF CULTURE AS AN ASPECT OF PLURALISM

11. In Europe, cultural diversity is an integral part of European cultural identity. The ability of the media to reflect the cultural diversity depends on the plurality of the media.
12. Freedom of information implies that citizens will have the possibility to access a variety of information, primarily different opinions and ideas, but in a wider context also a variety of cultural aspects and expressions. Culture in a broad sense influences society in subtle ways, building the basis on which we form our opinions. Uniformity in the media strengthens the tendency to conformity and weakens the ability to assess other perspectives and alternative opinions. Europe has the advantage of having many cultures. The reflection of this cultural diversity in the media strengthens the sense of European identity and the citizen's ability for democratic participation.
13. Within the framework of the World Trade Organisation, there is an attempt to treat culture as an ordinary commercial good or service. Should such efforts succeed, there is a danger of narrowing cultural diversity down to one or a few dominant cultures which will serve global audiences through the global dominant media. Competition between cultures or cultural expressions and values implies that someone will gain market shares and thus marginalise or extinguish other cultures or cultural

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<sup>6</sup> Judgment of 23.9.1994, Series A No. 298, p. 23, § 31

<sup>7</sup> Judgment of 27.4.1995, Yearbook of the European Convention on Human Rights 1995, 255

<sup>8</sup> Judgment of 20.5.1999, Neue juristische Wochenschrift (NJW) 2000, 1015

<sup>9</sup> Judgment of 21.1.1999, NJW 1999, 1315

<sup>10</sup> Judgment of 1.7.1997, NJW 1999, 1321

<sup>11</sup> Judgment of 21.1.1999, NJW 1999, 1318

<sup>12</sup> European Court Reports (ECR) 1991, I-4007, § 22 - *Gouda*; ECR 1991, I-4069, § 29 - *Commission v. the Netherlands*; ECR 1993, I-487, §§ 9 ff - *Veronica Omroep*; ECR 1994, I-4795, § 18 - *TV 10*; ECR 1997, I-3689, §§ 18 and 26 - *Familiapress*

expressions. This is, however, contrary to the traditional European view on cultural diversity. The European tradition, which has been strengthened over the last decade, is to acknowledge the value of European cultural diversity, and rather than letting majority cultures “win” over minority cultures, the policy has been to protect and promote minority cultures. This policy is based on a belief that culture and cultural expressions transcend the notion of being a merchandise, and that cultural diversity contributes profoundly to European identity and democracy.

14. The technological, economic and social facets of globalisation appear at the same time as challenges and as opportunities to a newly highlighted cultural diversity. The ongoing important efforts by the non-governmental International Network for Cultural Diversity (INCD) and the International Network on Cultural Policy (INCP) of the Ministers of Culture to prepare an international convention for the protection of cultural diversity provide an opportunity to elevate cultural diversity as a policy aim both within national cultural and media policies and as a protected global value. It seems appropriate that the Council of Europe member States closely follow the developments of this debate and its consequence on the protection of and support for media pluralism.

### **III. DIVERSITY OF CONTENT AND SOURCES AS AN ASPECT OF PLURALISM**

15. Diversity in the ownership of media outlets is not sufficient per se to ensure pluralism of media content. The way media content is produced also has an impact on the overall level of plurality in the media.
16. 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, documentaries or dramas. 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, series and films. As a consequence, the intense competition between newspapers or television channels does not itself guarantee pluralistic content. This raises the question of whether, and if so to what extent, inadequate competition among information sources can have a negative effect on the functioning of democratic society.
17. Particular attention must be paid to restrictions related to information which is necessary to form public opinion. A monopoly situation as regards such information can be exploited to manipulate public opinion. This happens, for example, when journalists covering a conflict are denied access to the place of operations and have to make do with reports supplied by military press spokespersons, as was the case in the Gulf War. There is also the danger of uniform sources of economic information, with consumers no longer able to fulfil their role in the market economy. Uniformity occurs when it is impossible to check information using other sources. The Internet encourages diversity of information sources, particularly in discussion fora. But it can do little to counter the uniformity of uncheckable information supplied by governments, organisations and businesses.

18. "Investigative journalism" is expensive but necessary if the media are to fulfil their "public watchdog" role. In this respect, it is noted that public television channels generally do have sufficient resources to provide well-documented information, thanks to their licence fee income, whilst smaller media companies rarely have the necessary resources for this type of journalism. Press conferences can also be a useful source of information -they offer journalists an opportunity to question their source- provided that journalists have the resources (time-wise and other) to verify/check the information received.
19. Despite the quantity of information received by newsrooms, the public has the impression that it sees the same headlines almost everywhere. The media as a whole focus on a limited number of events that are given priority over all the others. Often they are relatively trivial, and the attention they receive only lasts a short time, after which it shifts to other news items. This is the consequence of the intense competition between media undertakings to retain public - readers' and viewers' – attention. Competition is sometimes responsible for influencing the way information is presented, favoring attractive formats rather than the actual content. The selection of information is not governed solely by marketing considerations, there is also a form of "journalistic correctness", which is guided by the perception journalists' have of society.
20. Pluralism is not enhanced when newsrooms confine themselves to repeating agency reports or showing pictures supplied by other channels, for example foreign ones in the case of events abroad. In such cases, the journalists' role is reduced to selecting from a great mass of information coming from a limited number of sources.

#### **IV. HOW TO REGULATE THE MEDIA MARKET – BY SPECIAL REGULATION OR THROUGH COMPETITION REGULATION**

21. Competition legislation applies to the media sector, as well as to all other economic sectors in most countries. The purpose of competition legislation is to secure an effective use of society's resources by creating conditions for real competition. The EU merger regulation, monitored and enforced by the European Commission, has a similar purpose. Mergers and acquisitions within the media sector are therefore examined by competition authorities, at the national and EU levels (for EU member States).
22. Nevertheless, a number of countries have introduced special regulations to secure media pluralism. The main reason behind such special regulations is that competition legislation is considered insufficient to secure media pluralism. The purpose of media-specific regulation is to secure freedom of expression and information, and the main concern of media regulation is to safeguard the human and democratic rights of individuals. The assessment of conditions for effective competition is not within the scope of media regulation, and likewise competition authorities will not take freedom of expression and information into consideration. Media pluralism is not a primary goal of competition legislation.
23. Within the European Union, the Directorate General for Competition is responsible for competition regulation, and a number of acquisitions and merger cases have been dealt

with. Some of these cases have involved media companies. In many of the “media” cases in which the Directorate General for Competition has intervened, the intervention has had positive effects also in relation to freedom of expression and media pluralism. Generally speaking, however, competition legislation will only deal with a minority of relevant cases (from a media pluralism point of view), and the decisions are often too restricted to meet the needs of the media and cultural concerns.

24. This shortcoming has been acknowledged in the European Union’s regulation. Basically, the Directorate General for Competition has exclusive competence to deal with acquisitions and mergers that fall within EU regulation. National authorities have no competence to deal with those cases. There exists, however, an exception for cases concerning media pluralism<sup>13</sup>. Even if a case is being dealt with by the Directorate General for Competition, the case can also be dealt with by national authorities, and member States may establish stricter rules than the EU regulation. The fact that there is an exception for media pluralism in addition to public security and prudential rules, demonstrates the importance attached to media pluralism. When the Council Regulation was adopted, it was clear that the economic and competition aspects that the regulation was based upon did not make it suitable for the safeguarding of media pluralism.
25. At a conference in November 2001, Competition Commissioner Mario MONTI commented in relation to the regulation of the media industry that “competition rules are necessary to ensure an effective, functioning free market”, but added: “There will often also be a valuable political aim to ensure media plurality and a diversity of opinion both within and across media. Such plurality and diversity are fundamental to the health of an open, democratic society – may not be assured by a simple free market approach.”
26. Mr Monti pointed out that the need for media plurality is partly ensured by the competition rules themselves, and he gave some examples, which have been mentioned previously in this report. He nevertheless stated the following: “In other cases, however, there may be legitimate concerns about media concentration where the market power is less than would trigger competition concerns. In such cases, the competition rules would normally be insufficient to ensure media plurality. And in such cases, member States are free to implement additional rules. Where they are seeking to ensure media plurality, they can even prevent mergers that would otherwise be approved under the competition rules.” Similar points of view were put forward during a seminar held by the Belgian EU Chairmanship in autumn 2001.
27. The purpose and general scope of application of national competition rules are in accordance with the EU regulation. The main difference is the division of competence between national competition authorities and the European Commission. Practices in several countries show that there are very few cases which are being dealt with by both competition authorities and media regulatory bodies.
28. Competition regulation does not give a satisfactory protection against media concentrations which are contrary to freedom of expression and information, and to

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<sup>13</sup> Council Regulation (EC) No 4064/89 of 21 December 1989 Art. 21 (3)

the level of media pluralism which is desirable in a democratic society. There is definitely a need for sector-specific media regulation.

## **PART B: MEDIA OWNERSHIP REGULATIONS: ENSURING DIVERSITY IN THE PRIVATE SECTOR**

### **I. INTRODUCTION TO MEDIA OWNERSHIP RULES**

29. There is great variety in the regulations of the different Council of Europe member States as regards concentration control in the media sector. This being said, in countries where there are sector-specific regulations on media ownership, in addition to general competition law which applies subsidiarily to the media sector, it appears that the legislation, irrespective of the criteria or monitoring threshold employed, aims at ensuring at least three operators in the market –two private and one public service.
30. Therefore, although a single regulatory pattern does not emerge across Europe, generally speaking it could be sustained that controlling more than 1/3 of the television market is deemed as a limit in many States. This would mean that a minimum level of diversity and plurality implies having at least three nation-wide broadcasters. The situation in some smaller countries can be different, since there are limits on the economic affordability of private broadcasting, where maybe only one private broadcaster can be supported by advertising revenues. In several “smaller” countries, the foreign channels received are a means of contributing to pluralism.
31. Given the variety of ownership models throughout Europe, it would be unrealistic to consider that a common European regulatory approach in this area would be feasible. EU member States have already invoked in the past that securing media pluralism is a national competence (principle of subsidiarity), which has resulted in no action being taken so far on media ownership at the EU level. In the same vein, this report does not recommend a particular regulatory model for all Council of Europe member States. It is nevertheless recalled that the audience share approach is a widely used model, which presents the advantage of reflecting the real influence of a broadcaster in a given market and which, at the same time, is neutral on the number of licences which the broadcaster can hold and allows its international development. This model may nevertheless be difficult to implement in certain countries.

### **II. OWNERSHIP RULES IN SEVEN EUROPEAN COUNTRIES: KEY FEATURES FOR COMPETENT AUTHORITIES TO SAFEGUARD PLURALISM**

32. A summarised and comparative overview of media ownership regulations in seven European countries (France, United Kingdom, Germany, Italy, Spain, Norway and Croatia) is presented below. The measurements/criteria used in these seven countries to determine dominance and unacceptable market concentration are quite varied: audience share, equity limits, voting rights, turnover, etc., and can be regarded as representative regulatory approaches for the whole of Europe.

<b>France</b>	<p>The basic limit in France is that a legal person cannot hold, directly or indirectly, more than 49% of the <i>share capital</i> or <i>voting rights</i> in a nationwide terrestrial television service. Owners of newspapers are subject to a circulation limit of 30% of the market of the same type of dailies. <i>Audience share</i> thresholds are also used as criteria to control concentration in France. The following audience thresholds apply - radio: 150 million inhabitants; local &amp; regional terrestrial television TV: 6 million inhabitants; cable TV: 8 million inhabitants. In addition, there are <i>numerical limits</i> on the number of broadcasting licences which can be held by the same physical or legal person, which have to be taken into consideration in combination with the audience share and/or capital share limits. So far, operators have been permitted to hold 1 licence at the national level and 2 for satellite television services, but a degree of flexibility has been introduced for Digital Terrestrial Television (DTTV), where the same legal person can hold up to 5 licences, and the 49% capital share limit does not apply. There are no numerical limits for radio and cable licences, but audience thresholds nevertheless apply to the latter. The cross-ownership regime is based on the “<i>two out of four</i>” rule: operators are not permitted to hold interests in more than two of the following four sectors: terrestrial TV, cable TV, radio or press, and if an operator is active in two of these sectors, it must respect certain thresholds. Turnover is not used as a criterion to control media concentrations in France.</p>
<b>United Kingdom</b>	<p>Newspaper concentrations are subject to specific provisions under competition regulations. The threshold value in the press sector is an <i>average circulation</i> of over 500,000 copies. Where a newspaper proprietor has reached this threshold and intends to further expand, the proposed merger/acquisition will be authorised/rejected after testing whether or not it is in the public interest. The public interest test includes the desirability of promoting plurality of ownership, diversity in the sources of information available to the public and in the opinions expressed in the media. The basic threshold for the broadcasting sector is 15% of the <i>total market share</i>, measured in terms of audience time (and including the public service broadcasting audiences). Where an operator has reached this threshold, a number of numerical and equity limits concerning additional licences come into play, to prevent an accumulation of interests in the television sector. The same 15% threshold is used for the radio sector, in conjunction with a points system that attributes a weighting to the size of the audience in the coverage area of the licensee. The <i>cross-ownership regime</i> prevents a newspaper owner with a market share of 20% from holding national terrestrial licences (Channel 3 or 5 licences) but there is no restriction for such a newspaper owner in holding licences for local delivery services, satellite television services or digital multiplex services. Where the newspaper owner has a market share of less than 20%, any intended cross-holdings with regional or national Channel 3 or 5 licences will be examined against a public interest test. The draft Communications Bill contains proposals to radically reform the existing media ownership rules and reduce them to the minimum necessary. The main changes in the Bill are: (i) the removal</p>

	<p>of the existing restrictions on the non-European ownership of broadcasting licences, (ii) the removal of the 15% total TV audience limit, (iii) a relaxation of the rules on radio ownership, and (iv) a less onerous newspaper merger regime.</p>
<p><b>Germany</b></p>	<p>Concentration cases in the press, radio and television sectors fall under the scope of general competition law (subsidiary application to the television sector). The nationwide television sector is also subject to sector-specific legislation to safeguard plurality in the media. There are no numerical limits on the numbers of channels which operators are permitted to exploit, but it is prohibited for an operator to reach a dominant opinion-forming position with its programmes. The existence of such a dominant opinion position is assumed when an operator has a general television audience share (annual average taking into account all the channels of a given operator) of more than 30% with the programmes that can be attributed to it. However, this 30 % threshold is as a rule only an assumption which can be disproved in each specific case. Also, a dominant opinion position can be approved even above a viewer share of 30 %. The Broadcasting State Treaty of the Länder in its version of 1 July 2002 will allow more extensively to take other factors into consideration when examining whether there is a dominant opinion-forming position, such as the position of the operator on similar markets that are relevant for the media. Furthermore, as a means to secure plurality of opinion, there is a regulation according to which programmes with a television audience share of above 10 % or operators with an overall viewer share of more than 20 % are obliged to broadcast programmes of independent third operators, so-called “window programmes”, to a certain extent. There are no specific cross-ownership regulations, but there are some limitations at the Länder level which prevent owners of major local or regional newspapers from operating local or regional broadcasting stations. Turnover is not used as a criterion to determine whether a broadcaster has a dominant opinion-forming position or not.</p>
<p><b>Spain</b></p>	<p>As regards nationwide analogue terrestrial broadcasters, as well as digital terrestrial television (DTT), the ownership limit that a legal or natural person could not hold, directly or indirectly, more than 49% of the <i>share capital</i> in a licence-holding company has been abolished. As regards local television, it is forbidden to hold more than two licences for the exploitation of such services, or to carry out networking, unless an authorisation from the State or Autonomous Community has been obtained on grounds of the territorial, social or cultural characteristics of the municipalities. The main limit in the cable sector is that no legal or physical person can hold shares, directly or indirectly, in two or more companies which have obtained a licence if they jointly have more than 1,5 million <i>subscribers</i> in the country. No ownership limits exist for analogue satellite broadcasters. There are <i>no cross-ownership restrictions</i> in Spain. Provided that companies respect general competition law and the specific ownership limits mentioned above, they may simultaneously own or control an unlimited number of national and regional newspapers, radio networks, satellite or regional DTTV services.</p>

<b>Italy</b>	<p>In addition to general competition law which also applies to the media sector, the national press market is subject to limits based on <i>circulation</i> figures: an owner cannot hold more than 20% of the overall circulation of dailies in this market, whilst concentration control in the regional press market is based upon the number of different newspapers owned by a single proprietor: the latter cannot control more than 50% of the total number of dailies in the region. As regards free nationwide terrestrial television, there is a <i>numerical limit</i> on the number of licences which can be held by a single person: 20% of the network capacity, that is, currently a maximum of two channels, since there are 11 frequencies for channels (this limit is therefore variable and depends on the number of available frequencies). As regards nationwide pay terrestrial television, only one licence can be held. In addition to this numerical limit, a limit based on <i>turnover</i> also applies to pay and free TV terrestrial broadcasters: they may not accumulate more than 30% of the resources of the television sector. Cable and satellite broadcasters are also subject to a 30% turnover limit of the resources in their respective markets. The <i>cross-ownership</i> regime is also based on maximum financial resources which an operator can accumulate: owners with interests in the radio or broadcasting and newspaper or magazine sectors cannot hold more than 20% of the total resources obtained from advertising, teleshopping, sponsorship, TV subscription revenue, financing of public service broadcasting, and revenues from newspaper &amp; electronic publishing sales and subscriptions. A draft law foresees the elimination of previous cross-ownership limits between press and television. The current limit based on revenues/resources will be reduced for all operators from 30% to 20% but will be calculated taking into account the total revenues from all media markets.</p>
<b>Norway</b>	<p>Media concentrations are regulated in the Media Ownership Act of 1997. The purpose of the Act is to promote freedom of expression, genuine opportunities to express one's opinions and a comprehensive range of media. The Media Ownership Authority is empowered to intervene against acquisitions of ownership in newspapers or broadcasting enterprises if the acquirer alone or in co-operation with others has or gains a significant ownership position in the national, regional or local media market, and this is contrary to the purpose of the Act. A person who controls 1/3 of the national market is considered to have a significant ownership interest. In regional and local media markets there is no stipulated threshold, and each acquisition is evaluated in relation to the dominance in the market and in view of the purpose of the Act. There are no specific rules on cross-ownership. The former government published a White Paper on media policy, in which it invited the Parliament to discuss threshold values and the possible application of the Act to ("new") electronic media, co-operation agreements and vertical integration. In its deliberations, the Parliament also considered liberalisation of the media ownership rules.</p>
<b>Croatia</b>	<p>Specific media related anti-concentration regulation exists only for the broadcasting media, other media and cross-media ownership falling</p>



under the scope of the general Law on the protection of market competition (1998), where market share is defined and/or limited in terms of turnover. The Law on Telecommunications (1999) limits to one-third the share in the capital in terrestrial radio and television, and allows participation in only one radio or television organisation with a national licence. At the local level, this rule is relaxed and allows capital share in both radio and television, but only in non-adjointing areas. In very small areas (less than 5000 or 10000 people), it is possible to own 100% or 50% of the media, respectively. Foreign capital is allowed only up to one-third of ownership in any broadcasting media, with no restrictions in the press. In 2002, the government initiated a debate around its thesis for a Media law, envisaging a cross-media ownership anti-concentration provision.

### **III. RECENT TRENDS IN MEDIA OWNERSHIP PROVISIONS: FUTURE REGULATORY PROPOSALS FOR ANTI-CONCENTRATION MEASURES**

33. Generally speaking, convergence/digitalisation has led to a growth of delivery means of diverse content. At the same time, a trend towards the liberalisation of media ownership restrictions can be noted. Less stringent numerical limits on the number of licences which a single operator can hold or more flexible cross-ownership rules, are, for example, being considered in a number of countries.
34. The specificities of digital delivery platforms do not always make it feasible or relevant to apply traditional ownership limits to all of the new delivery platforms. This is particularly true for digital terrestrial television (DTT), and special regulations on the ownership of DTT multiplexes have therefore been introduced in some countries.
35. This being said, generally speaking, existing regulations on media ownership are also applied to digital broadcasting services in most European countries (for example, the audience share thresholds in Germany apply to both analogue and digital television services). A new complementary limit for digital delivery platforms has been adopted in Italy (and is being considered in other countries) based on reserving 40% of the transmission capacity to independent programmers.
36. Some countries have recently been considering the introduction of media ownership regulatory models based on a general clause of investigation, which would allow regulatory authorities to intervene whenever they found that a media concentration case might be detrimental to freedom of expression and the goal of ensuring diversity of opinions and services (for example, Sweden<sup>14</sup>).

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<sup>14</sup> A Media Concentration Committee in this country made a proposal to the Government, suggesting that mergers and acquisitions of media companies should be subject to both competition legislation and to a specific Media Concentrations Act. Such an Act would provide for a general clause of investigation and the possible prohibition of mergers and acquisitions that could impede a free exchange of opinions and comprehensive information, that is, when there is a fear that the proposed concentration could endanger freedom of expression (harm test to determine whether the merger in question operates against freedom of expression). The envisaged legislation would be general and thus cover both analogue and digital broadcasting services.

37. These systems easily adapt to new circumstances as opposed to sector-specific provisions, which involve long decision-making processes, and which need to be amended to cover new situations adequately. However, these systems have their drawbacks: i) decisions are taken on a case-by-case basis, thus creating considerable legal uncertainty among the affected parties, and ii) in some countries, imposing limits so loosely and vaguely defined upon fundamental rights could be deemed unconstitutional.
38. Flexible systems for the safeguarding of media pluralism based on a “harm test to freedom of expression” should be established on the basis of clear/precise legal provisions, and indicate at least which criteria should be taken into account by the authorities when adopting their decisions. These decisions should be duly reasoned, open to review by competent jurisdictions under national law and made available to the public.
39. Some market players claim that the arrival of new technologies undermines the rationale for stringent restrictions on media ownership, based on the assumption, inter alia, that new technologies per se bring about a significant increase in the number of choice and diversity in the media and that companies should not be hampered from competing in a global economic system by regulatory restrictions on ownership. However, based on developments since 2001, it seems appropriate that European governments maintain media ownership controls.
40. It would appear that the control of concentrations in the digital environment will increasingly be based on a set of flexible ownership limits in combination with regulations on access to digital platforms and cable networks (the safeguarding of pluralism in the new environment will to a greater extent rely on access controls to prevent “bottlenecks” and to a lesser extent on ownership per se). Rules to ensure fair access by third parties to conditional access systems of digital platforms and technical interoperability between decoding equipment will remain important regulatory objectives.

#### **IV. FOREIGN OWNERSHIP OF MEDIA IN COUNTRIES OF CENTRAL AND EASTERN EUROPE**

41. A rapid growth in the number of media outlets and the commercialisation of the media sector in Europe over the past ten years has produced some distinctive ownership patterns that may cause some concern in relation to media diversity.
42. Different foreign companies now predominantly own the printed press in some of these countries. At the national level, some of the press markets are highly concentrated.
43. In the broadcasting sector, commercial television, and to a lesser extent radio, is in many countries owned by the same company, Scandinavian Broadcasting System (SBS), and public service broadcasters are expected to contribute to diversity, but the fact remains that they do not always do so.

44. As the repercussions of predominant foreign ownership in the media sector in the central and eastern European countries are not clear, attention and analysis should be directed to this in the future.

<p><b>PART C: PUBLIC SERVICE BROADCASTING: AN ESSENTIAL ELEMENT FOR MEDIA DIVERSITY</b></p>
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45. The private sector alone, that is, the market, cannot guarantee per se a pluralistic media landscape. In a context of increasing concentration in the media, accelerated by digital developments, the role of public service broadcasters becomes crucial, as a counter-balancing factor and to ensure social and democratic cohesion. Therefore, over and above legislative measures on media ownership in the private television sector, it is equally important to strengthen and support the role of public service broadcasting.
46. The ongoing concentration trend in the commercial media requires a balancing weight on the other side: public service broadcasters. This means that the existence of a few dominant companies can only be tolerated if public service broadcasters have a strong and independent position.
47. A public broadcasting system detached from State influence is absolutely essential to provide diverse information, culture and content to all citizens. Only in such a way can the plurality of cultures in Europe survive. This has been repeatedly acknowledged by the Council of Europe and the European Union, and is reflected in the Protocol to the EC Treaties on Public Service Broadcasting, as well as in major decisions of the EC institutions, for example the Communication of the European Commission clarifying the application of State aid rules to public service broadcasting (October 2001).
48. Publicly funded, non-commercial broadcasting organisations need to be internally pluralistic in order to ensure their optimal role for media diversity. Public service charters, editorial agreements and bodies representing the public interest are beneficial to foster internal pluralism. The media output of these broadcasters can make a significant contribution to political and cultural pluralism, as well as serve as a vehicle for the expression of minority cultures. The fulfilment of the public service mandate also requires professional management and governing bodies.
49. The contribution of public service broadcasting to general interest objectives is acknowledged by most member States which, for example, impose must-carry obligations of public service channels on cable operators. In countries where digital terrestrial TV is being introduced, transmission capacity should also be reserved for public service broadcasters on the networks, as some countries have already done.
50. The extension of must-carry rules to all delivery platforms would obviously have a positive impact on pluralism, although the key factor should remain that public service programmes can be easily received by all users: if this is ensured, for example, by

means of terrestrial delivery, then extension of must-carry rules to all platforms might not be so necessary.

51. Extending must-carry rules to certain programmes services of a private nature would also seem justified if the latter were of general interest, if they fulfilled a public service mission and met clearly defined general interest objectives (cf. Article 31 of the Directive of the European Parliament and Council on Universal Service and Users' Rights related to Electronic Communications Networks and Services).
52. In conclusion, public service broadcasters should be strongly supported in the context of digitalisation and market concentration: they should have legal, technical and financial security to adapt to the competitive pressure from private broadcasters. In this respect, they should be able to co-operate with other operators in the media field, with a view to developing new media services and content, thereby contributing to media diversity. This might also require the reorganisation of public service broadcasters for the realisation of their overall mandate.

## **PART D: NEW TECHNOLOGIES AND DIVERSITY ISSUES**

### **I. CHALLENGES AND OPPORTUNITIES OF CONVERGENT MEDIA**

53. Development in technology poses new challenges to pluralism, and unless a coherent media policy based on citizens' right to information, as provided for in Article 10 of the European Convention on Human Rights, is in place, the development of a competitive and pluralistic media market could be compromised.
54. From a technical standpoint, the development of vertical integration, favoured by pay-television operators, makes it possible to erect barriers against interoperability by the use of Application Programme Interfaces (API) and Electronic Programme Guides (EPG) which are not open and standardised throughout Europe. If, on the contrary, digital TV standards were harmonised and interoperable, manufacturers would be able to simplify their range of products, prices for consumers would tend to decrease and access to a wide range of services would be facilitated.
55. Technological convergence of broadcasting, computing and telecommunications, the increase in the number of channels and liberalisation seemed initially to offer great opportunities: firstly, by channelling the same content via different means and technologies, and secondly, by ensuring the simultaneous presence of different contents on a single transmission means and/or technology.
56. Today, it is already technically possible for Internet users to receive certain television programmes at the time of their own choosing, either in their original versions or using the opportunities opened up by interactivity and multimedia, with a series of additional information services available on demand through databases. However, technical difficulties persist related to video streaming on the Internet and viewing habits have still not evolved radically so as to make the viewing on the computer of certain types of content, such as films, very successful.

57. Moreover, thanks to interactivity, traditional terrestrial broadcasting can include content so far considered to be typical of the telecommunications sector (such as viewers' intervention during broadcasts for questions or comments) or as electronic shopping (such as requesting or ordering a book that is being discussed in a programme).
58. In response to this rapid development of technologies and what they have to offer, individual countries have opted for a "laissez-faire" policy. On the assumption that the market guarantees the use of all the possibilities opened up by convergence, the responsibility for ensuring consumer well being, optimum resource allocation and the effectiveness of companies are left to market forces. These countries rely on competition rules to ensure that the system protects consumer interests.
59. Quite apart from the problems of how markets are defined, competition rules are by their nature designed to promote the development of the market(s). For example, to foster technological development, the EC practice has been to encourage acquisitions and mergers, which may assist technological development but has led to the emergence of global oligopolies that run counter to the principles of pluralism in the media field.
60. In the absence of corrections, the final outcome of liberalisation will be the transfer of resources from State monopolies to private oligopolies with too few safeguards for consumers (see the case of the sale of Deutsche Telekom's regional cable TV networks, KNW and KBW, appended).
61. The telecommunications sector provides sufficient evidence that the supposed balance guaranteed by the market is neither fair nor stable, and that the market has not optimised resources and/or guaranteed consumers/users satisfaction (see appendix).
62. As in the case of telecommunications, the growing number of channels does not, of itself, result in diversity of media or content. Yet, with the advent of digital broadcasting, media diversity remains a key policy objective that must be respected in the interests of democracy and societies' full cultural development.
63. Experience gained in the telecommunications sector offers a number of lessons on how to deal with the media sector.
64. As was shown in the report on media pluralism in the digital environment, adopted by the Steering Committee on the Mass Media in October 2000, multimedia groups (AOL/Time Warner or Vivendi), the majority of which operate internationally, increasingly control the entire chain of audiovisual products and services, including the management of rights, production, broadcasting and distribution.
65. Several private companies have adopted strategic alliances and mergers within the audiovisual sector or with partners from neighbouring market sectors or markets, such as computing and telecommunications. Many of these alliances are intended to create a synergy between the suppliers of audio-visual content and the distributors of audiovisual services.

66. Pluralism, that is, granting consumers/users access to media services of their own choice, under fair conditions, is only meaningful if there is a corresponding guarantee of diversity of supply, and thus of the availability of a whole range of content and the possibility of using any medium. This has not so far been the case, on account of the liberalisation of the markets and the argument that it is sufficient to apply competition rules.
67. As a consequence of media concentrations, a small group of companies control such traditional content as sport and films. It is their interest in offering this content on pay television that discriminates against the less well off, and prevents access by certain consumers to particular types of content.
68. To sum up, although a different regulatory approach is needed for content and networks, the new regulatory environment must take into account the links between the two, particularly regarding media pluralism, cultural diversity and consumer protection.

## **II. DIGITAL TERRESTRIAL TELEVISION (DTT)**

69. Digital Terrestrial Television (DTT) is the third system for the distribution of digital television channels, and like the other two platforms - cable and satellite - it offers added channel capacity, enhanced television services and interactivity. All three platforms are in a certain way complementary to each other.
70. Many European governments are committed to the introduction of DTT, in large part due to its democratic potential and opportunities for more diversity. Although countries are at different stages with the deployment of this new technology, most are moving in this direction. One of the key elements which governments recognise is needed for the deployment of DTT is an effective and well-managed digital switch-over policy.
71. The special features of DTT, which make it an attractive transmission means, are that:
  - DTT is in many countries the best means to bring digital TV to all homes at an affordable price for consumers, and can help in avoiding that part of the audience is excluded from access to digital TV;
  - DTT can facilitate the distribution of regional and local TV;
  - national authorities can regulate and impose public service obligations as well as obligations to distribute local/regional content to DTT operators, thus contributing to diversity of information;
  - DTT reduces the distribution costs for free-to-air public service television, which today in many countries has the obligation of reaching most, if not all, of the population.
72. From a media diversity point of view, the establishment of DTT is important. DTT will make digital TV accessible to a larger part of the population, minimising the

number of people who cannot access television when switch-over takes place. DTT facilitates regional and local TV broadcasts, and public service broadcasting will generally have an important presence on this platform as a result of “must-carry” rules adopted by governments.

73. Despite the above, Digital Terrestrial Television has had a difficult start in several European countries. The launching of DTT in Spain, Sweden and the United Kingdom has been far from successful. In Spain and the UK, the DTT operators have gone out of business and returned their licences/frequencies to the regulator. In Sweden, DTT has only attracted around 100.000 subscribers since April 2000<sup>15</sup>.
74. DTT has been marked by failures primarily because introduction of services was carried out on a “pay by user” basis, and the business models of the companies involved have failed as a result of the low number of subscribers. The British Minister for Media Policy, Tessa Jowell, has addressed the situation in the UK as “a failure of a company, not of a technology”. As mentioned above, the UK Government, as well as many other governments, seems to stand firm in its decision to establish DTT as the third digital TV platform.
75. The presence of free-to-air services on DTT seems necessary for the success of this platform. The funding base of free-to-air broadcasters would also need to be strengthened, and public service broadcasters should have a “forerunner” role as regards digital terrestrial developments. Such a combination with non-pay channels on DTT networks will also enhance the possibilities for all individuals to exercise freedom of expression and information.
76. The success of DTT would also be facilitated by having common (or open interoperable) technical standards for digital equipment in Europe. This has many advantages, mainly that it reduces to one the number of set-top boxes for viewers, regardless of the platform and/or service providers.
77. Subsidies or economic support to facilitate the launching of DTT could be foreseen, although such measures may be difficult for the EU/EEA countries. In Sweden, the DTT licence holder (the public service broadcaster) has proposed to offer every licence fee paying household a voucher, to be used to acquire a basic digital receiver box fitting the household’s choice of technical platform<sup>16</sup>.
78. Other measures possibly to be considered in highly cabled areas or because of other national circumstances might be facilitating regional switch-overs. In Germany for example, the switch-over to DTT will take place by regions, one after the other.
79. The problem with DTT is how to get through the initial period. The main challenge for governments is to define what conditions would be appropriate for the switch-over period as well for a permanent system. When governments look at how to handle DTT in the initial period, they should take into consideration media pluralism and avoid adopting special exemptory measures for DTT which could reduce or jeopardise freedom of expression and information or media diversity.

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<sup>15</sup> As of May 2002

<sup>16</sup> Olof Hultén, Swedish Television Company, speech at the 15th EPRA meeting, Brussels 16 May 2002

<b>PART E: TRADE LIBERALISATION AND AUDIOVISUAL SERVICES</b>
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80. Diversity and pluralism of the media/in the media is influenced by international trade policy. An example of how trade policy can have an impact on cultural production and distribution has been highlighted recently in the context of negotiations within the World Trade Organisation on trade in goods (GATT) and services (GATS). The audiovisual and broadcasting sectors and their treatment have become part of the globalisation controversy, where different positions can be identified.
81. GATT: The General Agreement on Tariffs and Trade applies to radio and television broadcasting only insofar as pay-TV broadcasting entails the sale or rental of decoders. Article IV of the GATT sets out special provisions on cinema films which allow the Contracting Parties to set screen quotas for films of foreign origin. However, Article XI of the GATT, to which no Article IV exceptions are possible, prohibits restrictions on the quantity of imports or exports. The European Union has set quotas for the broadcasting of European films on television in order, in particular, to protect European films - which are considered a cultural product - from being swamped by American ones. The problem in classifying films is to decide which regulations govern European co-productions. The nationality of the production company and of the actors and the country in which the film was shot are all relevant factors. It is an open question whether Article IV GATT can also be applied to TV productions.
82. GATS: Radio and television broadcasting is a service within the meaning of GATS. The agreement does not, however, contain any special provisions concerning the broadcasting of films. The main obligations GATS imposes on its members are: most-favoured-nation treatment (Art. II), transparency (Article III), and – subject to liberalisation commitments undertaken - market access (Art. XVI) and (equal) national treatment (Art. XVII).
83. Exceptions with regard to most-favoured nation treatment are allowed only insofar as they are set out in the Annex on Article II exemptions. This annex stipulates that GATS members must place the service sectors they wish to exempt from the most-favoured nation treatment clause on so-called exemption lists in which the scope of the service and the duration of the exemption must be clearly stated. The EU and other GATS members have also placed certain aspects of radio and television production and broadcasting on such a list.
84. Market access and equal treatment of nationals are specific obligations, which only apply if the members concerned have agreed to them on separate lists. The EU and other GATS members have only opened up their telecommunications markets to foreign service providers to a very limited extent.
85. In telecommunications GATS also has a special annex, designed to secure access to the services market for service-providers who need the telecommunications infrastructure to provide other services. In this annex, GATS members undertake to grant service providers from other member States more or less unrestricted access to



public telecommunications transport networks and services insofar as they are required for the provision of the service in question. However, paragraph 2b of the telecommunications annex states that the annex does not apply to “measures affecting the cable or broadcast distribution of radio or television programming”.

86. There are perhaps three broad and distinct basic arguments in the globalisation debate concerning the audiovisual sector and the broader field of cultural industries: one favours complete liberalisation of trade in audiovisual goods and the inclusion of audiovisual in the services negotiations, in which case the audiovisual sector would not be treated as being any different than trade in any other kind of commodity or service. This position is generally not accepted among European countries, which are predominantly (especially members of the European Union where this is the official common policy) in favour of the second argument, i.e. that the audiovisual field holds a special position because of its cultural value and should therefore be granted a privilege and an exemption from total liberalisation (which if applied to the audiovisual sector would preclude measures in support of audiovisual industries, i.e. subventions). The second argument is linked to the wish to avoid “Americanisation” or “globalisation” of culture and the loss of European national/regional cultural values.
87. There is also a third position which goes beyond the protection of the audiovisual field at the national level by using the “cultural exemption” in trade agreements, and seeks the creation of an international instrument for the protection of cultural diversity. This argument is broader than just the audiovisual field and centres on the issue of cultural diversity, which is defined to include all forms of artistic and cultural expression including popular culture, traditional knowledge and practices and linguistic diversity. The third position is at present converging around the idea of a draft Convention on Cultural Diversity, such as the one being prepared by the International Network on Cultural Policy (INCP). At the 5<sup>th</sup> Ministerial meeting of the INCP which took place in Cape Town in South Africa on 14-16 October 2002, the participating ministers agreed on a draft instrument on cultural diversity.<sup>17</sup> A final draft might be presented to the ministers at the next ministerial meeting of the INCP, to be held in Croatia in October 2003. A convention might be a future tool to protect and support diversity in the media field as well, and in this respect is a development that should be followed very closely by European countries.
88. The positions and arguments taken by countries differ according to their individual position and circumstances. In Europe, the countries facing a more difficult position in the international trade negotiations are those which are not members of the European Union and are neither “candidate countries”. At the international level, the developing countries face the most difficult challenge of retaining their cultural diversity in view of market globalisation.
89. In order to guarantee, protect and support media diversity and pluralism, attention should be paid not only to the relevant national and regional policies and practices, but more and more also to the international instruments and their implications.

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<sup>17</sup> Published on [www.incp-ripc.org](http://www.incp-ripc.org) (under Annual meetings, 2002).

## **PART F: CONCLUSIONS AND RECOMMENDATIONS**

90. Article 10 of the European Convention on Human Rights and the judgments of the European Court of Human Rights are conclusive that States are under the duty to protect, and if need be, to take positive measures to safeguard and promote media pluralism. Today, this necessitates that governments act concretely and decisively to counter increasing concentration in the media.
91. Ongoing concentration and convergence in the media field necessitates a strong and independent public service broadcasting to guarantee the dissemination of diverse information and opinions to the public.
92. The goal of any regulatory or control system on media concentrations should be to counteract market dynamics and operations, whether horizontal or vertical, that are detrimental to political and cultural pluralism, and thus avoid that a single or few companies control all opinion-forming media and the media culture within a given country.
93. Taking into account the specificities of each country, sector-specific rules should be designed to safeguard and ensure plurality and diversity in the media. General competition law can only have a complementary role as regards concentration in the media sector.
94. Amongst the indicators frequently used to control market concentration in the media sector are: turnover/revenues, shareholding, voting rights, audience share/share of voice, etc. The audience share indicator is one of the most relevant and useful since it reflects the real influence of an operator in a given media market, is neutral on the number of licences which the broadcaster can hold and allows the international development of the broadcaster.
95. The up-to-date collection and public access to economic information on providers and operators (turnover, audience share, etc) are absolutely necessary. Only on the basis of appropriate data is it possible to determine if media pluralism is vibrant or endangered. Such data should be collected and used in monitoring and as the basis for regulation and controls of media concentrations.
96. The development of an open and competitive television market in which citizens benefit from pluralism needs to ensure that public service broadcasting remains accessible to all: public service broadcasters should have a visible and easily accessible presence on as many delivery platforms and navigation systems as possible.
97. Given the pressures towards concentration stemming from, among others, digital convergence, the widest interoperability of digital television equipment in the interest of citizens and consumers is necessary.
98. The authorities regulating concentration in the media market should be entrusted with powers to enforce sanctions on companies that cross the permissible thresholds (for example, disinvestments, reducing influence in related markets, granting

airtime to independent third parties, establishing independent programming councils, or the extreme sanction of the withdrawal of a licence).

99. The impact of trade policy on the media sector and the threats to cultural diversity/pluralism which would result from further liberalisation in this sector should be recognised, and member States should carefully consider the possibility of adopting a convention on cultural diversity, taking into account the work of the International Network on Cultural Policy (INCP).

## APPENDIX

### I. STRUCTURAL EVOLUTION OF THE MEDIA SECTOR

100. The European media sector is undergoing a rapid and profound structural change. It is difficult to follow all transformations and evaluate their consequences. As companies enter into alliances and dissolve them at great speed, mentioning concrete examples in a report would risk being outdated at the time of its publication. Their mention would be further complicated by the fact that structural developments vary from one country to another. It is nevertheless possible to indicate certain trends:

101. At a technological level:

- the introduction of digital terrestrial television (DTT),
- the monopoly position of cable networks,
- the continued increase in the penetration of the Internet, especially among young audiences/users.

102. At the level of companies:

- the great number of mergers and collaboration agreements, with a tendency towards internationalisation (e.g. the merger between Vivendi and the Canadian company Seagram, owner of Universal studios, has led to a transatlantic alliance),
- the difficult financial situation of several groups in the media sector,
- the significant losses in share values of media companies in the wake of the bursting of the IT economy bubble.

103. From a commercial point of view:

- the development of pay television, mainly in the form of grouped offers (bouquets),
- the explosion of the costs in transmission rights (sports, films),
- the crisis in advertising revenues, which can become a factor of concentration.

104. At the level of offerings:

- a commercialisation of programmes to reach audience levels that will appeal to advertisers,
- uniformity of the programme schedules (same types of programmes at the same times),
- the standardisation of programme formats as part of international licensing.

### II. NEW TRENDS TOWARDS CROSS MEDIA OWNERSHIP: THE EMERGENCE OF THE MULTIMEDIA MULTINATIONAL

105. The emergence of new communication technologies, particularly illustrated by the Internet and digital satellite television, has opened new markets for the telecommunications industry, broadcasters and other content providers. The privatisation of former State telecommunication companies combined with a liberalisation of

television markets has made room for new players. Nevertheless, telecommunication operators still play a major role in the new convergent markets.

106. The key to success on the Internet and digital satellite television is having both practical technical solutions and attractive content. Content seems to be acting as a driving force for the sale of subscriptions to cable networks and decoders. The establishment of permanent co-operation structures such as mergers or joint ventures has been essential to ensure that operators have content permanently at their disposal.

107. The merger of technical operators with content providers is now frequent throughout Europe. The European Commission has investigated the most significant mergers on the grounds that they may be in breach of the European Union's merger regulation<sup>18</sup>. In addition to the more outstanding mergers, there is a strong trend of mergers, joint ventures, agreements and other joint projects where technology and content are combined to gain market share.

108. The Internet is a global platform and the primary goal is to reach as many people as possible. Some of the most significant mergers have been between Internet service providers and content providers. The merger between American Online (AOL) and Time Warner is the most well known case. According to the analyst company Jupiter Media Metrix, Microsoft, AOL and Time Warner together represent 40% of all Internet exchanges in the USA.

109. Digital satellite television has been introduced in many European countries and digital terrestrial television is also being deployed in many countries. A few major telecommunication operators and many broadcasting companies of varying sizes characterise the landscape. Until now, it would appear that many telecommunication operators prefer to establish alliances with private broadcasters rather than with public service broadcasters. If companies are to sell a cable subscription or a decoder, their offer has to be distinct and more attractive than that of their competitors. The importance of holding exclusive rights to film catalogues and other programmes/major events cannot be underestimated.

110. Another example of the cross media ownership trend is the increasing number of monomedia companies becoming multimedia companies, e.g. Bertelsmann, Bonnier and Egmont. Most major broadcasters and newspapers have Internet editions, publishing houses are buying broadcasting enterprises and broadcasters are buying production companies. One reason for such developments is the need to secure a broad industrial base in view of the uncertainty linked to developments in the media sector.

### **III. CROSS COUNTRY MERGERS: THE LOWERING AND EROSION OF NATIONAL MEDIA MARKET BOUNDARIES**

111. Within the European Union, the internal market facilitates the free flow of capital across national borders. It is, however, difficult to assess the frequency and extent of agreements and acquisitions. The Directorate General of Competition of the European Commission will not normally investigate such cases because the different markets within the internal market will not as a rule affect each other to such a degree that they breach EU

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<sup>18</sup> cf. paper by Mr Gudbrand GUTHUS (ref. MM-S-PL (99) 9)

competition regulation. The European Commission has stated that there has been a growth in the number of mergers and acquisitions in the media markets over recent years. Outside the EU/EEA area or between member and non-member States, markets are, in principle, more clearly separated.

112. The growth of media companies across national borders has primarily taken place within specific areas: for example, UPC, the American cable company, has bought cable companies in many European countries; Scandinavian Broadcasting System (SBS), a Luxembourg-based American-financed company, has bought satellite TV companies in various countries; similar examples can be found in the mobile telephone sector<sup>19</sup>; Norwegian newspaper companies have invested in newspapers in Scandinavia, the Baltic States and Poland; merger negotiations between national telecommunication operators are constantly making the headlines. A noteworthy development is the growth of free newspapers: the Swedish company Kinnevik has introduced the free newspaper concept "Metro" in many European cities.
113. The development of digital television and interactive services has also led to a number of joint ventures. Examples include Kirch/BskyB and Microsoft/Telewest in the television sector and Vodafone/Vivendi/Canal+ (Vizzavi) in the area of interactive services.
114. Many of these mergers, agreements or joint ventures have elements of vertical integration. As already mentioned, the most well known merger in this respect is that of AOL/Time Warner. Vivendi/Canal+/Seagram is another notorious example of vertical integration which was especially problematic because of the creation of Vizzavi. The merger was cleared after a number of modifications were made to the original agreement.
115. The conditions to authorise some of these mergers and joint ventures illustrates the pan-European dimension of this activity: for example the AOL/Time Warner merger was cleared after the agreed co-operation with Bertelsmann had been cancelled and the Vivendi/Canal+/Seagram merger was cleared after the shares in BskyB had been sold (in addition to other adjustments).

#### IV. THE EXAMPLE OF TELECOMMUNICATIONS

116. After three years of complete liberalisation of telecommunications services, it is possible to assess the level of competition in the voice telephony market by the fact that in the EU, about 82% of the population can choose between more than five operators for intercity and international calls (95% can choose between at least two operators), while about 29% can choose between more than five operators for local calls (45% for at least two operators).
117. In particular, in 2000, 461 operators were offering fixed vocal telephony services for intercity calls, 468 for international calls and 388 for local ones, representing increases of 89%, 67% and 74% respectively over 1999.
118. The question that has to be asked is whether, given this wide range of choice, consumers are benefiting proportionately in terms of price and quality of service.

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<sup>19</sup> cf. Section of the report on the Vodafone case.

119. At first sight, the answer is no. The so-called readjustment of charges has resulted in an average increase of 12% in monthly rental charges over the period 1997-2000, and of 7.5% for ten-minute and 15% for three-minute local calls. On the other hand, over the same period in the EU, the average cost of ten-minute interurban calls and international ones to destinations close to the Union fell by 40%, and ones to the United States by 49%.
120. It is clear from figures on average monthly expenditure on national calls (local and long distance), on the basis of the charges levied by long-established operators, that businesses have benefited more from liberalisation in terms of prices, and that ordinary private users cannot expect too much from the new market entrants, who tend to target more profitable markets and thus to lower their prices for these market sectors.
121. At the same time, the European Union's renouncement to adopt anti-concentration measures has had/will continue to have negative effects, even on new entrants.
122. Overall, the number of concentration cases examined by the European Commission under its competition law has doubled over the last three years, although the number of new cases related to agreements and dominant positions has declined purely as a result of a fall in the number of complaints and the more laissez-faire policy adopted by the Community.
123. This approach is very obvious. Among the cases concerning telecommunications infrastructure, reference may be made to the MCI Worldcom/Sprint merger and the Vizzavi joint venture.
124. In the latter case, the Commission authorised the creation of the Vizzavi portal in the form of a joint enterprise involving Vodafone, Vivendi and Canal+, after the companies concerned had given an undertaking that rival Internet portals would have equal access to the decoders and mobile telephone handsets of the parent companies, which meant that consumers who so wished could change portal. Although the issue at stake was the potential creation of a dominant position in a market considered to be on the boundary between infrastructure and electronic commerce (that of portals), the nub of the problem remains the control exercised by the partner companies over the technical systems: Vodafone's mobile networks and the decoders of Canal+.
125. The AOL/Time Warner and Vivendi/Seagram cases concern the control of content and the resulting risk of repercussions on markets downstream.
126. Finally, two other cases need to be considered. In 2000, the Commission authorised the sale of two Deutsche Telekom regional cable television networks, KNW in North Rhine-Westphalia and KBW in Baden-Württemberg, to Callahan Invest Limited. The Commission took the view that while immediately after the transaction, KNW and KBW would have a de facto monopoly in their territories, the transaction itself did not create or strengthen a dominant position on the market for pay-television in Germany, as KNW and KBW were simply taking over the monopoly previously held by DT.

127. Without any adjustments, the final outcome of this sort of liberalisation will be the transfer of state monopoly resources to private oligopolies with no safeguards for the consumer.

#### **IV. THE VODAFONE CASE**

128. This is an interesting case because it involves the expansion of one of the largest firms in the telecommunications sector into the media field using the 3G/UMTS system, which allows access to the Internet from mobile phones.

129. Vodafone is not the only telecommunications company to become interested in this new delivery platform. However, it is a good example on account of its dynamism and its extension, from its United Kingdom base, into major enterprises in a number of countries (purchase of Mannesmann and formation of Verizon Wireless in 2000, followed by holdings in mobile phone operators in Spain, Italy, Ireland, Switzerland, Romania, Mexico, China and Japan). Even though it decided to call a temporary halt to its expansion in late May 2001, it is continuing to refine Internet access.

130. According to several specialists in this area, the introduction of the new 3G/UMTS technology will take longer than originally anticipated. Moreover, the astronomical sums paid in certain countries in the bidding for licences will have an adverse effect on the system's profitability. Banks are already showing reluctance to lend to telecommunications firms.

131. Since the new system is not yet operational, it is still difficult to assess its impact on the range of existing media outlets. This impact will depend on various elements:

In terms of services supplied:

- How much is supplied: all Internet pages or just summary information? Will telecom firms develop their own information systems or collaborate with existing media businesses?
- Will it be easier to draft messages than with the current SMS (short message service) system?
- Will the new system be able to compete technically with PCs?
- In view of the very rapid progress in telecommunications, will new competing systems that are more advanced and better value for money shortly appear on the market?
- Will 3G/UMTS be economically competitive, given its high cost, the result both of the bidding process and of the need to develop a new network of antennas?
- Some governments intend to authorise competing firms to collaborate through network sharing. What will be the reaction of the competition authorities and will it be sufficient to bring down the costs?
- What will be the consequences of the current restructuring in the telecommunications sector? Are new monopolies emerging?



In terms of demand:

- How will customers react to the range of services on offer, as well as their quality and price, not to mention the effect of fashion (irrational behaviour of mobile owners)?
- Will customers be more interested in certain services and neglect others?

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