

# THE DEMOCRATIC DEFICIT AND EUROPEAN UNION COMMUNICATION POLICY

## AN EVALUATION OF THE COMMISSION'S APPROACH TO BROADCASTING

DAVID WARD

### Abstract

The article evaluates European Union broadcasting policy in the context of the democratic deficit. It argues that it is essential to understand the democratic deficit in terms of communicative action, but this entails the question of media policy and specifically broadcasting, as one of the dominant mediums in which citizens participate in public life. In outlining the basic nature of the European Commission's approach to broadcasting, the work employs the concepts of internal and external pluralism heuristically. Applying these two categories to the Commission's decisions on State aid and competition policy, in order to assess how European Union media policy hangs together to form a comprehensive approach to media regulation. It challenges what has become the orthodoxy in reviews of European audiovisual policy and argues that the Commission has adopted a mature sense of the importance of broadcasting in the democratic process. At the same time however, the idea that the democratic deficit can be fruitfully approached through broadcasting initiatives is undermined due to the restricted access the Commission has to the broadcasting sector in the regulatory sphere, where the Member States retain power.

David Ward is visiting lecturer at CCIS, University of Westminster, email: [wardd@wmin.ac.uk](mailto:wardd@wmin.ac.uk).

## Introduction

The democratic deficit thesis represents one of the most trenchant critiques of the contemporary process of European integration. The European Union is seen to be critically lacking democratic legitimacy, which would entail the full participation of citizens at a European level, who currently identify their political rights within the parameters of the nation state. As a result, there is little or no legitimacy accorded through direct democratic processes at the European level of decision making and therefore governance fails to be both steered by and accountable to, the public through direct links to the citizenry.

The problem of democratic legitimacy is located in the lack of mature input systems. The growth of output steering systems at the European level is seen as a necessary and positive step towards a satisfactorily framework to regulate the international economy. It is a move that increases the capacity of the Member States to collectively redistribute resources on social policy grounds. However, this alone is insufficient to justify government on a supranational level, without the participation and inclusion of the citizen, on a universal and equal basis that the republican system of government is grounded in.

Most work on contemporary democracy usually fails to go beyond an abstract definition of the constitutional rights of the freedom to communicate. In short, it fails to offer a description of what institutional conditions are necessary for the free and uncoerced application of these rights by individuals. As Lichtenberg (1995) has argued, there is a fundamental difference between the right to speak and the right to be heard. Particularly when large-scale modern societies are considered the central question is what kind of structures public discourse is mediated through. Ultimately, this means looking at how these structures are regulated and the objectives set, through media policy, for specific sectors of the communication media.

This article considers the role of broadcasting policy at the supranational level with these questions in mind. It seeks to understand the aims and objectives of European communication policy in the context of the democratic deficit. By reviewing European broadcasting policy, it rejects, what has become the orthodoxy in the academic literature on European policy. It will argue that the Commission is far more sympathetic than many academics would admit to the democratic requirements of the need for institutions to facilitate communication independent of both the State and commercial imperatives. The work heuristically employs the concepts of *structural* and *behavioural* pluralism in order to evaluate the rationale underpinning the decisions made by the Commission in terms of competition policy and State aid.

### The Democratic Deficit, Citizenship Praxis and the Public Sphere

The dynamics of the democratic political system and the relationship between the citizen and State has been usefully dichotomised by Scharpf (1997; 1998a). Scharpf argues that in order to adequately conceptualise contemporary democratic structures it is necessary to analytically distinguish between input and output processes. The State's democratic legitimacy not only derives from its function as a democratically elected representative of a political unit or community, but also from

its capacity and efficiency in an output sphere, where it acts to fulfil a range of policies in the public good.

The central criticism of the European Union on democratic grounds is that it suffers from a democratic deficit, which leads to the problem of legitimacy. The European Union level of governance therefore suffers from insufficiently developed infrastructures which would create a meaningful and legitimating input side to the decision making process. In this sense, the development of the EU represents a trade off, as "In principle, supranational authority at the European Union level may thus imply an augmentation of system capacity, while individual citizen influence diminishes" (Østerud 1996, 18). Hence, it is unsurprising that the growth of influence, both in quantitative and qualitative terms, of the EU's decision-making structures on the lives of citizens in Member States has raised the issue of the direct accountability of the institutions of the EU. To this day, these institutions remain largely uncoupled from the checks and balances emanating directly from the citizenry.

The input process, which consists of "binding decisions [which] should originate in the authentic expression of the preference of the constituency in question" (Scharpf 1998a, 2), is separated from the output one. This fracture between input and output processes creates a democracy gap, whereby the decision-making institutions are not held directly accountable to citizens. There is therefore a democratic deficit on two levels. Firstly, the lack of political support and identification at the Union's political level results in the absence of a satisfactory degree of public participation in EU decision making. Secondly, the Member States are bound by the terms of the EC Treaty and are therefore tied into certain policy commitments. This undermines the ability of the Member States to employ policy in certain areas, in isolation of the other members.

The solutions to the deficit have usually been framed within some form of institutional reform. They usually include the empowerment of the European Parliament, as the elected representative of the peoples of Europe, the creation of a directly elected and more accountable Commission that would more closely resemble national executives. And finally, there is the suggestion of nurturing pan-European political parties, which technically would be released, from focusing on European issues from the purview of national interest.

Institutional reform may well make the EU more transparent to the European public. However, if the EU fails to engage with the imagination of its citizens, institutional change at the polity level alone will not bring about the desired directly accountable democratic structures. The institutions will simply reproduce the current gap between the institutions and the citizen and they will still lack any form of democratic legitimacy, which is necessary for a truly accountable set of decision-making institutions. The question of the democratic deficit must therefore necessarily include an analysis of the normative grounds of communication. It is therefore essential to analyse both communication structures and practices that contribute in facilitating the input processes, in order to understand the quality and substance of citizenship, within any one system of governance. This is to suggest the democratic deficit and the lack of public identification with the European Union is essentially bound up with communication. As a consequence, the European Union is not merely lacking more accountable systems of governance, but more profoundly, discursive structures, which make political community possible.

The central problem of European democracy needs to be understood in terms of the sphere of participation and recognition that together act as the principle site for individuals who bind together their interests to form a sense of shared political community. The interaction of both individuals with one another and between the institutions of government and the citizenry within the political public sphere facilitates citizenship praxis and enables disparate members of a society to identify with a political community. The process of communicative action in the political public sphere acts to facilitate the normative laws of societies as well as provide the foundation for the necessary political culture for a collective system of government, by guaranteeing the right of all citizens in a community to impart and receive information and therefore constructively and without hindrance participate in the democratic process. This is encapsulated by the idea of public spirit Tocqueville identified in the first half of the nineteenth century in the United States:

*There is a sort of patriotism ... [which] is engendered by enlightenment, grows by the aids of laws and the exercise of rights, and in the end becomes, in a sense, mingled with personal interest. A man understands the influence which his country's well being has on his own; he knows the law allows him to contribute to the production of his well being, and he takes an interest in his country's prosperity, first as a thing useful to him and then as something created (Tocqueville 1998, 236).*

It is within such a framework that Habermas develops a theory of communicative action. The model situates the formation of joint community action within the "illocutionary binding energies of a use of language oriented to reaching understanding" (Habermas 1997, 8). The process of communication is thus explained in terms of an extension of the formal rule of the categorical imperative, which governs objective moral reason. In turn the public test of reason allows subjective maxims to either be rejected or accepted on the principle that they are acceptable to all members of society. However, for Habermas, the imperative does not need a priori grounding, as norms and moral agreement are decided in the empirical world and "rooted in the structures of argumentation themselves and do not need to be brought in from the outside as supplementary normative content" (Habermas 1996b, 77).

Communication action is therefore seen by Habermas in his earlier work as being bound up with a whole set of identity forming processes, whereby the individual is socialised through the interaction with the wider community. Thus Habermas' linguistic turn situates a framework of discourse ethics and procedural language structures into a fully developed theory of identity and community formation, mediated through the process of socialisation of the individual in a community. Three central features are reproduced to create the lifeworld of a community (1) the acquisition of cultural knowledge (2) the coordination of actions, which in turn acts as (3) the agency for the formation of identity (Habermas 1995b, 143-144). The lifeworld forms "the horizon for speech situations and the source for interpretation." Whilst at the same time it is constituted by the "network of communicative actions that branch out ... which live off sources of cultural traditions no less than they depend on the identities of socialised individuals" (Habermas 1997, 80).

There is a fundamental shift in Habermas' position in his more recent work. He has attempted to move towards a clearer distinction between the lifeworld and the political public sphere. To a degree the shift represents a turn towards a more Rawlsian framework by making a distinction between the lifeworld (in Rawlsian terms the background doctrines of the cultural sphere) and the sphere of political determination. In this respect, Rawls argues it is essential to uncouple the political decision making process from the cultural sphere and draw a distinction between rational debate about political choices based on justice as fairness and the sphere of culture and background doctrines.

The challenge for Habermas is to democratise the European Union through the European Parliament and the European Court of Justice and create a democratic union through the development of a European public sphere. This can not be primarily based on a cultural notion of community, but on a constitutional loyalty to a set of substantive rights, that are to be equally shared and enjoyed by all citizens regardless of background culture. Thus, bonds of active citizenship would build towards a constitutional patriotism, which would be forged through a political culture, as the "common denominator" that would act, through the praxis of citizenship, to bind people together on a European level:

*If the system of rights is elaborated and extended under such favourable circumstances, each citizen can perceive, and come to appreciate, citizenship as the core of what holds people together, of what makes them at once dependent upon, and responsible for each other ... . They learn to conceive citizenship as the frame for that dialectic between legal and actual equality from which fair and preferable living condition for all of them can emerge (Habermas 1996a, 135).*

Habermas' prescription is an ambitious one, not only because what he is proposing is some form of post-national citizenship, but also as a category of citizenship that demands not only joint political action between States but also, what he calls a common weal. Moreover, the foundations of Habermas' model lie in a model of communicative action and the ideal discourse situation developed throughout his work. These demand very strict discursive conditions to be satisfied in order to meet democratic normative criteria. It is not sufficient that European issues are discussed on a European political platform, this platform must conform to the ideal of free and uncoerced communication in the public sphere.

Habermas' notion of constitutional patriotism also requires a partial divorce between the idea of the nation state and democracy. As Habermas argues, citizenship becomes detached from the nation state and must, all things being equal, become an impetus on its own, developing its own force of social integration. This is possible if citizenship "can be recognised and appreciated as the very mechanism by which the legal and material infrastructure of actually preferred forms of life is secured" (Habermas 1996a, 134). The concept of constitutional patriotism Habermas has in mind is not merely legal in its presence, but one that citizens actually participate and identify with. The concept refers to a process where identity-conferring principles are forged through the relationship between the norms set down in the constitution and citizenship practice and discourse ethics.

A constitution is seen to be an embodiment of the public will, in that it sets out a series of norms and values, which a society holds to be shared and just. For these

norms to be accepted they must stand the test of public reason. The political public sphere must operate on a supranational level coterminous with governmental decision making, in order that the public steers the systems of the State and continuously governs the nature of the decisions that emanate from government. Garnham (2000) has drawn an important distinction here between a political public sphere that acts to bind political decision making to the authentic expression of the public, through access and participation, and other public spheres where a sense of community is forged between individuals, within the background institutions of society. As Garnham contends, the important thing in the context of the democratic system is that both of these spheres require mass media and are therefore intrinsically bound up with a number of institutions and regulatory mechanisms. Centrally, however, the political public sphere must match the scale and scope of government.

## Normative Requirements of Communication

In a democratic and open society an individual is entitled to both access and impart information in an uncoerced manner. The role of any State, governed by the normative requirements of a democratic system of government, must be to determine the nature of the institutions that are acceptable on social policy grounds, in order to accomplish a set of conditions that allow the individual to participate in public debate as fully as possible. A number of policy objectives therefore arise as prerequisites for democratic communication. These include (1) the right to universal access on a non-exclusive basis to a basic television service, (2) the right to a plurality of information from a number of sources, and (3) the right to have access to a diverse and quality range of information. The normative outline of these principles can be used heuristically in order to evaluate European communication policy under two headings, that of maintaining external and internal pluralism, which in turn require behavioural and structural regulation. This is a crucial distinction, particularly as the Member States have established a dual system of broadcasting, where there is a clear separation between commercial and public sectors, governed by different policy expectations.<sup>1</sup>

### Behavioural and Structural Regulation

Despite the fact that in the majority of discussions about media *ownership* and media *pluralism* the terms are often elided, the two concepts are not necessarily identical. A concentration of media ownership can provide a plural and diverse range of programmes as is evident for instance in the monopolies granted to public sector broadcasters in the pre 1980s period. Likewise a very plural competitive market with a number of different actors can produce a very narrow range of programmes (Doyle 1998).

Media ownership and media pluralism taken together entail two aspects of regulation. Firstly, there is the maintenance of plural market actors in any one market, with a belief that either monopoly or oligopoly conditions are unacceptable on grounds of the importance of the mass media. A diverse range of free media outlets, providing a range of views and opinions is seen as indispensable to the healthy maintenance of a democratic society. This type of regulation that aims to achieve this objective can be either negative or positive. The negative works usually through

competition policy and is supplemented in some countries with positive measures, such as the case of the Nordic press subsidies which, aim to support non viable economic publications in order to maintain a political balance between available publications (Høst 1999).

Structural pluralism relates therefore to the plurality of undertakings active on a specific market and has historically been associated with the press sector and the perceived need to constantly maintain a plurality of actors and outlets in a sector that is dominated, throughout Western Europe, by a commercial model of market supply and demand. The idea that the media sector should be diverse, is underpinned by a belief that in a democratic society, it is important for the members of any particular society to have access to a broad range of views and opinions, in order that the people living within a specific form of social organisation can make an informed choice on a variety of public matters.

Internal pluralism refers to a different set of regulatory issues. It is distinguished from structural regulation in that it employs behavioural regulation: broadcasters are obliged, through legal instruments to provide for pluralism within their television service. Questions of coverage, quality and diversity of programming rather than the amount of actors present in the market largely govern the objective of achieving internal pluralism.

Behavioural regulation has been central to the model of public service broadcasting monopolies, where in return for a privileged status these broadcasters have been required to provide a service in the interests of the public. Positive and negative requirements are laid down in a number of contracts and legal texts that establish the objectives that these broadcasters are to fulfil. The requirements are based on the perceived importance of the positive political and social benefits of broadcasting in the democratic life of citizens. A second aspect of behavioural regulation is concerned with the possible negative consequences of broadcasting. Hence, there has been a perception by policy makers that the limited nature of allocation in broadcasting can, in an unregulated environment lead to a narrow range of actors dominating the broadcasting ecology. This in turn represents a potential threat to democratic freedom to both broadcasters and the right of individuals to access a broad array of information. As a consequence the State has imposed on broadcasters a set of principles and obligations that technically guarantee that a wide range of programmes are available to the public and these programmes are of sufficient quality and diversity as to be representative of the views and needs of a democratic State.

In today's policy context, it perhaps not ideal, but nevertheless reasonable, to suggest external pluralism relates to the commercial television sector and internal pluralism has increasingly become associated with the public one. Historically, this may be a more difficult distinction to make, however, in light of either, the introduction of commercial television with little or no regulatory requirements, in terms of internal pluralism and the gradual retraction of any internal pluralism obligations on commercial broadcasters that have historically been established as public service broadcasters, this distinction is far easier to sustain.

If the democratic deficit can therefore be ascribed partially at least, to a communication deficit, then, to really understand the continued lack of communicative structures that operate on the EU stage, it is necessary to look towards communi-

cation policy. It is therefore necessary to identify to what extent has communication policy been employed in order to approach the critical problem of the democratic deficit. In this manner the second part of the article evaluates the performance of the Commission in terms of the above distinction between structural and behavioural regulation. It is crucial to understand the exact nature of EU media policy, as much debate about the democratic deficit and the impact of EU audiovisual policy on national communication structures, has clouded the real issues and have stultified the real potential in this sphere for policy initiation. This, I want to argue is the result of a powerful orthodoxy, that ultimately can not be sustained under empirical scrutiny.

### The Orthodoxy

In a number of critiques of European policy (inter alia Kaitatzi Whitlock 1996; Venturelli 1998) the European Union is seen to be the site where the deregulation of television and an erosion of the principles that have underpinned broadcasting policy since the Second World War have increasingly been played out. The orthodoxy claims that European Union audiovisual policy is broadly responsible for deregulating the audiovisual sector through a blanket application of competition policy. It argues that the EU has promoted the economic policies of the common market without acknowledgement of the importance of central communication institutions such as the public service broadcasting sector. The central foundations of these arguments stem from an unhelpful distinction within the EU institutions between what Collins (1993) has coined dirigiste and free market approaches to communication policy. The idea being that the free market approach of the strongest Commission directorates dominates the dirigiste concerns of the cultural departments of the Commission and European Parliament.

According to the orthodoxy the driving force of European policy is essentially economic and moreover, it is overtly liberalising in its motivation. The subsequent result of European policy is, (in the extreme version) seen to undermine Member State regulatory instruments, leaving the Member States disempowered in the sphere of television regulation. Venturelli (1998), whose work is the clearest expression of the orthodoxy, takes the approach to its ultimate conclusion, when she suggests that EU communication policy represents a shift from a public sector model of broadcasting, supported by social policy goals, to a model based on proprietary freedom characterised by the freedom of industrial organisations, through the commercialisation of the audiovisual market under a free market doctrine. Overstating the case, Venturelli argues the European Union is responsible for:

*Unleash[ing] forces of liberalisation by allowing consolidation of distribution networks along transnational lines and crippling the legal authority of Member States to regulate this growing form of domination of the public realm by a handful of broadcasters and programme suppliers (Venturelli 1998, 211).*

Venturelli continues to contend that EU regulatory initiatives have understood the liberal paradigm of freedom as one whereby the market is promoted to be the realm of freedom. As a consequence, a policy of non State intervention has reached prominence at the expense of the public service philosophy. Venturelli does recognise that cultural and political issues have been increasingly prevalent in European policy proposals. However, despite these moves towards a more substantive

policy position she concludes that “in the absence of a constitutionally grounded, public service right for citizens to participate in the public realm of the information society, only a liberalisation logic reigns” (Venturelli 1998, 210). The Television Without Frontiers directive is thus held responsible for the whole scale dismantling of a system of regulation designed to ensure that the broadcasting sector actively meets public interest requirements and is able to act independently of both commercial forces and State interests. EU policy is therefore seen to be responsible for the commercialisation of public space that existed on the national level prior to the growth of EU policy instruments in the audiovisual sphere. A logic of economism reigns and questions of democratic communication are entirely overlooked by the destructive forces of the Commission, according to this approach.

### Competition Decisions and Structural Pluralism

The Commission has attempted to regulate the commercial broadcasting sector through competition policy, which in turn has led to questions of media ownership and concentrations in individual national markets. In respect of media pluralism, the European Commission has confronted the question on two fronts. Firstly, it has attempted to develop a directive on media ownership and pluralism in the common market. This has been developed under continued calls from the European Parliament for Community action on media ownership. Secondly, it has dealt with questions of media concentration and pluralism through an ad hoc approach, in its application of the merger regulation,<sup>2</sup> where the Commission has been called upon to grant permission to media undertakings that have proposed either joint ventures or alliances.

The alliances where the Commission has adjudicated are of three kinds. Firstly, between actors on the same geographic market, who propose a venture in an established market;<sup>3</sup> secondly, between actors who propose to create a new market;<sup>4</sup> and thirdly, a venture which increases competition in an existing market.<sup>5</sup> In the latter two of these the Commission has taken a positive approach, even granting derogations of common market rules to new entrants in markets where a large amount of risk or capital investment is involved. In order to achieve this framework the Commission defines the market where the activity has an impact. Subsequently, by defining the market the Commission is able to assess the proposed venture based on market share. Markets are largely defined in terms of regulatory and national boundaries, though there is an increasing shift to linguistic markets. As a consequence, dominance of companies on markets is accepted, as long as this is achieved through superior services and performance.

However, it is important to stress that the Competition directorate’s acceptance of dominance through superior performance is not to suggest the decisions to clear alliances of mergers in the commercial sector are also aimed to create dominance in themselves. Indeed, there is a very specific logic underpinning the application of competition policy in this field that has a dual objective. On the one hand it aims to protect the European market, through instruments such as the programme quota system. This is also supported with initiatives to encourage European actors to adopt pan European strategies by harmonising legal and regulatory rules, that allow media companies the opportunity to exploit economies of scale and advantages conferred through size, which in turn creates a more equal

playing field between American and European undertakings. On the other hand, the second objective is the protection of pluralism pursuant of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The central aim of European policy in the area of commercial broadcasting is therefore to encourage larger media companies to adopt pan European strategies. Rather than permitting companies expansion on individual national markets, the utilisation of the merger regulations has been used to support expansion across markets, but not at the expense of pluralism of actors on national markets. Striking support of this approach is evident in positive clearance of joint ventures like the Audiofina and Bertelsmann one, which resulted in the formation of CLT Ufa and was, cleared on the basis that separate national markets were discernible.<sup>6</sup> Although the creation of CLT Ufa and its further consolidation with Pearson television, represents the establishment of one of Europe's biggest broadcasters, according to the Commission this is characterised by a spread across different markets and is therefore deemed pro rather than anti competitive. Some counter arguments suggest the establishment of CLT Ufa would lead to a dominant position throughout Europe, due to the competitive advantages conferred in areas such as programme acquisition rights. Despite these arguments, the Commission concluded that because the sale of rights to television programmes was undertaken at the national level, the combination of resources in CLT Ufa was not sufficient to block the synergy.

The similarities between the vetoed proposals of Kirch/ Bertelsmann and the later clearance given to a proposed alliance between BskyB and the Kirch group further support the Commission's response.<sup>7</sup> The BskyB/ Kirch proposal consisted of BskyB acquiring 24 per cent of KirchPayTV GmbH & Co. KgaA (Kirch TV) from Kirch Vermögensverwaltungs GmbH & Co. KG, the holding company for the KirchGruppe. In combining the resources of the two companies, the venture achieves a considerable position on the German market for both BskyB and Kirch, with access to a whole range of movie and sport channels, offered in a variety of packages through Premier. Although the case had obvious parallels with the earlier two cases in Germany that the Commission had blocked, the central difference was that BskyB did not hold a significant market presence in the either the German pay TV market or the free air television market.

The decisive factor was that the Kirch/ Bertelsmann joint venture was based between undertakings that operate on the same geographic market and the participants in the proposed venture were already active in various fields of the German audiovisual or telecommunications markets, thereby excluding the real possibility of these players competing against one another in the market. Whereas the BskyB/Kirch proposal significantly reinforced Kirch's position, this was judged not to be to the extent that the market in question would exclude Bertelsmann or other actors from entering and competing in the market.

The Commission, however, raised concerns over the conditional access system developed by the sister company of KirchPayTV, BetaResearch. Because the system is a closed decoder, the opportunity for Kirch to foreclose the digital PAY-TV market was significant. This was reinforced with the possibility, raised by the alliance, that the expertise in marketing and the injection of revenues from BskyB

would bring a dominant position in the German pay TV market and raise the barriers of entry to the market. Due to this, the Commission stipulated that the position would be tolerated on the condition that the d-box system and therefore digital platform, was open to other actors on a non-discriminatory basis.

Even where new markets are being created significant conditions of transparency and guarantees of open access have been required to gain clearance. Such was the case with the DTT service offered by the ONdigital consortium and the BiB proposal, which included BskyB, British Telecom and a number of other players. At times this has even included the exclusion of proposed participants including BskyB from ONdigital and Endemol from the HMG joint venture, in order to ensure that dominance is not acquired through either merger or joint ventures.

The Commission's approach is therefore characterised by positive clearance towards proposals that increase either the diversity of undertakings on a specific market or ventures that establish a wholly innovative service. In the TPS case this included the acceptance of an anti competitive exclusive programme deal which allowed the consortium exclusive rights to carry simulcasts of four channels; the commercial terrestrial channels TF1 and M6 and the two public channels France 2 and France 3. The carriage deal automatically excluded the dominant satellite operator, Canal + satellite, from the right to carry these services. Pursuant of Art 81 (1) and Art 81 (3) of the EC Treaty, the Commission considered the difficulties of developing a viable competitor to Canal + and the need to encourage an alternative source of programme supply on the pay TV market. It concluded that this was unlikely to happen given the extensive first mover advantage enjoyed by Canal + and in consideration of the high investment costs of developing as a competitor to the incumbent. The deal was cleared as no grounds for suggesting the exclusivity deal would actually lead to the elimination of competition in the pay TV market were found. TPS would provide a significant competitor in the market; whereby at that time no real competition within the PAY-TV market was evident. As TPS began to establish a consumer base the anti competitive clauses cleared by the Commission would diminish and would be withdrawn and reviewed after a three-year period.

Taken as a whole, the decisions would suggest that a degree of external pluralism is very much one of the central concerns of the Commission and that it has been very successful in implementing the merger regulation. Whilst the Commission has supported alliances in both new markets and separate geographic markets, the negative decisions it has made, signify that the limits of permissible alliances are located at the State level. This has been reinforced even in the face of strong opposition by key national political figures, most notably Chancellor Kohl, who is said to have attempted to apply pressure on the Commission to clear the CLT/Kirch alliance. Even though national governments have been promoting and encouraging national players, by reducing their own regulations on media ownership (and in the UK case a reduction of the regulatory enforcement of programme obligations on the ITV sector), the Commission has remained constant in its decisions. It has attempted to promote pan European market mergers rather than individual market concentrations. But, at the same time, it has tried to ensure in its rulings that individual markets are not dominated to an extent that is deemed contrary to the public interest.

## The Public Sector, State Aid and Internal Pluralism

Contrary to the arguments that suggest the Commission has largely ignored this sphere of regulation the fact is that it has also been an important consideration in the development of European communication policy. This is evident in the decisions, (which the Commission has been called upon to adjudicate) where the Commission has unequivocally stated that the philosophy of public service broadcasting is something that lies outside the competition rules and the strict terms of the European Treaty.

The issue of public service broadcasting within the terms of the EC Treaty was forced upwards to the European level by a series of complaints by commercial broadcasters against a number of public service broadcasters in the 1990s. The nature of these complaints is of two kinds. Firstly, German and UK commercial broadcasters submitted objections against the funding of new thematic channels introduced by public broadcasters. These consisted of complaints against the Federal Republic of Germany over the children's channel Kinderkanal and Phoenix, a channel dedicated to information and documentary operated by ARD and ZDF and in the UK, BBC News 24. The second group of complaints concerned the funding arrangements of a group of public broadcasters whose funding sources derived from a mixture of State aid and advertising. Telecinco, Mediaset and TF1 lodged complaints that respectively, the State aid, which supplemented advertising revenues for RTVE, RAI and France 2 and 3 constituted State aid that was incompatible with the express terms of the EC Treaty.

Although the cases raised different sets of issues there is a clear logic running through the Commission's approach to the question of applying the Treaty to the funding and operations undertaken by the public sector broadcasters. In all the cases the Commission has applied the European Court of Justice's interpretation of public service broadcasting in the context of the Treaty. It has therefore been able to circumvent any direct involvement in defining, either the remit of public service broadcasters or the nature of funding that these broadcasters receive. It has thus found an extremely convenient way of classifying public service broadcasters by invoking Article 92 and 90 (2) of the Treaty.<sup>8</sup> Article 90 (2) states:

*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules contained in this treaty, in particular to the rules on competition, in so far as the application of such rules do not obstruct the performance, in law or in fact, of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community (Art 90 (2) EC Treaty).*

The provisions permitted to an undertaking which falls under Art 90 (2) as interpreted by the European Court (EC 1999a) allow pursuant of Art 92, derogations of the competition rules. This is however, based on a proportionality test to ensure funding is proportionate to ensure the public undertaking is able to carry out the task it is required to carry out by the State.

*The suppliers of certain services of general interest may be exempted from the rules of the Treaty, where the rules would obstruct the performance of the general interest tasks for which they are responsible. Definitions of general*

*interest duties do not necessarily determine how they are to be carried out. This is why an exemption for the rules is subject to the principle of proportionality. This principle, which underlies Art 90 of the EC is designed to ensure the best match between the duty to provide general services and the way in which the services are actually provided, so that the means are in proportion to the ends sought (CEC 1996a, 12).*

The Commission is therefore concerned with the question of the distribution and application of the State aid granted to public broadcasters and whether the State aid is proportional to the services provided by these broadcaster.

In the German case the commercial broadcasters, who lodged a collective complaint as a consortium called VPR,T argued the introduction of two digital channels by ARD and ZDF represented unfair competition on grounds that they were granted privileged access to State aid as well as preferential access to the cable networks. The conditions granted to the public channels, according to the commercial broadcasters, went beyond the terms of the definition of the services of general interest criteria and conferred on ARD and ZDF an unfair advantage, over private channels that were already active in these markets, most notably the CLT Ufa/ Disney joint venture Nickelodeon's thematic children's channel.

The first part of the case questioned the financing arrangements of Kinderkanal and Phoenix through the licence fee and the advantageous position granted to the two channels that went beyond the definition of a basic service in German law.<sup>9</sup> The complainant claimed that the support through the licence fee (and thus State aid), whilst applicable to the generalist channels of the ARD network and ZDF could not be applied in the same terms to the specialist channels. Because the specialist channels did not meet the legal requirements of a basic service in German law, in that they did not cater for the whole of the population, the commercial broadcasters argued they could not be understood as part of the public service provision. In attempting to separate the general interest and specialist channels the complaint suggested the granting of funding through State aid did not apply to the different services. It therefore did not qualify as coming under the derogations pursuant of Article 90 (2) as is the case for the generalist channels.

The Commission rejected the claims made by the commercial broadcasters and although it conceded the funding of the channels constituted State aid, it reasoned the aid granted to the channels was compatible with the common market under Art 90 (2) of the Treaty. The reason for this exemption of the Treaty was that the argument presented by VPRT was based on a distinction between delivery forms, which overlooked the service provided by the broadcaster, regardless of different delivery sources. The Commission did draw a distinction between services of general interest and the basic service classification, but stated, based on the Protocol annexed to the Amsterdam Treaty on public service broadcasting, it was outside the scope of the Community to define whether special interest channels formed part of the service of basic provision or not. The Commission therefore restricted itself to the question of whether or not the specialist channels could be understood as a service of general interest, regardless of the debate of whether or not the notion of basic services could be extended to the thematic channels. The issue was not how a service was delivered, but the nature of that service. To qualify for derogations granted to services of general economic interest, the service had to be

a public service, as defined by the Member State. The Commission recognised it was the Member State who retained the prerogative to define a service of general interest and the functions and obligations which the particular service should pursue. The important point being that the undertakings must officially be entrusted by the Member State with the provision of a specific service. The Commission stated:

*The German authorities consider a channel for children, free of advertising and violence and with a high degree of information, and a channel, also free of advertising, providing background information on political and social issues and direct transmissions of political debates as “services of general economic interest” and entrust such undertakings with the provision of these services (CEC 1999b, 11).*

Due to the nature of the conditions of the channels i.e. they would be free of advertising, the second part of this question was axiomatic. The service could not be provided by advertising revenues and therefore without a large subscription base it was not a viable proposal to suggest that advertising free channels would be provided for by the commercial sector. The task of providing an advertising free channel would therefore be precluded without State aid. On the question of funding, the Commission also judged in the affirmative. It acknowledged that the funding set by the KEF organisation and the process for evaluating proportional funding for the specialist channels conformed to the Commission’s criteria of proportionality.

With these two conditions met the Commission ruled the exemption pursuant of Article 90 (2) of the Treaty was relevant even though the establishment of the two channels could distort competition in the market. “Art 90 (2) accepts a certain effect on competition and trade as a consequence of ensuring a public service remit to be provided” (CEC 1999b).<sup>10</sup>

In this context, the Commission acknowledged that it was the prerogative of the Member State to define the actual nature of these services. This is particularly the case in the broadcasting sector, pursuant of the Protocol on Public Service Broadcasting. The Protocol expresses the role of subsidiarity and the central role of the Member States in defining the exact nature of the public service remit of public sector broadcasters. The protocol states:

*The provisions of the Treaty establishing the European Community shall without prejudice to the competence of the Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account (Treaty of Amsterdam 1997, 87).*

The Commission cited the express terms of the Protocol and stated the Member State was technically free to define the remit for the public service undertaking, which was subsequently not within the scope of Community action. The role of the Commission was therefore not to define what could or not be included within a public service remit, but to judge on the proportionality of funding. Its central

role is to ensure that State aid grants and the use of these funds by the broadcasters does not affect trade contrary to the common interest i.e. to ensure that the official definition provided by a Member State does not go beyond the community notion of a service of general economic interest. In the BBC decision the Commission suggested:

*Even if the State financing of BBC News 24 would have led to more serious economic difficulties for its competitors, such effects could be accepted ... in order to allow a service of general economic interest to be delivered. Article ex 90 (2) Art 86 (2) Amsterdam Treaty ... accepts a certain effect on competition and trade as a consequence of ensuring the provision of a public service remit (CEC 1999a, 17).*

The Commission comprehensively rejected all aspects of the complaint against the BBC and again acknowledged the significant role of the State in defining the public service remit of broadcasters. As in the Kinderkanal/ Phoenix case the Commission supported the definition of public service and the extension of the fundamental principles of public service into new areas of broadcasting, based on the Member State interpretation of either the legal concept of the provision of a basic service or as stated in the BBC's Charter. Either way, it stated the applicability of Art 90 (2) and Art 92, as defined by the EC Treaty and thereby allowing derogations of competition policy and distortions to the market.

The decisions of the Commission on the compatibility of the provision of State aid granted to public broadcasters within the terms of the Treaty therefore broadly support the right of public service broadcasters to receive funding from a number of sources. The concern of the Commission has been that the proportionality test is passed and these funds are not abused by the public broadcasters. The positive nature of these decisions is also recognition of the perceived importance of public service broadcasting. The clear distinction between public and private broadcasting would also suggest the Commission is aware that the commercial sector is inherently different from the public one, especially in terms of what they are established to undertake and provide to the public. In this respect, the public sector is seen as integral to the democratic life of individuals and has been broadly supported in the above cases.

## Conclusion

The decisions the Commission has made in both the area of State aid and under the mergers regulation would suggest the Commission has developed an extremely sophisticated understanding of the role of broadcasting in terms of both its importance in the democratic life of societies in general as well as its wider aim to promote a pan European broadcasting sector.

The merger regulation procedure has been utilised in an increasing number of cases to decide on whether proposed mergers and alliances between European media companies are acceptable in terms of maintaining open and plural markets. Although most of the decisions have been positive, the Commission has been guided by the need to retain a plural media sector on each national market, whilst balancing this with the need to develop larger and more competitive media houses as a reaction to the perceived threat of American companies. However, this is not without certain requirements, even where significant new services have been proposed

the Commission has attached stringent conditions where a likely dominance in an area of the supply chain is the result of a merger. The Commission has therefore applied competition policy in order to regulate for external pluralism in a highly successful manner, mainly because the Commission holds a superordinate position in this field. The Council of Ministers and the Member States are bound by the terms of the Treaty to abide by Commission decisions on competition policy, whereas in other areas of media policy the Council of Ministers retain the ultimate decision making powers. Whatever the problems with regulating according to the logic of external pluralism are, and there are significant ones, including the trend towards excessive sameness (Neuman 1995), it remains an important category, and one that the Commission has dealt with in a satisfactory manner.

Internal pluralism has been a far more contentious issue for the Commission to approach. What is more important is that it is in this sphere of broadcasting where it could be argued, the opportunity lies in facilitating citizenship praxis at the supranational level. The central problem is that although regulation has been developed at the European level to account for public service broadcasting through Art 90 (2) this has resulted, coupled with the strategies of the public service broadcasters themselves, in the public service philosophy remaining within the confines of the nation state. Even where these broadcasters have adopted international strategies, supported by national governments, the strategies are inherently commercial and are therefore parallel services to that provided by the commercial undertakings.

The really crucial area of internal pluralism and the behavioural sphere of regulation is therefore a Member State concern and any attempt at Commission action in this area is likely to be fiercely rejected by the Member States and broadcasters on national interest grounds. The crucial division between the two spheres of regulation largely undermines any potential for democratic communication structures to be nurtured at the European level. It would also suggest the behavioural sphere of regulation that achieves internal pluralism is the key. Furthermore, the idea that a public service philosophy can be transplanted to a European level, in order to create a sphere of discourse that would act to encourage participation and debate on a European stage, is unlikely without the empowerment of the European Union in the sphere of behavioural regulation.

In this respect the idea that citizenship is built upon the foundations of citizenship praxis as ultimately conferring on the individual political status, through participation in the public sphere and the assumption that broadcasting is an important component in the relationship between democracy and the individual, the quality of this relationship has largely been a concern restricted to the sovereignty of the Member States. It has been the individual Member States, who have made the political choices to apply light touch regulation to the commercial sector, as it has been the Member States who have currently determined the strategies of the public sector. The failure of these broadcasters to engage in European issues collectively, something that would seem to be reasonably within the realm of possibility, is where the real essence of the democratic deficit, in broadcasting terms at least, must lie.

If European integration is to proceed, it must do so in the political as well as economic sphere. With the right political will and cooperation from the Member

States, something resembling European public service broadcasting could materialise, which in turn may encourage more democratic structures. This will require the Member States to rethink their current policy on the international services provided by the national public service broadcasters and begin to encourage more cooperation between the Member States in the sphere of broadcasting. There is a tendency to see the European Union as something independent of the Member States, rather than as constituted by them. This confuses the problem of where the responsibility of the democratic deficit is situated and where ultimately political action must be undertaken in order to ameliorate the present conditions of supranational governance.

In terms of the performance of the Commission, based on the decisions above, the European Union's communication policy has minimally attempted to protect both external and internal pluralism. Even in consideration of the limited legal instruments at its disposal it has found a novel method to achieve a level playing field for commercial broadcasters, as well as extending the right of Member States to implement and sustain policies in support of democratic communication through the provision of State aid. Evidence enough to suggest the orthodoxy is rather wide of the mark.

## Notes:

1. Of the Member States, at the time of the incorporation of the Television Without Frontiers Directive into national law, almost all had introduced competitive structures in broadcasting markets. In Belgium in 1989, VTM, a commercial channel began broadcasting; Denmark (limited competition through TV2); France privatised its most popular public broadcaster TF1 in 1987; Germany introduced private broadcasting in 1984; Greece 1989; Italy 1984. In the UK, the 1990 Broadcasting Act significantly relaxed the restrictions on ITV, whilst also reducing the powers of the ITC and Spain introduced competition in 1989. Only the Netherlands and Ireland, out of the Member States, had not initiated competition-oriented policies in the television sector before the directive.
2. European Commission (1989) Council Regulation (EEC) No 4064/89 on Control of Concentration Between Undertakings. Official Journal of the European Communities No L 257/14. 21.9.1990. Amended 1997.
3. European Commission (1999) Case No IV/M.993 Bertelsmann/ Kirch/ Premiere Council Regulation No 4064/89. Merger Procedure 1999. Official Journal of the European Communities. European Commission DG IV (1995) Case No IV/ M. 553 RTL/ Veronica/ Endemol. Regulation (EEC) No 4064/ 89 Merger Procedure 20/9/1995. Office for Official Publications of the European Communities.
4. Commission decision of 15th December 1999 relating to proceeding under Article 81 of the EC Treaty (Case IV/36.539-BiB [Open]. Official Journal of the European Communities L312, Vol.42. 1999
5. European Commission DG IV (1999) Case No IV/36.237 TPS. Regulation (EEC) No 4064/ 89 Merger Procedure 2/4/1999. Office for Official Publications of the European Communities.
6. European Commission DG IV (1996) Case No IV/ M.779- Bertelsmann/ CLT. Regulation (EEC) No 4064/ 89 Merger Procedure 07/10/1996. Office for Official Publications of the European Communities.
7. European Commission DG IV (2000) Case No COMP/ JV.37-BskyB/ Kirch Pay TV. Regulation (EEC) No 4064/ 89 Merger Procedure 21/03/2000. Office for Official Publications of the European Communities.
8. The Article numbers were changed in the Treaty of Amsterdam. Art 92 EC became Art 87 and Art 90 (2) EC was changed to Art 86 (2). For consistency purposes the original Article numbers will be used throughout the text, except in direct references from the Commission.

9. *Grundversorgung* is a conceptual term used to describe the obligations of public service broadcasters and includes issues such as positive programme requirements and universal coverage. The commercial broadcasters argued that a thematic channel works against certain features of this idea. See Woldt 1998.

10. Nickelodeon closed its operations in Germany in May 1998.

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