

PLURALISM AND MEDIA CONCENTRATION POLICY IN THE EUROPEAN UNION

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Introduction

In December 1992, the European Commission published its Green Paper "Pluralism and Media Concentration in the Internal Market: an assessment of the need for Community action" (COM (92) 480 final). This was the outcome of several requests on behalf of the European Parliament and some of the interests concerned. The purpose of the Green Paper was to assess the need for action at Community level in the light of the disparities between national rules on media ownership and consider potential options. By adopting the Green Paper, the Commission sought to provide a basis for discussion and receive opinions of all interested parties — the European Parliament, competent national authorities, European organisations representing television and radio broadcasters, publishers, journalists, audio-visual creative artists and producers, satellite and cable distributors and advertisers. At the same time, it sought to stress the importance which it attaches to preserving pluralism in the frontier-free area (i.e. the Internal Market). In the Commission's view, the freedoms of the Internal Market cannot be put into practice at the expense of pluralism; instead, their implementation must help to strengthen that market through the opportunities which it gives both to citizens and the media.

This paper sets out to examine the European Union policy on media concentrations prior to and after the publication of the 1992 Green Paper. It is divided into five parts. Focused working definitions of the terms pluralism and diversity are firstly provided. An historical background of the European media pluralism and competition/concentration policies is then presented, followed by an outline of the main points of the Commission's Green Paper. The interested parties' reaction

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in the context of the first and second consultation rounds is then explored. Finally, an attempt is made to point out the factors opposing the enforcement of an effective Europe-wide regulation in the field of media concentration.

The Notions of Pluralism and Diversity

Substantial structural changes in the European media industry are expected in the next years resulting from the combined effect of several factors: the further growth of commercial terrestrial television networks; the increase in cross-media ownership; the introduction of new technologies (i.e. digital compression), with the potential for precipitating significant changes in the number, type and relationship of the players in the media domain; and the progressing economic integration across Europe, with more media enterprises seeking to expand beyond their national boundaries. As part of its general objective of fostering full economic integration across the Single Market, the European Commission perceives as its possible role in the media sector the harmonisation of media ownership rules, in order to create favourable conditions for transnational investments. Eliminating national differences in the rules on media ownership should create a favourable institutional framework for the large foreseen increase in modes and means of delivery. A number of multimedia conglomerates are expected to develop across national borders.

While committed to encourage these developments, the Commission (and the European Parliament, in particular) are also concerned with their implications on pluralism and diversity in the media field. The perspective growth of new, wider multimedia corporations raises the issue of how to ensure that cultural and political pluralism and diversity of viewpoints in a given media market will be preserved and encouraged. However, the terms pluralism and diversity are maddeningly vague and loosely constructed ones and therefore difficult to define. The European Commission's 1992 Green Paper (GP), for instance, does not provide a definition of media pluralism; on the contrary, it mentions a variety of expressions used in national legislative statutes containing the "pluralism" concept: "**pluralism of the media,**" "**pluralism in the media,**" "**the pluralist nature of the expression of currents of thought and opinion,**" "**pluralism of information,**" "**pluralism of the press**" and "**plurality of the media**" (GP 1992, 14). The concept is therefore imprecise, but is easily used as a reason to justify measures in support of freedom of expression or diversity of information sources.

Media diversity is indeed a broad concept with many dimensions: plurality of contents, access to different points of view, offering of a wide range of choice, geographical diversity, etc. It thus encompasses pluralism of many kinds: regional, linguistic, political, cultural and in taste levels. Consequently, by concentrating on this notion, one will be able to cover a wide spectrum of social benefits that need to be preserved if the media are to support democratic life. But how can we measure the level of pluralism and diversity in a given media market? The Green Paper suggested three possible ways for assessing pluralism and diversity: (a) **according to the editorial content of the broadcasts or the press.** This is considered the most logical criterion although the most complex, data-demanding and subjective; (b) **according to the number of channels or titles.** Despite the fact that it is easily measurable, this alternative is rejected as insignificant in terms of diversity of editorial content; and (c) **according to the number of media controllers or owners.** This seems to be the Commission's preferred criterion since, although it too does not reflect editorial content, "whatever the

editorial content or the number of information carriers, concentration of control of media access in the hands of a few is by definition a threat to the diversity of information" (GP 1992, 20). Without being able to guarantee diversity of editorial content, this system constitutes a minimum condition to promote diversity of choice for the public.

However, such emphasis on the number of controllers implies a narrow and legalistic interpretation, in which the function of the pluralism principle is defined in a negative sense as "limit(ing) the scope of the principle of the freedom of expression with a view to guaranteeing diversity of information for the public" (GP 1992, 19). On the contrary, the emphasis on editorial contents reflects a view of pluralism as an objective, that is, the positive concern with ensuring a sufficiently wide variety of differing product types (for instance, programming schedules which pay attention to minority, political, cultural and social interests, or regional issues). In a broader perspective, we are sympathetic to a definition of pluralism that incorporates three positive elements: (1) sufficient **programme diversity** (variety of programme content). The media sector should offer a sufficient diversity in terms of breadth, price and quality of the product range, so that it reflects consumer preferences including cultural minorities. The existence of distinguished programmes/titles in areas where total demand is scarce (in arts, minority languages, etc.), available at affordable prices should be of prime importance in order to achieve a pluralistic media sector; (2) sufficient **access** to information. Diverse media should be accessible to all citizens if a truly democratic and pluralistic society is to be accomplished; and (3) sufficient **balance** in the provision of news and information. Diverse and accessible to all media that are culturally or politically biased when reporting or presenting information programmes present the worry that one particular cultural/political point of view might become dominant.

These dimensions of pluralism and diversity have been long-standing goals of all democratic states, although national media systems place different emphasis on these policy aims at different times. In both Europe and the USA, national courts have asserted in many cases that diversity is an essential criterion that should be born in mind when governments legislate in broadcasting.¹ Federal Communications Commission (FCC) policy in the USA attempted to encourage pluralism and diversity both by increasing consumer choice and by ensuring, through the "Fairness Doctrine,"² that a wide range of views have access to the media (Brennan 1989). The "Fairness Doctrine" though has today been eliminated by the FCC. It has been put forth the argument that the promotion of competition through market mechanisms will ensure balance and access to information. A similar faith in competition to ensure pluralism and diversity is currently observed in Europe. As the notion that a public monopoly on broadcasting was the appropriate solution came under pressure, broadcasting licences were slowly awarded to private consortia in direct commercial competition with each other and the public service broadcasters.

Pluralism and Competition Policy in the European Union

Competition policy in general is concerned firstly with preventing agreements between undertakings that reduce the effectiveness of the competitive process, secondly with controlling mergers that increase the probability of exercising undue market power, and thirdly with anti-competitive behaviour that enables companies either to acquire market power or to increase barriers to entry. The European Union's competition policy framework lies in the Articles 85-94 of the Treaty of Rome. Articles 85

and 86, in particular, aim to maintain or increase competition in the Single European Market and ban restrictive practices which distort or prevent competition or lead to a dominant position. Nevertheless, Article 85 does not necessarily completely prohibit these practices because under Article 85(3), agreements which abridge competition can be exempted if: (a) they contribute to improving the production or distribution of goods or promoting technical or economic progress. Typical improvements are reduced costs, increased efficiency, the quicker penetration of markets or increased production; and (b) allow consumers a fair share of the resulting benefits. Many joint ventures are justified on this basis and therefore might contribute to pluralism. In addition, a Regulation on the Control of Concentrations between Undertakings was adopted by the Council of the European Economic Community on 21 December 1989 and became effective on 21 September 1990 (Council Regulation (EEC) No. 4064/89, OJ No. L 395, 30 December 1989).

The Council Regulation was intended to complement the Commission's anti-trust powers conferred by Articles 85 and 86 of the Treaty of Rome. Article 1(2) states that concentrations may be presumed compatible with the common market if the aggregate world-wide turnover of all the undertakings concerned is less than ECU 5,000 million and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is less than ECU 250 million, or each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. It is worth noting that, despite these high threshold provisions, multi-media and international mergers pursued by economic and technological innovations are likely to surpass them. And it will become almost impossible for regulators to measure the market power of big, vertically integrated units operating globally across a range of product markets in which they hold different shares. Consequently, it will become hard to assess their impact on pluralism. Relevant to the question of pluralism though is Article 21(3) of the Council Regulation. Although the object of the Regulation is purely economic (i.e. effective competition), Article 21(3) stipulates that members may protect other values than those pursued by the Regulation. Plurality of the media is, among others, one such value. Therefore if the Commission decides that a concentration is compatible with EEC law, members could still prohibit that concentration because of other legitimate interests. The Court of Justice would then must decide on a "case by case" basis whether restrictions following from such a prohibition are admissible regarding Community law (Lange and Van Loon 1991, 33).

Competition policy rules ensure that the competitive process is not threatened by either market structure or the conduct of firms. However, their application to the media industry cannot always safeguard other values and objectives such as pluralism, diversity and freedom of expression. Competition policy and pluralism/diversity concerns cannot be conflated. Promoting effective competition in an industry does not necessarily imply greater pluralism in the quality and variety of services and products on offer. There is a concern that the expected proliferation of channels will not bring about a wider variety of programmes; on the contrary, the new channels will offer more of the same due both to financial restraints and limited audience shares. The questions of political and cultural pluralism in the media sector output, and of the provision of a wide range of products to satisfy heterogeneous consumer tastes, may be approached in terms of product differentiation and social welfare. A more com-

petitive media industry structure may not necessarily deliver the socially desirable level of product differentiation because it may be more profitable for the companies to locate in the centre of the market (i.e. “where demand is” in product space).

This is particularly true where (as in television) price competition is muted.³ Thus the incentive to differentiate products is weaker when firms are able to operate in the near-absence of price competition. This tendency to converge on tried-and-tested formulae poses a potential danger to welfare in terms of the variety of products offered by the market. This also relates to the possibility that the market might display a bias in favour or against certain types of products. When demand for products or services in a particular category is generally inelastic, the services which are actually offered may end up positioning too close to each other; and those products for which the elasticity is comparatively lower may not be produced at all.

This is likely to remain true in all cases where there are sufficient entry barriers to support a relatively small number of players. If barriers decline and new players enter into the market, especially as price competition intensifies (due to the expansion of pay-TV), there will be less of an incentive for companies to position themselves in the “centre of the market” and thus offer a fairly homogeneous diet of middle-of-the-road programmes. There will be instead an incentive to locate further away from each other as each location becomes saturated, and satisfy “niche” markets, which means a range of differentiated products will be supplied. Pluralism and diversity will be increased, as a wide range of individual preferences will be satisfied. In this perspective, it is apparent that competition policy does have a role to play. To the extent that it operates to prevent the creation of greater barriers to entry, or indeed to reduce the existing barriers rendering the market contestable, competition policy might favour pluralism.

This policy instrument however cannot always be relied upon as sufficient to deliver pluralism both for the economic reasons briefly outlined above and because addressing pluralism concerns would then be subordinate to the existence of an abuse of economic market power which triggers an antitrust investigation. The safeguarding of a competitive environment and the promotion of diversity are different (although sometimes overlapping) objectives. The latter can only be fostered by specific media rules on either content or ownership. The European Commission, through its 1992 Green Paper, admitted that the achievement of the pluralism objective requires tighter regulation than that of competition and launched an ambitious initiative to regulate media ownership at European Union (EU) level with the aim of preserving pluralism in the market. Let us first try to delve into the past and highlight the factors which led the Commission to that decision.

The European Parliament and Media Concentration

In the last several years, the European Parliament (EP) has been leading a campaign to urge the Commission to propose regulatory measures in order to limit media mergers so as to safeguard pluralism. European Parliament's two resolutions in the mid-1980s called on the Commission to formulate a policy framework regarding competition rules for the mass media. In 1985, the Parliament adopted a “Resolution on the Economic Aspects of the Common Market for Broadcasting in the European Community” (EP, 10 October 1985, PE Texts 7/85, 57-60). The resolution requested the Commission “to set up an investigation into the competition policy aspects of current developments in the television market and the film industry” (EP 1985, § 15). In its 1986

“Resolution on the Fifteenth Report of the CEC on Competition Policy” (EP, 14 November 1986, PE Texts 10/86, 58-65), the Parliament considered that

there are considerable potential dangers to competition in the fast-growing and increasingly complex area of the media, which is increasingly supranational in scope, and where interlocking ownership of newspapers, magazines, television stations and cable and satellite interests is becoming increasingly frequent (EP 1986, 62).

The request was repeated by the European Parliament in its 1987 “Resolution on the Sixteenth Report of the CEC on Competition Policy” (EP, 17 December 1987, PE Texts 12/87, 56-61). The Commission's reply to those repeated requests was that it was carefully considering Parliament's advice, especially in view of increases in levels of concentration at that time.

The European Parliament dealt with the problem of pluralism through its amendments on the Television Without Frontiers Directive proposal in 1985. After mentioning that the level of concentration has been increased in the audio-visual industry due to the creation of private monopolies, it called for the safeguarding of cultural diversity in the sector (OJ No C 288/113, 11 November 1985). The European Parliament Legal Affairs Committee put forward several amendments on the Television Without Frontiers Directive tackling the development of dominant positions in the mass media. In Amendment 66 of Article 22a, the Committee stated: “If the market is to be a creative melting pot, the Community must put up a determined struggle against the pathological tendencies to destroy fair competition and real variety. If the market is to be dominated by a few media companies, we risk losing freedom of choice” (OJ No C 110/21, 27 April 1988). The Television Without Frontiers Directive was agreed upon by the Council on 3 October 1989. The Directive however did not include specific proposals for the media concentration and pluralism questions.

In 1990, the European Parliament adopted a “Resolution on Media Take-overs and Mergers” (OJ No C 68, 137-8) in which states that “restrictions are essential in the media sector, not only for economic reasons but also, and above all, as a means of guaranteeing a variety of sources of information and freedom of the press.” The Parliament thus recognises two reasons for controlling media mergers at a European level: traditional economic ones — control the potential abuses arising from market dominance — and pluralistic ones — safeguarding a variety of information sources. It considers that a process of unlimited and unchecked concentration in the media threatens the right to information, editorial independence and journalists' freedom. It recalls that Community legislation regarding the completion of the internal market does not include any regulations on the protection of the right to information or media mergers. It therefore calls on the Commission to

put forward proposals for establishing a special legislative framework on media mergers and takeovers together with anti-trust laws to ensure that: a) minimum professional standards are guaranteed; b) journalistic ethics are protected; c) the risk of subordination of small companies is eliminated; and d) freedom of expression for all those working in the media is safeguarded.

It concludes by asking Member states that do not have laws limiting concentration in the media sector to adopt such instruments as soon as possible, giving due consideration to written and audio-visual communication.

Followed that resolution, the Commission published its "Communication to the Council and Parliament on Audio-visual Policy" on 21 February 1990 (COM(90) 78 final). In § 2.2.3. on Pluralism and Mergers, the Commission specifies that the Community's audio-visual policy does not seek to develop the audio-visual sector at the expense of pluralism; on the contrary, it attempts to strengthen it by encouraging the diversity of the programmes offered to the public. It also mentions that, since media operators' activities assume a European dimension, national legislation could be circumvented and would not therefore be sufficient to guarantee pluralism in all cases. Significantly, the Commission recognises that both the application of Articles 85 and 86 of the Treaty of Rome and the Merger Regulation are unable to cover threats to pluralism posed by multi-media ownership. One could easily detect here a coincidence of the views of the EP and the Commission as far as the safeguarding of pluralism is concerned.

The Parliament's 1992 "Resolution on Media Concentration and Diversity of Opinion" (OJ No C 284/44, 2 November 1992), drafted by socialist members Ben Fayot and Dieter Schinzel, called on the Commission to

submit a proposal for effective measures to combat or restrict concentration in the media, if necessary in the form of an anti-concentration directive, with a view to: (a) harmonise national provisions on the concentration of media ownership; and (b) guarantee diversity of opinion and pluralism where the proposed concentration is on a European scale.

The above members of the European Parliament mentioned that competition law cannot be used as a substitute for media law or for a specific law on media concentration: "(C)oncentrations in the media sector which threaten diversity of opinion do not necessarily also involve distortions of competition, just as, conversely, the conditions of freedom of competition are no automatic guarantee for diversity of opinion" (Document EN/RR/207 249, PE 152 265 final). The resolution also asked the Commission to submit (a) a proposal for a European framework directive safeguarding journalistic and editorial independence in the media and (b) a proposal for a directive regulating the right to reply in the print media and radio sectors. Advertisers' obligation to provide adequate funding for the press and vocational furtherance (including professional ethics) of journalists were two additional suggestions. Finally, there was the Parliament's call to the Commission to set up a European Media Council, a new body charged with observing media ownership patterns, ensuring transparency with regard to the inter-linking of firms, reporting on proposed mergers and submitting proposals on possible concentration measures. An extensive legislative scheme is thus put forward by this resolution.

Overall, the European Parliament's concerns can be summarised as follows: (a) unchecked concentrations in media ownership could threaten information, editorial independence and journalists' freedom (i.e. objectivity of reporting); (b) concentration of ownership threatens diversity of information and opinion and therefore hinders free information to the public; (c) control of a large number of media by one individual or company jeopardises pluralism by lessening media autonomy and independence; and (d) differing national laws on media concentration could disadvantage the operation of the Single Market, as this creates the risk of circumvention of the law and distortion of competition between media companies in various Member States as well as different start-up conditions for those embarking upon activities in the media. The

Parliament calls for a legislative framework on media mergers and takeovers together with anti-trust laws on the grounds that diversity of opinion and pluralism of information cannot be guaranteed by competition rules alone.

The Green Paper on Pluralism and Media Concentration

As indicated elsewhere, the Commission responded to Parliament's proposals by publishing its "Communication to the Council and Parliament on Audio-visual Policy" in 1990. The results of the Communication are laid down in the promised Green Paper, "Pluralism and Media Concentration in the Internal Market: an assessment of the need for Community action" (COM(92) 480 final). Its purpose is to present both an initial assessment of the need for Community action concerning concentration in the media (television, radio and the press) and the different approaches which the Commission might adopt once it has consulted the parties concerned. The remarkable difference from the 1990 Communication though is that the Green Paper (GP) identifies no objective regarding media pluralism at European Union level: "Protection of pluralism as such is primarily a matter for the Member States ... there would not appear to be any need for action at Community level, since national mechanisms for protecting pluralism can be applied to situations with a Community dimension" (GP 1992, 7). As explained above, the Commission's alternative is to limit the number of media controllers, an action which will enhance pluralism indirectly: concentration of control of media access in the hands of a few is by definition a threat to the diversity of information (GP 1992, 20).

Part two of the Commission's Green Paper describes the level of media concentration in Europe. This part is based upon a Booz-Allen & Hamilton study commissioned by the Commission (DG III/F-5, Brussels, 6 February 1992). The study tried firstly to analyse the relevant media consumption patterns from the point of view of exposure to lack of pluralism, secondly to show the level of concentration in the supply and consumption of the media, and thirdly to assess whether there should be a need for a Community-level intervention in the field of pluralism and concentration of the media. Regarding the first issue, it pointed out that while there is a wide choice of channels available to consumers, a few national channels (television or radio stations) or daily newspaper titles tend to enjoy a dominant share in consumption. Concerning the level of concentration, the study found that the top three television channel controllers have over 80% of the audience share in most of the Member states. In radio too, top four station controllers (many of which operate several stations) have over 70% of the listeners in seven of the then twelve European Union countries. The concentration level in daily newspapers was found to be low in comparison with television and radio. Overall, media concentration in the Community appeared to be high should state-owned channels were to be included in the analysis. The study concluded that national rules limiting the shareholdings in a channel do not appear to prevent dominating influence of a single group, especially where non-media players hold stakes as long-term investments, letting one majority shareholder to control the channel operations and programme content. Therefore, a Community-level initiative to harmonise the different rules aiming at ensuring pluralism and checking on all forms of media concentration would be appropriate.

The Green Paper set out to assess the need for action at Community level in the light of the disparities between national rules on media ownership. Part three of the

Green Paper presents a view of measures taken at national level. Indeed, since the mid-1980s all Member States have introduced various and differing rules on media ownership in order to limit operators' freedom and consequently preserve pluralism. Four types of provisions can be distinguished: (a) limits on mono-media concentration. These prevent the same person (natural or legal) from controlling or having an interest in several media of the same type at once (television, radio or newspapers); (b) limits on multi-media concentration. These prevent a single person from controlling (or having an interest in) several media of different types (for example, a newspaper company cannot control a television station, or a television station is not allowed to control a radio station); (c) limits on shareholdings in a radio or television company. This applies irrespective of how many other media are controlled (for instance, in some member states it is impossible for a person who does not own any other media to hold more than 25% of a television channel); and (d) limits concerning "disqualified persons." These prohibit certain types of operators or bodies from holding a radio or television licence (public bodies, local authorities, religious or political organisations, advertising agencies, etc.).

These provisions vary widely between Member States. In some countries (e.g. Italy) a media company can own 100% of a television channel, whereas in others the ceilings are 50% (Germany), 49% (France), or even 25% (Greece). In most countries there are numerical limits on licences one person can hold, but in others such restrictions do not apply to satellite or cable channels (United Kingdom). A few countries allow newspaper publishers unlimited access to television and radio ownership (Belgium, Finland), while in others are subject to restrictions. The concern is that these discrepancies of existing national rules on media ownership create obstacles to the freedom to provide services across borders and the freedom of establishment, thereby preventing media operators from benefiting from the advantages of the Internal Market. They produce distortions of competition between firms from different states by placing companies operating in liberal regimes in a better position than those established in systems with stricter rules. Such difference in national legislation might also hamper media companies in developing pan-European strategies — creating subsidiaries in different Member States or investing in new media outlets across Europe. According to Margot Frohlinger (1995, 1-8), Head of Unit E/5 "Media, Commercial Communication and Unfair Competition," the differing national laws on media ownership affect not only growth and competitiveness of the European media industry but also adversely affect pluralism since foreign operators entering national markets often contribute to political, cultural and linguistic diversity. She adds that there is a demand for action at European Union level in order to guarantee the fundamental freedoms of the Internal Market.

In part four, the Green Paper proposes three ways of responding to the situation, without the Commission expressing a preference for any one of them at that stage. The first is taking no action at all. This option means that the Member states would continue settling the matter on their own and European Union action would only be justified if the individual states failed to achieve results. However, such a *laissez faire* approach would not by any means lead to the convergence of disparate national laws, thereby slowing the European consolidation of the media. Indeed, two European countries (i.e. Britain and Greece) have already introduced new rules to regulate media ownership, while others (i.e. Germany, Italy, the Netherlands and France) have announced their intention to review their media laws. The second option is a recom-

mendation to enhance transparency in the media. The aim would be to facilitate the disclosure and exchange of information on media ownership between national authorities. As shown above, the need for transparency has been pointed out repeatedly by the European Parliament. In the Commission's view though, transparency as such does not raise serious problems which have to be dealt with at Community level. The Green Paper states that the Commission has not been notified of any obstacles in the exchange of information between competition authorities so that there is no need for an institutional mechanism (GP 1992, 79-80). The harmonisation of national restrictions in the area of media concentrations either via a Directive or a Regulation or by the creation of an independent committee consists the third option. The intention would be to establish common rules that would strike a balance between the objective of diversity of media ownership and access to the media.

The three policy options mentioned by the Commission in its Green Paper should be considered in the light of the three objectives that have become apparent from the above analysis. It should be obvious by now that the chief objective is the completion and the proper functioning of the Single European Market. The craving for the harmonisation of national media ownership rules has more to do with ensuring the smooth operation of the single market rather than safeguarding pluralism as such. This might be the reason why harmonisation would affect ownership rules only and not rules related to the content of the mass media, since the latter do not normally influence the performance of the internal market. In any case, the accomplishment of this objective could, in the Commission's opinion, help to increase pluralism by providing more opportunities for media entities. Pluralism is once again invoked to justify the second major objective, that is the implementation of an industrial policy to foster the competitiveness of the media industry. By making media firms competitive, the Commission seeks to contribute indirectly to media pluralism. The main concern though is to create an economically viable media sector, boost production and assist the formation of big units able to compete internationally. Differing national regulatory frameworks on media concentrations, mergers and acquisitions might affect the competitiveness of media undertakings. The formation of an audio-visual policy to create the European audio-visual space is the third Community objective. The national inconsistencies and sometimes media policy anachronisms could indeed affect the operation of trans-frontier channels. However, trans-border activity should not, according to the Commission, result in Euro-conglomerates that might affect fundamental rights and especially pluralism and freedom of expression.

Our impression is that DG-XV's approach, as expressed through the Green Paper, is to conflate two different although sometimes overlapping goals. On the one hand, it attempts to pursue an industrial strategy which would enable European media undertakings to become big and therefore both compete effectively globally and prevent, by their presence, the take-over of a country's media by foreign interests. The deregulatory move that this aim implies carry a price, that is the threat to the diversity and circulation of ideas that might be caused by the concentration of political power in the hands of a few. The Commission is careful to ensure that its policies "do not adversely affect pluralism" (GP 1992, 7). It also argues that competition law "can also contribute to pluralism in the media" (GP 1992, 60). The positive point is the Green Paper's acknowledgement that competition and pluralism are different criteria and cannot replace one another. Yet it affirms that there is a connection between them,

since the former can have positive effects on the latter. As stated by Davis (1993, 9) however, the twin aims of competition and pluralism are safeguarded by different ways. The first is fostered by removing barriers to entry whereas the second is guaranteed by "positive" content regulation. The Green Paper itself admits that the achievement of the pluralism objective requires tighter regulation than that of competition (GP 1992, 82). It seems thus that the Commission has embarked upon a dubious task of conflating diverse and sometimes incompatible concerns. It remains to be seen whether it will achieve the desired end. As it will become apparent though, the industry's reaction was not encouraging.

The Consultation Process

As soon as it was adopted, the Green Paper was transmitted to the European Parliament and the Council of Europe. The Commission also asked the Economic and Social Committee to deliver an opinion on it. In addition, federations and associations representing industry interests at European level as well as individual operators were also asked to make contributions on the seven specific questions raised in the Green Paper (1992, 99-119). In launching a wide-ranging consultation process, the Commission sought to provide a basis for discussion on whether Europe-wide legislation in the field of media concentration is necessary. The purpose was to feed the Commission with the information it requires if it is to adopt a position on this sensitive issue. The Commission document refrains from any ambitious proposals, although it reveals a slight preference for taking action.

The consultations lasted over a year, with more than seventy organisations sending written comments on the Green Paper. The first hearing between the Commission and European associations and federations was held on 26 and 27 April 1993. It became clear, from the outset, that no agreement between the interested parties was about to be worked out. The majority of proprietors was against any kind of intervention at Community level while non-proprietary interests regarded European Community action essential (COM 26/27 April 1993). Overall, however, the industry's position was in favour of imminent change concerning the national rules on media ownership so as to be in level with globalisation and the development of new technologies. The diversity of the interests concerned was especially on the question of the level — national or European — at which the change should take place. The industry was reluctant to take a position on this matter without knowing in advance the exact content of the rules.

Having analysed the results of that hearing, the Commission decided to form and send a complementary questionnaire to all interested parties on 28 July 1993 (see CEC 1993-94, Vol. IV 1994, 3-6). The aim was to obtain more information on the issues raised during the preliminary reactions to the Green Paper and, in particular, on the impact of the new technologies, the potential development of national regulation and the content of the rules (audience and control criteria). That complementary questionnaire together with numerous contacts and informal bilateral meetings that took place between the relevant Commission departments and the interests concerned helped, in the Commission's view, to increase the latter group's awareness of the need to take part in the consultations. Nevertheless, apart from European industry federations, thorough comments from interested parties were received from three countries only (United Kingdom, Italy and Germany) while some positions were originated in France,

the Netherlands and Greece. The television sector made the most numerous written contributions (about twenty), whereas some fifteen positions emanated from the press industry, six from the radio sector, eight from multi-media groups and five from journalists' federations and employees in the media sphere (see COM(94) 353 final for a list of replies to the complementary questionnaire). The big absentees were consumer associations which were not invited in the consultation process. The non-participation of consumer federations is highly regrettable since it is in the name of citizen consumers that the changes will take place.

Media Proprietors' Response

Most media proprietors' federations were against a European Community initiative to harmonise legislation on media ownership at European level. The European Newspaper Publishers Association (ENPA), in its April 1993 response to the Green Paper, supports Option I (taking no action) because: (a) a lack of pluralism and diversity is unproved; (b) the status quo is preferable to opening the door to what they believe would be greater restriction; (c) they feel that the imperative of national pluralism regulation will take precedent over Commission action; and (d) they question the legal competence of the Commission to rule in this area (CEC 1993-94, Vol. I, item 14, 1993, 1-8). In its 1994 response to the complementary questionnaire, it adds that if the Commission is to take action with regard to cross-ownership, such action should definitely not bring about more regulation but its opposite, deregulation. It concludes that changes in the media caused by new technologies (i.e. digitalisation and compression) will create many new sources of information, giving the public a vast array of choice. The public will immediately turn to another source as soon as it realises that there is one-sided information (CEC 1993-94, Vol. IV, item 6, 1994, 1-18). A similar approach was taken by the Association of Commercial Television (ACT), the European Publishers Council (EPC) and the Federation of Associations of Periodical Publishers (FAEP). FAEP's view, in particular, was that special regulation for the media is unnecessary since there are sufficient instruments at hand covering companies in general (CEC 1993-94, Vol. I, item 7, 1993, 1-7; see also CEC 1993-94, Vol. IV, item 8, 1994, 1-3), while the EPC considered cross-media activity essential if newspaper and magazine publishers are not to lose competitive advantage in the developing multi-media world (CEC 1993-94, Vol. I, item 6, 1993, 1-9; see also CEC 1993-94, Vol. IV, item 7, 1994, 1-10).

Big media units such as News International plc, a wholly owned subsidiary of Rupert Murdoch's multi-media company News Corporation and Fininvest Comunicazioni, Silvio Berlusconi's multi-media group, stated that the Commission ought not to take any action at European Community level on discipline of media concentrations. The variety and configuration of media products on offer is, according to them, the best way to ensure freedom of thought. A positive approach would insist on action to eliminate the restrictions, not harmonise them, and therefore create the greatest possible space for freedom of enterprise. Both companies argued that, since there is little evidence that the diversity of national pluralism regulation causes distortion of the internal market, there is no scope for Community action to harmonise it (CEC 1993-94, Vol. II, items 7 & 11, 1993, 1-22 & 1-22 respectively). There were quite a few medium-sized firms, however, which were in favour of a change of the status quo. Three British-based media companies (Independent Television, Channel Four Television and Pearson plc) together with the Milan-based multimedia group Editoriale

L'Espresso supported a harmonised, although liberalised, system of regulation. ITV's response, in particular, focused on the distortion of competition in the British market caused by BSkyB, a satellite channel in which Murdoch owns a 40% share. Since BSkyB has been classified as a non-domestic satellite broadcaster, it falls outside British jurisdiction with regard to ownership regulations. This loophole enables Murdoch's News International to own 40% of this national satellite television channel, whilst also owning about 35% of the national press in Britain. In contrast, an ITV company can only hold 20% of a national newspaper or 20% of a satellite channel. Pearson plc, a holding company to BSkyB and publisher of *The Financial Times*, also called for European Community action to eliminate inequities in media investment opportunities in Member States which arise by virtue of diverse national rules. Pearson however, like Channel Four Television and Editoriale L'Espresso, argued that a liberalised system of regulation setting minimum but adequate transnational standards would be the only way to create a "level playing field" without resorting to divestment (CEC 1993-94, Vol. II, items 2,4,5 & 8, 1993, 1-10, 1-16, 1-9 & 1-14 respectively).

Media Professionals and Workers' Organisations Response

Representatives of media professionals and trade unions formed another group considering European Community action desirable. The European Group of the International Federation of Journalists (IFJ), for example, having linked the pluralism notion with that to access to information channels and diversity of information sources available to the public (a citizen rather than an operator-oriented approach), criticises the Green Book for using as its starting point the concept of the single market and putting pluralism in second place. On the question on whether Community has the competence to regulate pluralism, the IFJ accepts that the protection of pluralism as such is primarily a matter for the Member States but urges the Commission to at least ensure that Member States are in a position to protect pluralism through national regulation. Media policy in Europe would thus guarantee that concentration in the media does not adversely affect pluralism, democracy and diversity of opinion. Although concentration can, in theory at least, safeguard the autonomy of editorial groups vis-...-12 vis advertisers and political power, the plain fact, according to IFJ, is that concentration of media ownership as such has not resulted in a more critical media serving the public interest. Having been critical to other arguments supporting media concentration (i.e. the argument that concentration saves unprofitable publications from closing down, or that it enables media firms to compete effectively in the global market), the IFJ concludes that the identified high level of concentration of media ownership harms fundamental rights such as freedom of expression and pluralism. A comprehensive media policy at European level, taking into account not only economic but also cultural factors, is thus urgently needed (CEC 1993-94, Vol. I, item 9, 1993, 1-14).

The European Graphical Federation (EGF), the European Committee of Trade Unions in Arts, Mass Media and Entertainment (EGAKU), the Broadcasting, Entertainment, Cinematograph and Trade Union (BECTU) and the Comité des Industries Cinématographiques et audiovisuelles des Communautés Européennes et de l'Europe extracommunitaire (CICCE) also convinced of the need for an initiative to preserve cultural goals like pluralistic information and cultural/linguistic identity. The EGF strongly favoured European action. It provided examples of transnational concentrations that show clearly the links between individual large firms and how such links

are used in part to circumvent national constraints on the size of shareholdings in media undertakings. For this reason, it pointed out that national capacity to act must be protected by European agreement on basic principles and minimum rules. It went on to criticise the Green Paper for leaving out important measures to create information pluralism, such as legal minimum standards for “internal pluralism of the press” and workers rights, the protection and encouragement of different forms of ownership and commercial organisation, and the safeguarding of journalistic principles. The EGF urged the Commission to introduce Community-wide limits on owning interests in companies, directives on press and advertising concentration and tax advantages and other subsidies (CEC 1993-94, Vol. III, item 1, 1993, 1-42). Both EGAKU and CICCE called the Commission to develop, in co-operation with the Member States and representative professional organisations in the media, a truly European cultural policy that will maintain the principles of pluralism and cultural diversity (CEC 1993-94, Vol. I, items 5 & 11, 1993, 1-4, 1-3 respectively). Finally, BECTU, a trade union representing 55,000 members in the British broadcasting, film and theatre sectors, illustrated the need for limits on media concentration, for consistency of regulation across the Community and for limits on non-European Community concentration of media ownership (CEC 1993-94, Vol. II, item 1, 1993, 1-3).

Public Service Broadcasters' Response

In its answer to the complementary questionnaire sent by the EC Commission, the European Broadcasting Union (EBU) stressed first of all the risks that the digital technology carries for media pluralism. It pointed out that the expected proliferation of channels will not bring about a wider variety of programmes; on the contrary, the new channels will offer more of the same due both to financial restraints and limited audience shares. An additional risk to media pluralism highlighted by the EBU is the increased competition for programme material that the new technology will cause and its adverse consequences on small and newly formed firms. Only those enterprises that are in a position to establish vertical links with programme suppliers will have a strategic advantage. Multimedia concentration, integration between software and hardware sectors, and the convergence between media, telecommunications and data processing will also increase the risks of biased programme information and programme selection systems. For these reasons, the EBU declares that national measures on media ownership will become inadequate. However, it claims that European harmonisation would not solve the problem, since broadcasters will be free to set their activities outside the Community and use the frequencies of a non-European Union country. On the contrary, transparency measures are highly desirable. In any case, it advanced the position that public service broadcasting organisations must be exempted from a potential harmonisation instrument. This is because the latter cater for internal pluralism, that is the multiplicity of opinions and information which are reflected within a company, as opposed to external pluralism, which presents a situation where many firms are varied to such an extent that together represent a multiplicity (CEC 1993-94, Vol. IV, item 3, 1994, 1-9). Indeed, by setting limits on the concentration of ownership and the control of media companies, the Commission wants to foster external pluralism. Similar positions were advocated by German public broadcasters ZDF and ARD. In their shared response they rejected option III (harmonisation) and supported option II, favouring transparency measures (CEC 1993-94, Vol. II, item 9, 1993, 1-5).

The Economic and Social Committee's Response

The Economic and Social Committee (ESC) adopted an opinion on the Green Paper on 22 September 1993 (OJ C 304, 10 November 1993, 17-24). Regarding the safeguarding of pluralism as such, it declared, as trade unions and journalists' federations did, that there is a risk that information pluralism may be affected by monopoly-type mergers so that action at European level to maintain it is required. It considers Community's decision to avoid taking action to maintain pluralism as not correct, adding that economic health and competitiveness of business do not automatically increase it (ESC 1993, § 3.1). Recognising the special role of the media in the democratic process, the Committee advocates minimum democratic standards in the European press and audio-visual sectors. It thus calls upon the Milan Declaration of 5 March 1993 of the International Federation of Journalists, which stressed the need both for securing pluralism within media and protecting editorial independence (ESC 1993, § 3.1). The Committee approves most of the European Parliament's observations pointed out in the resolution of 16 September 1992 and, in particular, the drafting of a charter for European non-profit making broadcasting organisations, the protection of Europe's cultural heritage, the formation of a Media Code with the intention to maintain professional ethics, a Directive securing journalistic and editorial independence, and the proposal for measures to tackle concentration in the media including transparency (ESC 1993, § 1.7). However, it rejects action relating to transparency separate from rules on media ownership (option II) because it believes that both types of measures should be dealt with together to be effective. Therefore, it calls for a drafting of a proposal for a directive and considers sub-option c (establishment of an independent Committee) to be "reasonable and effective" (ESC 1993, § 4.7).

The European Parliament's Response

The European Parliament reacted to the Commission's Green Paper through its Resolution of 20 January 1994 (OJ C 44, 14 February 1994, 177-179). That resolution was based upon a report that was drafted by the authors of the 1992 resolution Luxembourg and German Socialist Members Ben Fayot and Dieter Schinzel (Document EN/RR/242/242609, PE 204.759/final, 5 January 1994). The report requests that the European Commission prepare a proposal for a Directive firstly to harmonise national anti-trust legislation in the media industry and secondly to enable the Community to interfere should a dominant position that might undermine pluralism arises. That would give the Commission unprecedented powers to intervene in the media sector, wherever it felt that a proprietor owned too many newspapers or television channels. The two rapporteurs suggested that the Directive should cover all media and carry on investigating concentration patterns well beyond formal ownership (for example, "sleeping partners"). They also asserted that advertising agencies should be excluded from running media companies, that firms buying advertising space should be subject to anti-trust rules in order to ensure that they cannot exercise undue influence on the media, and that links between broadcasters and programmers should be restricted.

According to the rapporteurs, the accomplishment of the above goals requires an action programme including the following: (a) a Directive on the right of access to information from both the European Union and national bodies, similar to the Freedom of Information Act existing in the United States; (b) a European media code to preserve professional ethics; and (c) a framework Directive to retain journalistic and

editorial independence in the entire media sector. Particular reference was made to the creation of a European Media Council whose role would be monitoring developments in the media, providing expertise and opinions to the Commission on mergers, and ensuring transparent relations between media firms.

The European Parliament adopted the report by 112 votes in favour, 60 against and two abstentions. Although the majority of the European Parliament voted in favour of the report, the result clearly reveals that not all Members thought that more regulation in the area of media concentration is in the public interest. The vote on the report split the European Parliament along ideological left-right lines, showing that the battle for Community policy in the area of media concentration and pluralism has not only a juridical basis but, above all, a political hue. Indeed, if one takes a look at the debates for the adoption of the Fayot/Schinzel report (OJ No 3-441, 20 January 1994, 228-36) it will become clear that, even though all the Members of the Parliament agreed on the need for pluralism, some argued that the achievement of this goal should come through stricter rules and others asserted that liberalisation is the appropriate root. The Members divided according to their political positions. The Socialists backed the report since it was drafted by two of their associates, while the Greens argued that it should go even further to protect job losses. On the contrary, the Liberal Group and the European People's Party, both pursuing right-wing policies, opposed the text claiming that it is far too interventionist and does not take adequate account of crucial economic and competitive aspects. Christopher Jackson (United Kingdom), draftsman for the Opinion of the Committee on Economic and Monetary Affairs and Industrial Policy (Document EN/RR/242/242609, PE 204.759/final, 5 January 1994), although agreed with the rapporteurs on preserving pluralism, he also mentioned that media concentration in Europe must be encouraged for not leaving Japan and the United States to take the lead. His associate Hoppenstedt (Germany) declared that "certain concentration operations are simply an economic necessity," whereas Mrs Lavire (Netherlands) called for less bureaucracy and opening of the market. Rawlings (United Kingdom) emphasised: "the rapporteurs' exclusive preoccupation with pluralism of ownership has blinded them to the real issue now facing the European media," meaning the convergence of new communication technologies and digital compression. The Internal Market Commissioner Vanni d'Archirafi, closing the debate, reckoned that no Directive would be able to harmonise behaviour patterns and tried to reach a compromise by stating that "if pluralism is to be protected, we need a strong, competitive communications industry in Europe. The former, pluralism, cannot exist without the latter." He then promised that the Commission will reflect on Parliament's proposals and take a position in spring 1994 on the necessity of Community-wide action.

The 1994 Communication

The Commission thus set itself an ambitious timetable for action. That timetable though has never been achieved. The Commission postponed plans to introduce a law on cross-border media ownership, something that would have caused a major reform of the European media industry. Instead, it submitted a Communication to the Council and the European Parliament on 5 October 1994 (COM (94) 353 final), in which it presented the outcome of the first consultation exercise and its evaluation. The Communication also called for further consultations on the subject across the media industry, with the dual objective of "rejecting or confirming the need for a Community

initiative" and "in the event that such an initiative would prove necessary, define its limits" (COM(94), 6). At first glance this seems to be a positive step towards maintaining and developing Commission's links which were forged with the Members of the Parliament and the interests concerned during the first consultation process. Yet the first issue — the need for European action — had been dealt with extensively in the first consultation round, where the European Parliament, the Economic and Social Committee and the majority of the 70 companies and industry organisations answered positively on the necessity of such action. That result was confirmed by the Communication itself (COM(94), 15-21). Bearing in mind that the second objective — content of an initiative — had also been tackled in the complementary questionnaire, one could safely conclude that the first consultation exercise which lasted one and a half year was pointless.

This was not what Commissioner Vanni d'Archirafi wanted to happen. In the debates preceded the publication of the Communication, the sitting Internal Market Commissioner presented a paper on the issue for discussion at the European Commission's weekly meeting on 21 September 1994 (Tech Europe 1994, 5-7). He tried in vain to convince the Commissioners that harmonisation of national ownership rules is needed in the name of smooth operation of the Internal Market. Many participants highlighted the difficulties arising from the subsidiarity principle. Competition Commissioner Van Miert argued that the Commission should be careful not to offend national sensibilities by taking measures which would have an impact on media pluralism, an area which is within the exclusive jurisdiction of Member States. Mr Van Miert presented his country's experience where there is a complex regulation system in force with the aim to maintain a balance both between language groups and television and the press. Belgium, he declared, is against a European initiative which would require it to liberalise its media market. Most Commissioners consented to Mr Van Miert, asserting that the Union should avoid intruding on subsidiarity territory, although admitting that national regulation on pluralism could constitute obstacles to free movement of services and freedom of establishment.

Conclusion

Thus the drafting of a directive on this hot issue proved to be politically unworkable. As a result, the final document passed refrains from any ambitious proposals and simply announces a second consultation phase based on another questionnaire (XV/9557/94-EN). In fact, this constitutes a third round taking into account the 1993 complementary questionnaire. The Commission's unwillingness to commit itself to a policy proposal could mean either that it is playing for time or, even worse, that the "no action" option is still on. Those hesitations made the European Parliament to express its disappointment to the non-decision-making policy course. In its Resolution of 27 October 1994 (OJ No C 323/157, 21 November 1994), the European Parliament calls the Commission once again to take action to harmonise national legislation on the media with the objective of creating and maintaining a diverse and pluralistic forum of opinion in the media (EP 1994, § 6). In addition, it urges the Community to give a precise calendar for the presentation of a draft legislation in the field of media concentration and pluralism.

However, the probability of a directive looks extremely low at present. At the time of writing, the Commission is still at the process of analysing the results of the second

survey. Although it promised the presentation of a potential initiative during 1995 (COM(94), 44), that deadline has never been met. There are several factors that complicate the outcome. Firstly, there is the conflict among the Commissioners about the viability of the plan. The media concentration topic has been a political hot potato within Europe for several years. There are also serious doubts about Community competence to regulate in the area of media concentrations and pluralism, since the Commission has itself stated in its Green Paper that the objective of safeguarding media pluralism as such is neither a Community objective nor a matter within Community jurisdiction. This may prevent the Commission, contrary to the wishes of the European Parliament, from approaching the issue of media concentration from the cultural and human rights perspectives and from tackling it in an all-encompassing way.

Thirdly, national restrictions on media ownership (as the Commission recognises at pages 55 and 56 of its 1992 Green Paper) are diverse and inconsistent. Proposals for establishing or changing rules are obviously based on different objectives and perceptions in each Member State. It therefore appears highly unlikely, given the history of media regulation in Community countries and the different pressures for change, that individual Member States will voluntarily legislate to approximate or harmonise their laws. Lastly, there is the question on the content of the scheme. The creation of a European Media Council seems highly unlikely, while some other of the European Parliament's proposals to maintain pluralism, such as controls on advertising and bartering, could be taken by DG-XV. The only recommendation that DG-XV is likely to heartily endorse is the proposal that guarantees access for all broadcasters. In any case, if there is to be an initiative of some kind, the Commission is far from deciding precisely what form it will take. In the meantime, the big players continue forming alliances, taking advantage of non-decision-making policy course. Murdoch's tentative talks to take a stake in Fininvest, the £3 billion merger between United News and Media (publisher of the Daily Express) and MAI (the broadcasting and financial services group which controls two ITV franchises) in Britain in February 1996, the partnership between the French Canal Plus, the German Bertelsmann and Murdoch's BSkyB in March 1996 in order to develop digital technology and pay-TV in Europe, and the merger between Compagnie Luxembourgeoise de Telediffusion (CLT) and UFA (which holds Bertelsmann's business in the electronic media sector) in April 1996 (subject to the approval of both German and Brussels competition authorities) are four examples of the on-going tendency towards concentrated ownership power. These examples provide a good illustration of the extent to which delays in policy making can benefit big players and eliminate pluralism in the market.

Notes:

1. This view was taken in 1969 by the US Supreme Court in *Red Lion Broadcasting Co. versus FCC*, in 1961 and 1986 by the West German Federal Constitutional Court in their *Deutschlandfernsehen* and *Lower Saxony* Judgements, and in 1986 by the French Constitutional Council in its decision on the constitutionality of the 1986 law on the freedom of communication. Even in the UK, where there is no written constitution, there is a rhetoric of diversity (for more information see Porter, 1989).
2. At the heart of the 'public trusteeship' model of broadcasting, the Fairness Doctrine (deriving from the 1934 Communications Act) obliged broadcasters to cover issues of public importance or controversy and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues (Brennan, 1989; Horwitz, 1989).
3. If, say, there are only two firms competing on price in a given market, they will have an incentive

to locate themselves as far as possible from each other on the product line, and thus to offer as diverse a product as possible, both in terms of product variety and quality. Proximity of location would mean that prices are gradually eroded as the firms compete for each other's business. But in situations of non-price competition, where there is no interdependence of the two firms' pricing decisions, the firms are bound to locate 'in the centre of the market', because there is no incentive for product differentiation.

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