



**REGULATING AUDIOVISUAL MEDIA SERVICES IN
THE EUROPEAN UNION:
ON THEORY OF LOW INTENSITY
CONSTITUTIONALISM**

by Aleksa Andelković

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PROFESSOR: Marie-Pierre Granger, PhD

Central European University

1051 Budapest, Nador utca 9

Hungary

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Abstract

“Regulating audiovisual media service in the European Union: on theory of low intensity constitutionalism” explores the process of constitutionalisation of the European Union and introduce the concept of low intensity constitutionalism that is closely connected with the activity of the European Court of Justice in broadening powers of the Community through provisions on free movements of goods, people, capital and services of the founding treaties. “Regulating audiovisual media service in the European Union: on theory of low intensity constitutionalism” explores the previous legal situation in audiovisual media services that was characterized by the huge Government interference and evolution toward more liberalized and harmonized Community legal rules considering audiovisual media services in attempt to see whether these rules helped in expanding powers of the Union and limited the powers of the Member States.

The purpose of this thesis is to analyze the rules, contained both in the Community legislation and in the practice of the European Court of Justice relevant to the status of audiovisual services and to find out how audiovisual services are used to widen the scope of Community “market rules” and how this affects the process of constitutionalisation of the European Union.

*“When airwaves swing
Distant voices sing*

*Wenn Wellen schwingen
Ferne Stimmen singen”*

“Airwaves” by “Kraftwerk”

1. Introduction

The idea to explore development of European economic constitutionalism came from, in time and place, a distant legal framework. The first, rough contours of ideas presented here were formed while studying case *Gibbons v. Ogden*¹. *Gibbons vs. Ogden* is one of the earliest landmark cases of the United States Supreme Court. In this 1824 case the US Supreme Court, with John Marshall as the Chief Justice, held that the power to regulate interstate commerce was granted to Congress by the Commerce Clause of the Constitution. Chief Justice Marshall announced: “Commerce is undoubtedly traffic, but it is something more - it is intercourse. And what is the power of Congress over commerce? It is the power to regulate, that is, the power to prescribe the rule by which commerce is to be governed.”² Chief Justice Marshall in *Gibbons v. Ogden* established broader interpretation of the Congressional powers by “expounding” the Constitutional provision in a way that changed the constitutional, legal and economic landscape of the United States of America.

This old but certainly not forgotten case from the period of Chief Justice Marshall, who is sometimes portrayed as a “definer of the nation” not only because of the importance for the development of the independence of the judicial branch of government but also for promotion of the concept of a political system based on constitution as a highest normative act, was the starting point for the research of economic constitutionalism.

¹ *Gibbons v. Ogden*, 22 U.S. 1 (1824)

² *Ibid*

“Regulating audiovisual media services in the European Union: on theory of low-intensity constitutionalism” examines the process of constitutionalisation of the European Union through legal analysis of the Union’s regulatory powers and activities of the European Court of Justice in audiovisual sector.

It is undoubtedly an understatement to say that the European legal order is a place of constant change, especially in the time of heated debate about Union’s constitutional framework and when Union is defining/redefining its role. The vibrant nature and the mutual impact of the analyzed phenomenon is the *raison d’être* for doing research on the constitutionalisation of the European Union.

In the last 50 years the European Community/Union developed from the intergovernmental organization for promoting economic goals to the supranational legal ‘organism’ and nowadays “it is increasingly difficult to define an area of the member’s state traditional governance functions that is not, directly or indirectly, impacted by the European Union.”³ This paper deals with how the European Union is influencing regulations of the audiovisual sector. Through the process of regulation of the internal market the European Union is not only defining its role, its powers and duties, but also through such practices the process of constitutionalisation in the European Union is going on. Maduro is summoning: “The logic of market integration dominates the European Constitution and its supremacy over national law”⁴

Telecommunications, one of the last bastions of national sovereignty and monopoly of the State, became a vibrant and a highly competitive area of Community life. “Cable television, direct broadcast satellites, digitalization, etc. eliminated borders, expanded markets, and in, general, made life more exciting for consumers but more difficult for

³ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), *International Journal of Constitutional Law*, 332-356, page 340

⁴ Maduro MP, *We the court : the European Court of Justice and the European Economic Constitution : a critical reading of Article 30 of the EC Treaty*, Oxford : Hart Pub., Evanston, Ill., USA, page 2

government. The old state monopolies of the audiovisual media became increasingly anachronistic.”⁵ We will see good example of clear displeasure of the Member States of Community interference in once exclusively State domain and rationales behind the Member State’s interference in audiovisual sector when analyzing European Court of Justice (ECJ) cases such as C-11/95 “Commission v. Belgium”⁶. D.A. Levy in his analysis of broadcasting rules affirms this: “Broadcasting in Europe started as a highly regulated industry, where the primary focus of regulation was decidedly national, the objectives and instruments of these national approaches differed wildly, and where in every case the regulation of broadcasting was treated very differently to that of other sections of the communications sector such as telecommunications or newspapers and publishing.”⁷ The aim of this paper is modest in the sense that it puts limits on the aim and the method: the constitutional analysis is limited to the audiovisual sector and explaining how the once jealously kept State dominion was opened to competence, how it was liberalized and harmonized.

The European Union’s arrival on the audiovisual scene happened in the 1980’s, first with the presentation of the Green Paper⁸ of 1984, continued with adoption of the “Television Without Frontier” Directive of 1989 and “coincided precisely with the technological revolution that precipitated, especially among the European electronic media, a series of significant developments, such as their liberation from traditional government ownership. Media commercialism was an especially large challenge for most of these proud welfare states, where egalitarianism and not competition seem to be governing social rationale.”⁹

⁵ Paraschos, E.E., *Media Law and Regulation in the European Union, National, Transnational and US Perspective*, Ames, Iowa: Iowa State University Press, 1998, page 129

⁶ C-11/95, *Commission v. Belgium*, ECR 1995, I-4114

⁷ Levy D.A., *Europe’s Digital Revolution Broadcasting regulation, the EU and the nation state*, New York : Routledge, 1999, page XV

⁸ *Television Without Frontiers*, Green Paper on the establishment of the Common Market for broadcasting, especially by satellite and cable, COM (84) 300 final

⁹ Paraschos, E.E., *Media Law and Regulation in the European Union, National, Transnational and US Perspective*, Ames, Iowa: Iowa State University Press, 1998, page 5

In breakthrough in the area of legal regulation of audiovisuals, the European Union mainly used two instruments to expand its influence: “the general competition rules (especially Article 37, 85, 86 and 90 of the EC Treaty) and regulations which have been specifically adopted for the markets”¹⁰. The specific audiovisual sector regulation covers two separate features: content and technical aspect. Currently, the European Union regulatory framework aims to create the conditions necessary for an effective single market for broadcasting within the Community.

Why are audiovisual services important? Judge Lenaerts of the ECJ reflects most views of legal practitioners and scholars on the importance of telecommunications when he states that they “provide a tool for interaction between the people, undertaking and authorities. They create a platform of communication necessary for the development of social cohesion and economic activity.”¹¹ We can distinguish three broad categories of reasons: a) economic reasons b) political / social reasons and c) constitutional reasons.

The economic importance of audiovisual services is derived from its commercial value. “Telecommunications, information industries and innovation constitute one of the most important industrial sectors for the economic development of the European Union.”¹² The audiovisual sector directly employs over one million people in the European Union and according from European Commission 2003 estimations the value of services is 250 billion euros annually.¹³ Projections say that there are expectations of further growth and that there are “likely to reach even higher levels as revenues from broadband and mobile services begin to rise.”¹⁴

¹⁰ Nihoul P., Rodford P., *EU electronic communications law : competition and regulation in the European telecommunications market*, Oxford ; New York : Oxford University Press, 2004, page 2

¹¹ *Ibid*, page V

¹² Mathijsen P.S.R.F., *A guide to European Union law*, London : Sweet & Maxwell 2004, 8th ed., page 251

¹³ According to date from Nihoul P., Rodford P., *EU electronic communications law : competition and regulation in the European telecommunications market*, Oxford ; New York : Oxford University Press, 2004

¹⁴ Nihoul P., Rodford P., *EU electronic communications law: competition and regulation in the European telecommunications market*, Oxford; New York: Oxford University Press, 2004, page vii.

The social and political importance of audiovisuals is often used to justify regulation. The battlefield of this type of reasoning is mixed with arguments that vary from emphasizing the growing need for regulation of content on the one side of the spectrum, to the more technical aspect problems on the other side of the spectrum. Barendt distinguishes three types of social and political rationales behind the regulations¹⁵. The first rationale emphasizes the role of the government in preventing possible chaos in the ether and ensuring “protected transmission capabilities for individual broadcasters.”¹⁶ The second rationale underlines the scarcity of available transmission possibilities and argues that the task of the governments is to ensure interference-free dissemination and reception. The third emphasizes the special social and democratic importance of the audiovisual sector. The German Federal Constitutional Court (BVerfG) decision in “Third Television case”¹⁷ is a good example of this kind of reasoning.¹⁸ BVerfG stated that broadcasting freedoms serves “to secure the freedom of the individual to influence the free formation of individual and public opinion. Broadcasting is both a “medium and a “factor” in the constitutional protected process of free opinion formation.”¹⁹

The third category of arguments is constitutional arguments. The audiovisual services touch several constitutional categories which justify the need for regulation. In “Broadcasting

¹⁵ The rationale behind regulation broadcasting is strongly connected and influenced with special protection provided to speech. Although theories of free speech are not part of this thesis it is good to mention four traditional reasons for protection of free speech according to W. Hoffmann-Reim in his “Regulating media : the licensing and supervision of broadcasting in six countries”, page 267:

1. to facilitate individual self-fulfillment
2. to advance knowledge and discovery of truth
3. to promote democracy through a process of self-governing society and check abuses of power by public officials
4. to expedite the functioning of society, especially by assuring a proper balance between conflict and consensus, allowing social change, and fostering social integration

¹⁶ Hoffman-Reim W., *Regulating media : the licensing and supervision of broadcasting in six countries*, New York : Guilford Press, c1996, page 269

¹⁷ Television III Case (1981), 57 BVerfGE 295

¹⁸ According to Levy, German concept of regulating broadcasting can be called “broadcasting constitutionalism”

¹⁹ Kommers D.P., *The constitutional jurisprudence of the Federal Republic of Germany*, Durham, N.C. : Duke University Press, 1997, page 408 and 409

Law and Fundamental Rights” Smith²⁰ defines four main categories of constitutional guarantees important for audiovisual sector. First deals with right to property and right to free economic initiative. Second type of constitutional provisions guarantees freedom of speech and expression. The third one provides equality amongst the citizens and forth seeks “to ensure that individuals have access to the basic skills necessary for effective social and political expression”²¹

The legal approaches to the audiovisual field are diverse and the number of books and articles on audiovisual sector at the level of the European Union is considerable: from examination of the public policy in the area of broadcasting in Levy’s skeptical “Europe’s Digital Revolution – Broadcasting regulation, the EU and the nation state”²², Nitsche’s examination of the role of public interest in competition analysis in “Broadcasting in the European Union: the role of public interest in competition analysis”²³, legal analysis of EU competition legislation in Garzaniti “Telecommunications, broadcasting and the internet – EU competition law and regulation” or Nihoul’s and Rodford’s in “EU electronic communications law: competition and regulation in the European telecommunications market”²⁴. Since my approach is a constitutional one, the work of Smith in “Broadcasting law and fundamental rights”²⁵ was of substantive help. Although Smith’s “Broadcasting law and fundamental rights” is a comparative study of broadcasting regulation in four western European countries the chapters on constitutional tools of analyzing trade and on constitutionalisation of the European Union was of high of importance for this thesis. For the general theory of constitutionalism and on concept of European Economic Constitution I used

²⁰ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997

²¹ Ibid, page 97

²² Levy D.A., Europe’s Digital Revolution Broadcasting regulation, the EU and the nation state, New York : Routledge, 1999

²³ Nitsche I, Broadcasting in the European Union : the role of public interest in competition analysis, The Hague, T.M.C. Asser Press, c2001

²⁴ Nihoul P., Rodford P., EU electronic communications law : competition and regulation in the European telecommunications market, Oxford ; New York : Oxford University Press, 2004

²⁵ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997

inspiring and seminal Maduro's book: "We the Court: The European Court of Justice and the European Economic Constitution"²⁶.

The purpose of this thesis is to analyze the rules, contained both in the Community legislation and in the practice of the European Court of Justice relevant to the status of audiovisual services and to find out how audiovisual services are used to widen the scope of Community "market rules" and how this affects the process of constitutionalisation of the European Union.

The first chapter will introduce the concept of traditional constitutional tools of the trade and provide the general theoretical framework for analyzing the phenomena of constitutionalisation in the European Union. The second chapter will deal with the current status of the regulation of content and technical aspects of audiovisuals at the Community level and will analyze legislative proposal of the new "Audiovisual media services" Directive. The third chapter will analyze the work of the European Court of Justice in the process of expanding the powers of the Union, especially in the field of free movement of services and in regulating content in audiovisual sector and how the rulings of the ECJ were used to "constitutionalize" the European Union. Finally, the conclusion will give the overview of the analyzed materials, answer whether the European Union rules in audiovisual media sector fall within the proposed model of constitutionalisation and whether and in what extent they helped in "constitutionalisation" of European Union.

²⁶ Maduro MP, *We the court : the European Court of Justice and the European Economic Constitution : a critical reading of Article 30 of the EC Treaty*, Oxford : Hart Pub., Evanston, Ill., USA,

“Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements, which first create a de facto solidarity.”

Robert Schuman on May 9th, 1950 (Schuman doctrine)

2. Constitutional law without constitutional politics: constitutional tools of trade and theory of European constitutionalism

In order to approach to the issue of constitutionalisation in the European Union first we must examine the status of audiovisual media in constitutions of the European countries, then explain the evolution of the European legal order and introduce the concept of “traditional” constitutional tool for trade. After examining the place of traditional constitutional tools for trade in the legal framework of the European Union, the second part will focus on the theories of constitutionalism and explain the notion of low intensity constitutionalism.

2.1. Audiovisual media services and European legal order

The majority of European constitutions are silent about audiovisual media. A close look in the European constitutions will show that they don’t set out detailed provisions governing the regulation of radio and television.²⁷ The rationales behind these are various and go from the fact that in the time of adoption radio and television were non-existing to those that seek explanation in the fact that at the time of adoption economic, social and cultural status of audiovisual media was different. The fact that most Constitutions did not have clear provisions about audiovisual media “forced judges to make creative use of a number of

²⁷ Exceptions are the Constitution of Portugal which in Article 38 (5) stipulates that the state is to ensure that there is a functioning public radio and television service and the Basic Law of Germany which in Article 5(1) states that: “Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed.”

generalized provisions applicable to the wide spectrum of activities.”²⁸ On the Community level when in 1973 the first case considering broadcasting arose the ECJ was confronted with the clear lack of provisions about audiovisual services, it used and widen the free movement rules of the EC Treaty in order to solve the legal dispute and establish it’s own competence

The early European Community was defined as a primarily economic community with the aim of furthering economic integration of the Member States and the regulatory powers of the Community in the field of culture were limited. The Treaty establishing the European Economic Community (EEC Treaty) of 1957 was set up on four basic economic freedoms: free movements of goods, persons, capital and services. The corner stone of these freedoms is based on Article 23 of the EC Treaty which represents the general rule on the freedom of movements of goods.

Article 23 of the EC Treaty states:

1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Article 25 and of Chapter 2 of this title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

We will see that through evolution of the European Community/Union legal order “the extent of regulatory powers left to Member States largely depends on the scope given to Article 23.”²⁹

²⁸ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997, page 95

²⁹ Maduro MP, We the court : the European Court of Justice and the European Economic Constitution : a critical reading of Article 30 of the EC Treaty, Oxford : Hart Pub., Evanston, Ill., USA, page 1

Freedom to provide and receive services across national boundaries is granted in the EC Treaty in Chapter 3, from Article 59 to Article 66 (now from Article 49 to Article 55). These freedoms accompanied with Community competition rules were used to widen the role and competence of the Union when it was realized that in many areas, including the audiovisuals, the simple line between “national” and “international” or “economic” and “cultural” activities can not be drawn easily.

The further boost in expanding the competences of the Union came with the Treaty on European Union of 1992. The Treaty on European Union added new competences to the Union including those in the cultural field. Article 3(p) of the Treaty states that Community actions will contribute *“to education and training of quality and to the flowering of the cultures of the Member States”* and new Article 151 was added which deals with cultural matters. Smith concludes: “Despite its initial emphasis on economic relations the European Community has consequently become closely involved in cultural matters and has developed its own cultural agenda.”³⁰

In the case of broadcasting the first major blow for the bigger involvement of the European Union was 1974 Saatchi decision of the ECJ in which the Court found out that *“the transmission of television signals, including those in the nature of advertisements comes, as such, within the rules of the treaty relating to services.”*³¹ The technical revolution of transmission techniques of the 1980s combined with liberalization of the national market and the increase of the economic importance of the broadcasting gave strong impetus toward a more active role of the Union.

The second important step toward more involvement of the Union was the adoption of the “Television without frontiers” directive of 1989 which set up the foundations for cross-

³⁰ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997, page 93

³¹ 155/73 Saatchi, 1974, ECR 1974, 409

European television services market. This directive “limits the ability of Member States to require that foreign broadcaster services comply with domestic program requirement.”³²

From the examination of legal development in the sphere of audiovisual services so far we can conclude that the stronger involvement of the EU was achieved in several steps:

- a) by opening up national markets through implementation of the 1989 Television Directive;
- b) by encouraging development of co-operation between players from different EU countries and
- c) by ensuring that no operator is in contravention of the Treaty competition rules.

Speaking about the nature of the Union’s policy in audiovisual sphere Smith rightfully concludes that the approaches taken by the European Community/Union in the area of audiovisual services are colored by liberal or interventions philosophies which inevitable produce tension.

The last spike in a legal trident of Community powers in audiovisual sector is competition provisions. Competition legislative plays important role in the audiovisual media sector. According to “The A to Z of Audiovisual and Media Policy of the Directorate General for Informational Society and Media”³³ there are three major instruments of competition regulation in the EU:

- a) antitrust law that eliminates restriction agreements on competition and abuse of the dominant position on the market
- b) merger control that prevents excessive concentration and

³² Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997, page 93

³³ The A to Z of Audiovisual and Media Policy of the Directorate General for Informational Society and Media, http://ec.europa.eu/comm/avpolicy/info_centre/a_z/index_en.htm (accessed on March 11, 2007), section Competition and Media

- c) monitoring state aid granted by the Member State in order to prevent that “such measures do not distort competition in the Common Market”³⁴

For the audiovisual sector several competition provisions are very important. Article 37 (now Article 31) states that: “*Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.*”

Article 85 (now Article 81) prohibits agreements between undertaking and concerned practices which “*may affect trade between Member States and which have as their object or effect prevention, restriction or distortion of competition within the common market*” Article 85 (3) in conjunction with Article 89 give power to Commission “to exempt any agreement from these rules, if it contributes to improving the production or distribution of goods or if it promotes technical or economic progress.”³⁵

Article 86 (now 82) prohibits abuse by one or more undertakings of a dominant position within the Common Market or a substantial part of it.

Barendt emphasizes the importance of Article 90 (now Article 86) for the legal position of broadcasting. The first paragraph of the Article 86 prohibits “the enactment or maintenance of any measure concerning public undertaking with special rights which are contrary to the non-discrimination and competition provision of the Treaty.”³⁶ The second paragraph of Article 86 states that the “*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 does not obstruct the performance, in law or in fact, of the*

³⁴ The A to Z of Audiovisual and Media Policy of the Directorate General for Informational Society and Media, http://ec.europa.eu/comm/avpolicy/info_centre/a_z/index_en.htm (accessed on March 11, 2007) section Competition and Media

³⁵ Barendt E.M., *Broadcasting law: a comparative study*, Oxford : Oxford University Press, 1993, page 140

³⁶ “The interest of the Community” part of the provision of the Article 90 (now 86) was not part of the original Article 90 of the EEC Treaty. The original version was limiting the power of the Community.

particular tasks 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.” This means that audiovisual media can be excluded from the exclusive national competence and the regulatory power can be transferred to the Community/Union. ECJ used the provisions stated in Article 90 (now 86) to extend its competences and squash the monopoly of the national broadcasters in cases C-155/73 Saatchi or C-260/89 Elliniki Radiophonia Tileorassi Anonimi Etairiasuch. Barendt concludes: “Community competition law will undoubtedly have a greater impact in the future. For example, the Community Merger Regulation may apply when the control of broadcasting companies changes hands.”³⁷

2.2 Traditional constitutional tools of the trade and the European Union

The previous overview is leading us to explore what Smith is calling “constitutional tools for the trade” and to see whether the European legal framework is provided with necessary legal tools for regulating trade. Smith distinguishes “four main categories of constitutional provisions which have a potential bearing on organization of the audiovisual media”³⁸ those which concern a) property and free economic initiative, b) speech and expression, c) equality and d) access to the basic skills necessary for effective social and political participation.

a) Right to property and right to free economic initiative

The right to property and right to free economic initiative are protected at the Union level through primary legislation of EC Treaty provision and ECJ activities. Part Three of EC Treaty on Community policies (especially Title I and III) guarantees free movement of goods and services and freedom of establishment within the European Union and “serves to protect

³⁷ Barendt E.M., *Broadcasting law: a comparative study*, Oxford : Oxford University Press, 1993, page 143

³⁸ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997, page 95

economic activity with an inter-state dimension from national restraint.”³⁹ ECJ affirmed right to property and to trade as fundamental rights to be respected in European Community law in *Hauver v. Land Rheinland – Pfalz* case from 1979.⁴⁰

b) Freedom of speech and expression

The European Union doesn't have its own charter on fundamental rights and civil liberties but the freedom of expression within the scope of Article 10 of the European Charter on Human Rights and Civil liberties is recognized as a fundamental human right through judiciary activity of the ECJ.

c) Principles of equality and proportionality

Primarily legislation of the EC Treaty covered only certain forms of discrimination such as gender discrimination and discrimination of workers. Gender discrimination and promoting gender equality is stated as a principle of the Community in Article 2 and more extensively covered in Articles 137 and 141 of the EC Treaty. Prohibition of the discrimination of the workers is stated in Article 39(2) and regulatory powers of the Council considering discrimination are listed in Articles 40, 41 and 42 of the EC Treaty. Through activity of the ECJ principle of equality was recognized as one of the general principles of the Community law. According to ECJ activities “the principle of equality imposes upon the legislative body a duty to ensure the statutory provisions do not draw arbitrary or unreasonable distinctions between individuals and groups.”⁴¹

Smith is defining principle of equality as “generally understood to require that restraints on individual action be suitable tailored to achieve their objective and not to be excessive.”⁴² EC Treaty considers proportionality as one of general principles of the Community and in Article 5(c) states: “Any action by the Community shall not go beyond

³⁹ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997, page 95

⁴⁰ 44/79, *Hauer v. Land Rheinland-Pfalz*, ECR 1979, 3727

⁴¹ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997, page 96

⁴² *Ibid*

what is necessary to achieve the objectives of this Treaty.” The European Court of Justice also considers proportionality to be general principles of the Community law and this is affirmed by the fact that proportionality test is used in the practice of the Court.

d) The access to basic skills necessary for effective social and political participation

Article 3(q) of the EC Treaty states the as the task of the Community to contribute: “*to education and training of quality and to the flowering of the cultures of the Member States*”. The policy powers of the Union in this field are not directly enforceable and they are designed only to “support and supplement” Member States action in these fields.

The stated provisions are phrased in general terms which gives space for judiciary interpretation “and the construction of quite divergent regulatory frameworks for the broadcast media”⁴³

2.3. Theory of Constitutionalism

The European constitutionalism has big and profound impact on the Union, on policies and functions of the Union. European constitutionalism can be characterized as: “the process by which the European Community treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private within the sphere of application of EC law.”⁴⁴ The constitutionalism is what differentiates the Community from other transnational legal systems organizations.

Constitutionalism transformed and expand community legal framework (namely EC Treaties) from legal agreements between national states to the legal agreements binding to individuals also. Seminal ECJ case “Van Gend en Loose” presumed in unprecedented manner that there is direct relation between European Community and “the peoples of Europe”. From

⁴³ Smith R.C., “Broadcasting laws and Fundamental Rights”, Oxford : Clarendon Press, 1997, page 98

⁴⁴ Stone, A., Constitutional Dialogues in the European Community”, European University Institute Working Papers, RSC No. 95/38, 1

that moment new autonomous legal order was endowed with sovereign rights of constitutional power and power of constitutionality. The clear and tangible result of the process of constitutionalisation is that allowed “the expansion of the political ambitions inherent in the process of European integration.”⁴⁵

European constitutionalisation is not *heavy* and *thunderous*, rather we can describe it as “silent” and “invisible” in sense that “it is not necessary for the actors fully to perceive or articulate its impact”⁴⁶. The extent of constitutionalism was limited, in Maduro’s words, by “instrumental relation to an intergovernmental political community. In other words, the EU’s constitutional authority is derived from the member states.”⁴⁷

The process of “transformation of the Europe”⁴⁸ in Weiler’s term enabled Europe “to lay claim to the normative and political authority expressed in the doctrines of supremacy⁴⁹ and direct effect and leading to its emergence as a community of open and indeterminate political goals.”⁵⁰ According to Maduro, growth of the competences, shift to more majoritarian decision making and more degree of EU control over those policies that remained on the level of Member States are the three key elements of the “transformation of Europe”. “Europeanization” is not similar to the process of constitutionalisation of the European Union but the process of “transformation of Europe” in which European Union laid claims for the normative and political authority opened the way for the claim to the power of constitutionality.

⁴⁵ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), International Journal of Constitutional Law, 332-356, page 337

⁴⁶ Weiler, J.H.H., The constitution of Europe : "Do the new clothes have an emperor?" and other essays on European integration, Cambridge : Cambridge University Press, c1999, page 223

⁴⁷ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), International Journal of Constitutional Law, 332-356, page 333

⁴⁸ Maduro will name this process “Europeanization”

⁴⁹ See 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen, ECR 1963, 1

⁵⁰ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), International Journal of Constitutional Law, 332-356, page 334

2.3.1. Three views on European constitutionalism according to Maduro

The supranational character of European Union opens up several questions on the nature of constitutionalism in the European Union. According to Maduro, the answer to the question on the nature of supranational constitutionalism is strongly connected with the way in which we can conceive the constitutionalism as a concept, in other words from the way in which constitutionalisation is contextualized. Maduro clearly distinguishes three separate and distinct views on European constitutionalism:

a) *constitutionalism as limit to power* defined as “set of legal and political instruments limiting power”⁵¹

b) *constitutionalism as an expression on polity* defined as “repository of the notions of the common good prevalent in a certain community and as an instrument for organizing power in pursuit of that common good”⁵²

c) *constitutionalism as deliberation* by creating “a deliberative framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all”⁵³.

The legal analysis of the audiovisual services regulation and the European Court of Justice activities in the field of audiovisual services will show how main players in the supranational arena (namely ECJ and the Commission) are applying “the deliberation concept” of constitutionalism which is less problematical and more “silent” for the Member State in order to push forward constitutional concepts (such as the nature of European polity, the values on which the polity is organized or the further restrictions on regulatory domains traditionally attached to the State sovereignty). Maduro’s three sided face of constitutionalism will lead us to the conclusion that the aim of the European constitutionalism is to support

⁵¹ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), *International Journal of Constitutional Law*, 332-356, page 333

⁵² Ibid

⁵³ Ibid

normative supremacy of Community rules and preventing states from disregarding the interest of the broader European Community.

2.3.2. Geology of European Constitutionalism according to Weiler

We can distinguish several periods in history⁵⁴ of European constitutionalism. First one was of “the period of concrete steps” or “period of doctrine” in ECJ was struggling in interpreting the Treaties, in solving concrete legal problems challenged in the same time with the number of different legal doctrines. Maduro is calling this period “period of low-intensity constitutionalism” and it will be subject of particular interest in the next subchapter.

Second period is “the period of intensive judicial activity” in which the aim was “to take disparate legal doctrines, to baptize them as “constitutional”, and to put them together with the bold assertion that the whole was greater than the parts – that the constitutional framework had come into being long before the Court was willing to use the vocabulary, or, arguably, even to think in these terms.”⁵⁵

Third period is “the period of interdisciplinary approach to the constitutionalism”. Weiler is especially interested in approach of the political science to the constitutionalism and vice versa. He distinguish two particularly important approaches of the political science to the constitutionalism; one approach explores the classical concerns of the political science of the state contexts such as regulatory state, federalism, aggregation of power within the new framework of EU and the process of constitutionalisation. Second one places the constitutionalism as the object of its research. In Weiler’s words “The European Court of Justice, its doctrines and its interactions with other actors – Community institutions, national courts, the lawyers, etc. became a central concern to political science with extraordinary

⁵⁴ Weiler will call this not history of European Constitutionalism but rather geology of the European Constitutionalism

⁵⁵ Weiler, J.H.H., *The constitution of Europe : "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge : Cambridge University Press, c1999, page 216

rewarding results.”⁵⁶ In the same time lawyers and legal scholars “discovered” the social science with same success which added the new, more interdisciplinary, dimension in legal analysis of EU legal institutes. The multidisciplinary approach became dominant in the constitutional discourse about European Union, the strong frontiers can not be easily drawn and scholars interested in constitutionalism in the European Union are the “nomads” of legal science who easily pass over the traditional boundaries between legal “science” and other sciences.

2.3.3. The legitimacy of the European Court of Justice

The constitutionalisation of the European Union is closely connected and interlinked with the European Court of Justice and the question of the legitimacy of the ECJ. We already saw that the first period of the European constitutionalism or “the period of doctrine” is strongly connected with the activities of the ECJ. In order to constitutionalize its own legal order the ECJ first was to legitimize itself in front of Member States and national courts. Maduro distinguish four important steps: to construct Community law as the Community’s own legal system which was done with introducing notions of direct effect and supremacy; secondly, the “subjectivation” of the Treaties which meant to that Court moved from a state-based interpretation of the Treaties to an individual-based interpretation; thirdly, the cooperation with the national court; and fourthly the Court’s co-ordination of its efforts and strategy with those of the European Commission. The analysis of the cases considering audiovisual services at the level of the European Union will show how important the European Court of Justice was in widening Community provisions to the audiovisual sector.

⁵⁶ Weiler, J.H.H., *The constitution of Europe : "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge : Cambridge University Press, c1999, page 228

2.3.4. On low-intensity constitutionalism

On previous pages we distinguished that constitutionalism can be seen as a “deliberation”, more precisely - the role of constitutionalism is to create “a deliberative framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all”⁵⁷. The deliberative role of EU constitutionalism is strongly connected with the economic nature and intergovernmental structure of the early Community and it’s strongly connected with “the period of concrete steps” when European Union began to claim the normative and political authority that would be expressed in the doctrines of supremacy⁵⁸ and direct effect and would lead to “the emergence as a community of open and indeterminate political goals.”⁵⁹

This subchapter will explain the notion of low-intensity constitutionalism in more details since it is strongly connected with expanding regulatory powers of the Union in the field of audiovisual media services.

The constitutionalism on the level of the European Union emerged from the process of constitutionalisation of the founding treaties and through the process of integration as it described by Robert Schuman: “Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements, which first create a *de facto* solidarity.”

In the period of low intensity constitutionalism the nature of political process was still intergovernmental. Weiler is proving this when he states that “the success of the constitutional construct would depend not only, or even primarily, on the utterances of the European Court but on their acceptance by the national actors, mainly courts, and principle

⁵⁷ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), *International Journal of Constitutional Law*, 332-356, page 333

⁵⁸ See 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECR 1963, 1

⁵⁹ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), *International Journal of Constitutional Law*, 332-356, page 334

national courts.”⁶⁰ The major distinctions of the period of low-intensity constitutionalism were limitation to the “adoption of the instruments of constitutionalism necessary to limit and, at the same time, legitimate the normative and political authority claimed.”⁶¹ This period was more traditional in the sense that the Court was working out its contours, examining the reach, trying to understand its rationale and its legal significance.

The process of low-intensity constitutionalisation is characterized by several elements. This process was not product of “constitutional moment” in Schmittian sense but “a gradual judicial and political development that was often constructed by the reference to national constitutional sources.”⁶² This bottom-up approach was strongly influenced by the intergovernmental nature of the Community especially national courts, business litigants, European Commission. The decisions of the ECJ in the audiovisual sector are a good example of bottom-up approach since most of the cases involved references for a preliminary ruling by the national courts and powerful business litigants such as national broadcaster companies or transnational cable companies. This bottom-up approach used quasi-constitutional instruments such as treaty revisions, constitutional interpretation by the ECJ to expended power of the Union.

Since not product of “constitutional moment” there was no substantive difference between the legislative and constitutional process. Both were strongly dominated and influenced by the intergovernmental nature of the Union. This body without a soul not reflected “a social or political contract that would empower and organize the Union so as to promote good or to resolve conflicts between competing vision of the common good”⁶³ but

⁶⁰ Weiler, J.H.H., *The constitution of Europe : "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge : Cambridge University Press, c1999, page 221

⁶¹ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), *International Journal of Constitutional Law*, 332-356, page 334

⁶² *Ibid*, page 340

⁶³ *Ibid*

was consisted of various constitutional doctrines with the main goal to justify and legitimate the normative authority of the Union.

In the Maduro's split of three kinds of constitutionalism, low intensity constitutionalism was not "in search of polity" and in rare occasions when it was mentioning "the polity" it was in a manner that was upholding the Member States sovereignty. The term low intensity constitutionalism, now we can see, was used because of the fact that "it was not linked to the creation of a European polity but is limited to the control of European and national forms of power."⁶⁴

Low intensity constitutionalism was one of the limited goals in the sense that it was complementary to the Member State constitutions and to the intergovernmental structure of decision making on the level of European Union. But when this limited and silent constitutionalism encroached to the sovereign rights of the Member State it was supplemented by the appeal to the protection of freedom and private autonomy in the face of power. In the case of audiovisual sector we will see exactly this.

Low intensity constitutionalism is progressively challenged both by the extent and the nature of the accumulated powers of the Union. Schuman's de facto solidarity is not capable "of adapting itself to an emerging polity of open-ended goals whose policies have increasingly redistributive effects and in which the political dynamics increasingly evade the control of the state."⁶⁵

2.3.5. The challenge to the process of constitutionalisation of the European Union

Although outside of the scope of the research in this paper there is a clear need to map out challenges to the process of constitutionalisation. We can outline two main reasons for doing this. First reason is a broader one and helps and to see the extent of the

⁶⁴ Maduro MP, "The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism", 2005, 3(2-3), *International Journal of Constitutional Law*, 332-356, page 342

⁶⁵ *Ibid*, page 343

problems/challenges that European Union is facing in the process of constitutionalisation. Second one is more practical and more close to the aim of this paper because tracing out the challenges will help us in finding those institutions and process that are against or skeptical toward the concrete steps that will lead to the constitutionalisation of the European Union. In next chapters we will see how some of the challenges listed here were part of the long “battle” of the Union in processing of widening its own competences in audiovisual sector.

Weiler is defining several types of constitutional challenges:

- a) challenges from the collectivity of the states
- b) challenges from the individual Member states⁶⁶
- c) challenges from the constitutional actors within the Member States⁶⁷
- d) challenges from new constituencies within the Court of Justice⁶⁸ and finally
- e) challenges from the public opinion⁶⁹

⁶⁶ The case of France and the Netherlands rejected the proposal of the Constitution of the EU is the clear example

⁶⁷ See Solange I and Solange II cases of the BVerfG

⁶⁸ Weiler is ephasazing the role of the Advocates General

⁶⁹ Weiler is summoning this when he states that: “Europe is no longer part of concensus and non-partisan politics in many Member States” (Weiler, J.H.H., The constitution of Europe : "Do the new clothes have an emperor?" and other essays on European integration, Cambridge : Cambridge University Press, c1999, page 231)

“The regulatory framework could serve to a substantial extent as a model for further rules to be adopted in these other sectors.”

Koen Lenaerts,

Judge of the Court of Justice of the European Communities

3. From Green Papers to Audiovisual Media Services Directive: Regulation of the audiovisual media services

There are two fundamentally levels of legislation in the European Union: level of primary legislation and secondary level of legislation. Primary level legislation is concentrated in the provisions of the EC Treaty. The primary level of legislation covers audiovisual sector through several separate legal areas: through rules of freedom of movement of services, powers of the Union in the culture field and by general competition rules. Relevant provisions for the regulation of the audiovisual sector in the EC Treaty sector were already discussed in the second chapter.

In this moment is it important to emphasize that the regulatory powers of the European Community / Union were limited both in the aim and in the scope: to create common market. The main instruments for achieving the goal were four basic freedoms of movements. For regulating audiovisual sector the freedom of movement of services is particularly important. EEC Treaty established the freedom to provide and receive services across national boundaries in Chapter 3 of the Treaty from Article 59 to Article 66 of the EEC Treaty (now from Article 49 to Article 55 the EC Treaty).

Maastricht Treaty of 1992 established, for the first time, specific competence in the field of culture. Article 3(p) of the Maastricht Treaty states that Community actions will contribute *“to education and training of quality and to the flowering of the cultures of the*

Member States”. New added Article 151 deals with cultural matters was added but the wording in the provisions is “rather vague and, at best, aspirational.”⁷⁰

The Protocol on the System of Public Broadcasting attached to the Treaty of Amsterdam of 1997 provides the legal background for funding public broadcasting unless it “*does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest.*”

European Union used general competition rules, especially those of Articles 37, 85, 86 and 90 of the EC Treaty for broadening powers of the Union beyond the borders imposed by the Treaties. On the level of the primary legislation there are number of articles that are covering competition.

Article 37 of the EEC Treaty (now Article 31 of EC Treaty) states that: “*Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.*”

Article 85 of the EEC Treaty (now Article 81 of EC Treaty) prohibits agreements between undertaking and concerned practices which “*may affect trade between Member States and which have as their object or effect prevention, restriction or distortion of competition within the common market*” Article 85 (3) in conjunction with Article 89 give power to Commission “to exempt any agreement from these rules, if it contributes to improving the production or distribution of goods or if it promotes technical or economic progress.”⁷¹

Article 86 of the EEC Treaty (now 82 of EC Treaty) prohibits abuse by one or more undertakings of a dominant position within the Common Market or a substantial part of it. The Article 86 of the EC Treaty will be especially important for legal position of the

⁷⁰ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000, page 167

⁷¹ Barendt E.M., Broadcasting law: : a comparative study, Oxford : Oxford University Press, 1993, page 140

broadcasting as we will see when analyzing the case-law in the forth chapter. The first paragraph of the Article 86 prohibits “the enactment or maintenance of any measure concerning public undertaking with special rights which are contrary to the non-discrimination and competition provision of the Treaty. Second paragraph of the Article 86 states that the *“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 does not obstruct the performance, in law or in fact, of the particular tasks 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.”*

The founding treaties of the primary legislation did not contain any specific reference to the broadcasting but in the time of adoption of Maastricht Treaty it was well established that broadcasting came within the sphere of EC Treaty. As it was already said it was in 1974 in C-155/73 “Italy v. Sacchi” case when ECJ decided that broadcasting was covered by the EEC Treaty. “The decision in Sacchi clearly brought broadcasting into European Community competence, by acknowledging that, to the extent that broadcasting had an economic or commercial function, it had a role to play in the competition of the internal market.”⁷²

The secondary level legislation is richer and more diverse in the approaches to the audiovisual media services and it is the aim of this chapter to analyze the rules found in the secondary legislation. The sector specific regulation, as it was previously mentioned, can be separated in rules that are dealing with content and those that are dealing with technical issues.

⁷² Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000., page 170

3.1. Content regulation

Content is regulated through the “Television without Frontiers” (TWF) Directive. TWF Directive was adopted in 1989 and amended for the first time in 1997. The digitalization of the broadcasting changed the reality of the European broadcasting scene and in 2005 Commission proposed new revision of the Directive.

The TWF Directive lays down the minimum standards that the content regulation of television broadcasts by the member States must guarantee. This was introduced in order to ensure a “free market” in broadcasting services: a single European market with common legal rules facilitating the cross-border provision of services without any legal obstacles. “The directive thus seeks to facilitate broadcasting across European frontiers by prescribing similar content rules in a number of areas, and providing that no European country may restrict retransmission or reception of broadcasts emanating from another EU country for reasons falling within the scope of the directive.”⁷³ TWF is clearly in the scope of the “constitutionalism of deliberation” which creates “a deliberative framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all”⁷⁴. In the same time TWF Directive do not use the thunderous language in promoting big goals, the aims of the Directive, at the first sight, are modest and are in accordance with intergovernmental nature of the Community, the aim of the Directive is to harmonize and liberalize the internal market with common set of rules.

In order to fulfill its goals TWF Directive introduced the “country of origin” principle which means that broadcasters only have to comply with the national law of the Member State in which they are located. “Once this compliance is verified, a broadcast that is transmitted to another Member State shall not be subject to secondary control under the

⁷³ Television across Europe: regulation, policy and independence, Budapest : OSI/EU, 2005, page 102

⁷⁴ Maduro MP, “The Importance of being called a constitution: Constitutional authority and the authority of constitutionalism”, 2005, 3(2-3), International Journal of Constitutional Law, 332-356, page 333

national law of the receiving State. The retransmission of the broadcast can only be suspended by this State in exceptional circumstances.”⁷⁵ The intergovernmental nature of the Community is supported by the “country of origin” principle but the ECJ used this principle in several “Commission v. Belgium” cases to limit the power of the national broadcaster regulatory bodies in regulating interstate movement of television services.

The main objective of the directive was a mixture of commercial interests and patronizing of culture: to facilitate the growth of a strong European broadcasting industry that could provide a counterweight TV programs from the United States which were perceived as a threat to European culture.

The TWF Directive main provisions concern several important aspects:

3.1.1 “Listed” events of major importance for society

“Listed” events of major importance for society provision in the TWF Directive enables that the Member States can agree on designated (“listed”) events which free access to the broadcasts is guaranteed. The aim of these provisions is “to ensure public access to broadcasts of major importance to society.”⁷⁶ The list consists of the major sport events (the “listed events” list covers only national team matches) and cultural happenings. The ECJ is also active in explicating the notion of listed events in case such as T-33/01 “Infront WM AG v Commission of the European Communities”⁷⁷

3.1.2. Quota regulations

Quota regulations are provided by the TWF Directive in favor of European works and works of independent producers. “These rules aim to ensure diversity of programming and to promote television production in Europe.”⁷⁸ The question of quotas is still a controversial one

⁷⁵ Television across Europe: regulation, policy and independence, Budapest : OSI/EU, 2005 page 102

⁷⁶ Ibid, page 114

⁷⁷ T-33/01, Infront WM AG, ECR 2005, 0

⁷⁸ Television across Europe: regulation, policy and independence, Budapest : OSI/EU, 2005 page 114

that rises whether there is a need or desirableness of these provisions. De Witte explains that rationales behind was motivated by both industrial and cultural concerns.⁷⁹ Article 4 of the Directive provides that broadcasters shall dedicate the “majority proportion” (interestingly Directive is not specifying the meaning of the term which is going to increase the activity of the ECJ in audiovisual sector) of the airtime reserved for drama and documentary programming to European works excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. According to the Directive work is considered European if it is *“made exclusively or in co-production with producers established in one or more Member States by producers established in one or more European third countries with which the Community has concluded agreements relating to the audiovisual sector, if those works are mainly made with authors and workers residing in one or more European States.”* The quota for independent producers establishes a requirement of 10 per cent in terms of airtime or programming budget for European works created by producers who are not associated with any broadcaster.

3.1.3 Advertising and sponsoring

The regulation of advertising and sponsoring is included in detailed way in the TWF Directive. These provisions can be classified in two categories: the “qualitative rules” and “quantitative rules”. Qualitative rules of the TWF Directive regulate the substance of advertising. Quantitative rules of the TWF Directive regulate the insertion of advertising between or during programmes and are specifying the maximum duration of advertising like in C-245/01 “RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk”⁸⁰. The Directive requires that “advertising content and editorial content of a television programme must be clearly separated by visual means.” There are detailed

⁷⁹ See De Witte, B., “The European Content Requirement in the EC Television Directive – Five Years After” in Barendt EM (ed) The Yearbook of Media and Entertainment law 1995 (Oxford University Press, 1995)

⁸⁰ C-245/01, RTL Television, ECR 2003, I-12489

provisions on the duration and insertion of advertising and teleshopping spots. TWF includes general standards of content regulation of advertising and sponsoring. “Advertising shall not prejudice respect for human dignity. Advertising shall not be misleading and shall not prejudice the interests of consumers.” There is a restriction or ban for certain products (tobacco products, medicinal products and treatment or alcoholic beverages). Sponsoring is subjected to following restrictions: “A sponsor may not be granted any influence on the editorial content and/or the scheduling of a television programme, and the responsibility and the editorial independence of the broadcaster may not be affected. Unlike commercials, sponsoring is restricted to merely profiling the sponsor by means of promoting a particular television programme without giving any relevant incentives for consumption. The tobacco industry may not sponsor any television programme. Pharmaceutical and medical supply companies may act as a sponsor provided that their sponsorship only promotes the name or image of the company but no prescription drugs or medical treatments.”⁸¹ European Commission specified in interpretive communication⁸² how the new advertising and sponsoring techniques – such as split screen, interactive advertising and virtual advertising – are going to be interpreted in the light of TWF Directive. This communications specified that the TWF Directive provisions on hourly and daily duration of advertising shall apply in full to split screen advertising, or that virtual advertising and sponsoring techniques, such as the display of three-dimensional images on football grounds. The good example of this is the C-429/02 “Bacardi France SAS, formerly Bacardi-Martini SAS v Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and Girosport SARL”⁸³

⁸¹ Television across Europe: regulation, policy and independence, Budapest : OSI/EU, 2005, page 115

⁸² European Commission, Commission interpretative communication on certain aspects of the provisions on televised advertising in the “Television without Frontiers” Directive, C102/2, Brussels, 2004.

⁸³ C-429/02, Bacardi, ECR 2004, I-06613

3.1.4 The protection of minors

The protection of minors is guaranteed on two levels: by general protection measures and special protection in the field of advertising. TWF Directive calls in Article 22, 22a and 22b for measures “*to prevent minors’ physical, mental or moral development from being impaired.*” The TWF Directive clearly distinguishes between programmes that might seriously impair the development of minors and programmes that are likely to impair their development. Programmes that *might seriously impair* the development of minors are completely banned (broadcasts that involve pornography or gratuitous violence). Programmes that are *likely to impair* the development of minors are not totally banned from television but are subject to restrictions (mostly by scheduling). “*When such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.*” Decoding technologies can also be used when it is appropriate. Minor-specific advertising rules can be found in TWF Directive. This directive provides detailed regulation which prohibits, for example, advertisements depicting minors consuming alcoholic beverages or exploiting the special trust that they place in parents, teachers or other persons.

3.1.5 The right to reply

The right to reply is guaranteed to natural and legal persons by the Article 23 of the Directive. The Article provides “that there must be no unreasonable terms or conditions, hindering the exercise of the right of reply, and that it must be transmitted within a reasonable time, and at a time and in a manner appropriate to the offending broadcast.”⁸⁴

⁸⁴ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000., page 170

3.2. Technical regulation

Regulation of the audiovisual services can be achieved two folded: by regulating content or by regulating the technical features that are necessary for the transmission. The regulation of technical features is challenged by the digitalization of the broadcasting and while, according to Levy, “analogue broadcasting was characterized by limited channel choice, the need for the viewer to fit in with the schedulers, and a clear understanding that the television was simply a device for watching broadcasting programmes”⁸⁵ digitalization is bringing “undoubted technological convergence between the previously distinct technologies of broadcasting, computing and telecommunications.”⁸⁶ The “broadcasting” is taking step back to the “narrowcasting” and fragmentation of the market.

Two aspects of technical regulation are of particular importance: a) radio spectrum management for terrestrial broadcast transmission and b) digitalization and the problem of digital television gatekeepers that arose in the environment of digital television.

3.2.1 Radio spectrum management

The radio spectrum management, as it said in the introductory chapter is used as reason for interference of the State and regulating audiovisual sector. “Every terrestrial broadcast transmission uses airwaves and therefore requires regulation of the restricted capacities available.” Radio Spectrum Decision, adopted in the year 2002, encourages coordinated action of the Commission and the Member States in the negotiations on spectrum management. Although digitalization, in comparison to analogue transmission, allows up to ten times more channels to be broadcast on the same bandwidth it and reduce the limits on transmission, in the same time raises new challenges for the allocation of airwaves to broadcasting. According to Levy, the phenomenon strongly related with the digitalization

⁸⁵ Levy D.A., *Europe’s Digital Revolution Broadcasting regulation*, the EU and the nation state, New York : Routledge, 1999, page 3

⁸⁶ Ibid, page XV

such as the conditional access system, applications programming interface (API) and accompanying EPG, “will increase the opportunities for monopoly control and anti-competitive behavior”⁸⁷ and lead to reconsidering the nationally organized regulation. “Before digitalization the frequencies were already occupied by analogue channels. “Therefore digital terrestrial transmission can only be implemented to the detriment of the analogue technology upon which the broadcasters and viewers have so far relied.”⁸⁸ The question of transition to digital transmission and “switch-off” from analogue to digital transmission arose several important questions. “For instance, it should be ensured that consumers have enough information to become acquainted with all the possibilities of new digital terrestrial services and to adjust to the new transmission technology by purchasing digital set-top boxes.”⁸⁹ Although the European Commission issued guidance for member States in a Communication on digital switchover in 2004 specific EU measures are not envisaged. The European Commission issued the Communication on Accelerating the Transition from Analogue to Digital Broadcasting, “in which it concludes that it expects most broadcasting in the EU to be digital by 2010, and proposes a deadline of early 2012 for phasing out traditional analogue terrestrial broadcasting.”⁹⁰

3.2.2. Digitalization and the problem of digital television gatekeepers

The technical regulation of digital broadcasting is covered by the European Union framework for electronic communications⁹¹ which represents a “single, common set of rules

⁸⁷ Levy D.A., *Europe’s Digital Revolution Broadcasting regulation, the EU and the nation state*, New York : Routledge, 1999, page 14

⁸⁸ *Television across Europe: regulation, policy and independence*, Budapest : OSI/EU, 2005, page 108

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Framework Directive is defining giving electronic communications networks in Article 2(a) as: “transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.”

for all communications that are transmitted electronically.”⁹² The EU regulatory framework consists of the following instruments:

a) Framework Directive setting out the main principles, objectives and procedures for an EU regulatory policy regarding the provision of electronic communications services and networks.

b) Access and Interconnection Directive stipulating procedures and principles for imposing pro-competitive obligations regarding access to and interconnection of networks on operators with significant market power.

c) Authorization Directive introducing a system of general authorization, instead of individual or class licenses, to facilitate entry in the market and reduce administrative burdens on operators.

d) Universal Service Directive requiring a minimum level of availability and affordability of basic electronic communications services and guaranteeing a set of basic rights for users and consumers of electronic communications services.

f) Commission Competition Directive consolidating the legal measures based on Article 86 of the Treaty that have liberalized the telecommunications sector over the years.

The digitalization produces a more effective way of using transmission capacities but in the same time “introduces new risks to the pluralism of media contents.”⁹³ Digital

Electronic communications services are defined in Article 2(c) as:

“services normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services.”

From the definitions provided in the Framework directive we can distinguish three major elements of the electronic communications:

a) the electronic communications are regarded “as being closely connected with activities consisting in conveying, transmitting or routing.”

b) the electronic form of activity which means that the communications takes the form of an “signals” which is different from their original form

c) the notion of signals which can be understood as sound, image and data

⁹² The A to Z of Audiovisual and Media Policy of the Directorate General for Informational Society and Media on http://ec.europa.eu/information_society/policy/ecomm/index_en.htm – accessed on 25th of February 2007.

⁹³ Television across Europe: regulation, policy and independence, Budapest : OSI/EU, 2005, page 108

broadcasting creates opportunities for entrant to the market of the new players in addition to the existing to the existing players (cable, satellite, terrestrial network operators) but in the same time creates the possibility that new players, the digital broadcasters, monopolize the market, discriminate third parties “with respect to access to the particular technical service and in terms of conditions of payment”⁹⁴, disseminating their own content and become “digital gatekeepers”. According to “Television across Europe: regulation, policy and independence” possible “digital gatekeepers” includes:

- a) operators of multiplexing services;
- b) manufacturers of digital equipment (including set-top boxes);
- c) providers of application programming interfaces (API);
- d) providers of conditional access systems (CAS);
- e) providers of electronic programme guides (EPG).

“Multiplexing services ensure that digital broadcasting signals are packed into transmittable data containers. This packaging is carried out in digital play-out centers.”⁹⁵ Discrimination could occur in a way that their programs are bundled in digital packages against their will or “that additional service information to their programmes is not included in the multiplex signal.”⁹⁶ Multiplexing services is not regulated on the European level and such services only have to meet general competition law requirements (such as Article 82).

European practice shows that either viewers must have a digital television or the digital multiplex signal must be converted back into analogue signals by the recipient in order to view it with an analogue television set. This can be done either through an analogue/digital converter that is built into the television set or by an external decoder (set-top box). EU law does not impose rules on the decoders themselves. Instead, provisions are made for the hardware and software that are used in the set-top boxes.

⁹⁴ Television across Europe: regulation, policy and independence, Budapest : OSI/EU, 2005, page 108

⁹⁵ Ibid

⁹⁶ Ibid

Conditional Access System (CAS) is a technology that allows encryption/decryption of digital television signals in such a way that only viewers who possess the relevant decoding device, such as a smart card, can watch a given programme. The Access Directive obliges CAS operators to offer their services to all broadcasters on a “fair, reasonable and non-discriminatory basis”, compatible with EU competition law.

Application programming interfaces (APIs) are software that controls the hardware components of the set-top box. Digital services that can be received with the same set-top box generally include not only the digital television broadcasts, but also electronic programme guides (EPGs) as well as a variety of multi-media applications. Different providers can offer different technologies and it is up to the APIs to make sure that services can all be processed and mirrored in the set-top box. According to Access Directive, the national regulatory authorities are able to impose obligations on operators to provide access to APIs on fair, reasonable and non-discriminatory terms. The Framework Directive requires EU member States to encourage providers of interactive television services and interactive receiver equipment to offer an open API, and to encourage transparent provision by API providers of all information necessary to other applications.

Electronic programme guides (EPGs) have the same role that printed television guides have in time of analogue broadcasting. EPGs are similar to the web browsers and they help viewers to find their way through the multitude of different channels offered on digital television and to access the selected programme. EPGs, principally, can have two forms: a broadcaster can run its own EPG to guide recipients through the digital offer of their programmes or a platform provider (generally a satellite or cable network operator) can offer an EPG that provides information on different digital offers. “Naturally, broadcasters will want access to the superordinate EPG of the relevant platform operator. Apart from the pricing, another concern that broadcasters might have is the ranking of the listed

programmes. There is a strong feeling, especially among commercial broadcasters, that in a multi-channel television environment their listing position on an EPG will influence their viewing figures.”⁹⁷ Access Directive states that member States can oblige EPG operators to provide access to their facilities on “fair, reasonable and nondiscriminatory” terms.

3.3. Toward Audiovisual Media Services Directive

The end of the overview of legal rules considering audiovisual sector is reserved for explaining the new tendencies in regulating audiovisual media services in the European Union. The original “Television without Frontiers” Directive was adopted in 1989 and due to the rapid changes at European broadcasting scene was amended in 1997. In 2005 the European Commission proposed the revision of the current Directive to amend it to a new Audiovisual Media Services Directive.

There is a clear need for modernization of the audiovisual legal framework at the European Union level “since the audiovisual industry is undergoing a second major revolution”⁹⁸ driven by several new technological features which were developed in last several years. The convergence of technologies and services: traditional (linear) TV, Internet TV, TV on mobile phones and other mobile devices, expansion of fixed broadband, digital TV and 3G networks, increase in per-view, innovations in non-linear service delivery such as video on demand (VOD), peer-to-peer exchanges of audiovisual content, interconnection of linear and non-linear services, changing of the viewers habits, new advertising methods, such as search-related ads on the internet or SMS ads on mobile phones are just few of them.

“European Commission interpretative Communication on certain Aspects of the Provisions on televised Advertising in the "Television without Frontiers" Directive”

⁹⁷ Television across Europe: regulation, policy and independence, Budapest : OSI/EU, 2005, page 111

⁹⁸ Modernization, European Commission, Audiovisual Media Policies, http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/index_en.htm - accessed on 27th of March 2007

addressed to some of the most urgent questions such as new advertising and sponsoring techniques such as split screen, interactive advertising and virtual advertising. But the old Directive does not meet the rapid changes of the second broadcast revolution.

On 13 of December 2005 European Commission adopted the legislative proposal for the revision of the “Television without Frontiers” Directive. The new sets of rules are a response to technological developments and create a new level-playing field in Europe for emerging audiovisual media services (video on demand, mobile TV, audiovisual services on digital TV). The reasons for adopting the new Directive are twofold: it is necessary to ensure that the legislative framework allows the audiovisual sector to maximize its potential for growth and job creation in Europe, whilst continuing to safeguard general interest objectives. Secondly, the Community must maximize the competitiveness of the European audiovisual industry in order to ensure that digitalization does not simply result in a flood of imported or archive (repeated) material. The European audiovisual industry must remain capable of providing quality audiovisual content that is of relevance and importance to European citizens.”⁹⁹ In the same time the proposal of the “Audiovisual Media Services Directive” reaffirms the basic concept of content regulation in the European Union which cultural diversity, protection of minors, consumer protection, and media pluralism.

The main features of the proposal of the new Directive include:

- a) some basic obligations for all audiovisual media services – including on-demand (non-linear) services – which are subjected to the original “country of origin” principle and

⁹⁹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Principles and guidelines for the Community's audiovisual policy in the digital age /* COM/99/0657 final */, <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:51999DC0657:EN:NOT> (accessed on 27th of March 2007)

- b) more flexible rules for television advertising.

The novel in this proposition is the ‘expanding’ the content regulation to all the ways in which content can be distributed including over electronic networks and their comply with a set of minimum rules harmonized at the European level regarding the protection of minors and human dignity, but also in view of qualitative rules concerning advertising. The proposal of the Directive also establishes obligation for non-linear providers of services to promote European works.

The second prominent novel of the proposal is the adapting of new rules considering advertising and sponsoring for new, non-linear provider of services. The new rules are more flexible in a sense that they abolish some of the quantitative limitations from the TWF Directive. “The insertion rules are simplified and made more flexible. Instead of being compelled - as is now the case - to allow twenty minutes time between each advertising break, broadcasters will be able to choose the most appropriate moment to insert advertising during programmes. Nonetheless, cinematographic films, children programmes and news remain protected and may only be interrupted once per each period of 35 minutes time. The proposal does not change the hourly limit for advertising of 12 minutes nor the qualitative restrictions.”¹⁰⁰

The current status of the Directive is next: The Commission on 9 March of 2007 has unveiled an updated text of the modernized "Television without Frontiers" Directive. After a first reading in the European Parliament and the Council, there is now broad agreement with the Commission about the future legal framework for Europe's audiovisual sector.¹⁰¹

¹⁰⁰ The A to Z of Audiovisual and Media Policy of the Directorate General for Informational Society and Media on http://ec.europa.eu/information_society/policy/ecomms/index_en.htm (accessed on 27th of March 2007)

¹⁰¹ Current status and updated Commission proposal can be seen at:

“The margin of insulation necessary to promote integration requires that judges themselves appear to be practicing law rather than politics.”

Burley and Mattli

4. Sacchi and beyond: European Court of Justice and the audiovisual media sector

This chapter will be focused on the activity of the European Court of Justice in the audiovisual media sector. It will provide the analysis of the most important cases of the ECJ considering audiovisual media sector starting with the Sacchi case and how television broadcasting “became” service within scope of Article 49 of the EC Treaty. The analyses will be two folded and will cover both the application of general principles of the Treaty, in particular the free provision of services, and interpretation of the “Television without Frontiers” Directive. It is important to say that the number of the ECJ cases dealing with the audiovisual sector is a substantial one and this chapter will analyze those that are important for the main arguments in this paper: namely to see how the ECJ expound the regulatory powers of the Community, to explore how it used the proportionality analyze to harmonize the common market and how the content regulation of the “Television without Frontiers” Directive was to liberalize the internal market and reduce the powers of the Member States in the audiovisual sector.

4.1. From Sacchi to De Agostini

The European Union arrival on the audiovisual scene happened with 1974 decision in 155/73 Italy v. Sacchi¹⁰² case in which European Court of Justice ruled that the television signals falls within the EC Treaty on free movement of services. Guissepe Sacchi, a manager of “Telebiella”, Italian television broadcaster transmitting program via cable, refused to pay the license fee charged on every television set which was the way to fund. RAI, Italian State Broadcasting Company, held the monopoly over the television broadcasting and commercial advertising and licenses for cable television were not yet issued. Sacchi argued that the this practice was in contradiction with the EC Competition law (Articles 2, 3-5, 37, 86 and 90) to charge fees to television sets who are able to receive cable television and not terrestrial signals. According to Sacchi, the provisions of Italian broadcasting law are inhibiting television advertising and effect imports. The defendant railed on Article 30 (now 28) of the EC Treaty which guaranties the free movements of goods. The Advocat General and the Court refused this but stated that *“in the case of television not the electricity but the transmission of the program was subject to import”*¹⁰³ and found out that: *“the transmission of the television signals, including those in the nature of advertisements, comes, as such, within the rules of the treaty relating to services.”*¹⁰⁴

The importance of Sacchi decision of the ECJ is twofold: firstly, it established that audiovisual field is within the EC Treaty competence and secondly, it emphasized the role of broadcasting in creating internal market while in the same time limited possibilities on Member States to put restrictions on broadcasting. Proclaiming this Saachi case raised dilemma about “what restrictions on broadcasting could be legitimately imposed?”¹⁰⁵

¹⁰² 155/73 Saachi, 1974, ECR 1974, 409

¹⁰³ 155/73 Saachi, 1974, ECR 1974, 409

¹⁰⁴ Ibid

¹⁰⁵ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000, page 170

The 62/79 “SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others”¹⁰⁶ case from 1980 gave the ECJ opportunity to solve the dilemma raised by Saachi decision seven years before. The case involves Belgian cable broadcaster which picked up the television signals from Germany “and relayed them by cable to their subscribers.”¹⁰⁷ This was the infringement of the exclusive right to broadcast movies held by Belgian company. Belgian cable broadcaster argued that the exclusive right is not compatible with the freedom to provide services. The ECJ rejected this and stated: “*whilst Article 59 of the EEC Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application on national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between member states.*”¹⁰⁸

The Coditel decision found out that the EC Treaty provisions about free movement of services could not prevent the Member States from restricting broadcasting but in the same time ECJ found out that the restrictions “could not discriminate between foreign and national broadcaster.”¹⁰⁹ In other words restrictions should be “beyond” national frontiers and should not serve to the economical aims and should be “proportional”.

The question of proportionality and the scope of the restrictions established by the Coditel decision emerged in the same year in 52/79 “Procureur du Roi v Marc J.V.C. Debaue and others”¹¹⁰ case. The Belgian law prohibited the transmission of broadcasting “in the nature of commercial advertising”. The Belgian law also imposed obligation to cable broadcasters were to block out commercials in foreign television programs. “This prohibition extended to foreign broadcasters relayed by cable for Belgian audiences, even though the

¹⁰⁶ 62/79 Coditel, 1980, ECR 1980, 881

¹⁰⁷ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000, page 170

¹⁰⁸ 62/79 Coditel, 1980, ECR 1980, 881

¹⁰⁹ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000, page 170

¹¹⁰ 52/79, Debaue, 1980, ECR 1989, 833

inclusion of advertising was lawful in the country of original transmission.”¹¹¹ The cable broadcasters disregarded these provisions and challenged whether the provisions of the Belgian law are compatible with the free movements of services provision of the EEC Treaty. ECJ decided that the restrictions are legitimate and stated that: *“In the absence of harmonization of the rules applicable in the matter of television broadcasting, all Member States are competent to regulate, restrain or prohibit advertising messages, for reasons of general interest and without discrimination.”*¹¹² In Coditel and Debaue ECJ affirmed the principle that free movement of services can be restricted and Debaue decision emphasized the fact that in absence of harmonization of the laws restrictions were possible and affirmed that there wasn’t violation of the free movement of the services provision since there was no discrimination between national and foreign broadcasters in restriction of advertising. Debaue moved little further and presented “general interest” as reason to regulate, restrain or prohibit broadcasting.

The principle of “general interest” presented in Debaue case emerged again in “Bond van Adverteerders and others v The Netherlands State”¹¹³ case of 1988 when the question in front of the Court was: “Could discrimination between national and foreign broadcasters be legitimate if the purpose for the discrimination was to serve the Member State’s public interest?”¹¹⁴ The Dutch Cable Regulation Act prohibited cable programs, included advertisement, and subjected programs containing Dutch subtitles to an authorization that had to be obtained from the Dutch minister. The official explanation was that the aim of the legislation was to prevent the indirect establishment of commercial television which would unfair compete with the national broadcasting.¹¹⁵ According to Dutch government, the purpose of law was in the scope of “general interest” of Debaue case. The advertisers

¹¹¹ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000, page 171

¹¹² 52/79, Debaue, 1980, ECR 1989, 833

¹¹³ 352/85, van Adverteerders, ECR 1988, 2085

¹¹⁴ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000, page 171

¹¹⁵ 352/85, van Adverteerders, ECR 1988, 2085

challenged the provision of the Dutch law and whether it violates the free movement of service of the EEC Treaty. ECJ found out that: *“National regulations which are not indiscriminately applicable to the provision of services, whatever their origins, and which are therefore discriminatory, are not compatible with Community law.”*¹¹⁶ According to the ECJ decision even if the measures taken by the Dutch Government were in pursuing non-economic aims within the scope of the “general interest” of the Debaue decision they could be achieved by applying less restrictive means. Interestingly, the Court did not touch upon the substantive question of the interpretation of the concept of public interest.¹¹⁷

The good example of using general interest to protect national broadcasters and the clear case of discrimination is the “Commission v. Belgium”¹¹⁸ case of 1992. Belgian law prohibited the transmission of television signals from the other countries unless they are not on the official language of the country of origin. The Belgian law also included the prior authorization on broadcasting and defined “own cultural productions” which was the compulsory part of the commercial programs in a discriminatory way. The Belgian law was not applying to the Belgian television operators which were subjected to the scrutiny of the other, Belgian broadcasting law. This was the clear case of the direct discrimination and the Belgian explanation that the imposed restrictions were in “general interest” of the Member State was not conveying for the Court. What was interesting in case, which in other terms would not be found here, was the Court’s interpretation of the role of the regulatory bodies in the Member State. *“The national broadcaster is restricted on how to shape a national broadcasting system by the four freedoms. No remedy on cultural grounds is available by a “general interest” if the national legislation is directly discriminatory.”*¹¹⁹

¹¹⁶ 352/85, van Adverteerders, ECR 1988, 2085

¹¹⁷ De Blois, M., Case Note on Case 352/85 Bond van Adverteerders, 27 CMLRev. (1990) pp. 371-381, p.379

¹¹⁸ C-211/91, Commission v. Belgium, ECR 1992, I-6757

¹¹⁹ Ibid

The adoption of the “Television without Frontiers” Directive provoked several important decision of the European Court of Justice. The question whether the Directive had been correctly transposed into Belgian law arose in C-11/95 “Commission v. Belgium”¹²⁰ case of 1996. Several issues arose in case especially the question of prior authorization of foreign television programs that was substantial part of the Belgian law and the question about interpretation of Article 4 and 5 of the Directive considering the European quotas. According to the Belgian government’s interpretation, Articles 4 and 5 of the Directive must be interpreted in the light of Article 128 (now Article 151) on culture of the EC Treaty. The court rejected both claims submitted by the Belgian Government. ECJ held that: *“the country of origin” principle demanded free circulation of television programs within the internal market without being inhibited by an authorization requirement.*¹²¹ ECJ decided about the second question of the interpretation of the quotas for European work and held that the Article 128 (now Article 151): *“does not in any way authorize the receiving state, by way of derogation from the system established by Directive 89/552/EEC to make programs emanating from the other Member States subject to further control”*¹²² The decision in Commission v. Belgium restricted national regulatory bodies in restricting the free movements of services and the possible restrictions of the TWF Directive that could be imposed on the free movements of television signals.

The special protection of the minor established by the TWF Directive was the one of the major question for the ECJ in joined case 34-36/95 “Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB”¹²³ of 1997. De Agostini, a Swedish company, has advertised their children magazines on a Swedish channel and a satellite channel emanating from the UK. The question in front of the Court was: “Can

¹²⁰ C-11/95, Commission v. Belgium, ECR 1995, I-4114

¹²¹ Ibid

¹²² Ibid

¹²³ C-34/95 Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and C-35/95, C-36/95 TV-Shop i Sverige AB, ECR 1997, I-03843

Article 59 (now 49) of the EC Treaty or the Directive 89/552/EC be interpreted in the sense that they preclude the application the application of a prohibition on advertising directed at children?”¹²⁴ The Court and the Advocate General was of the opinion that Article 16 and 22 of the Directive “*contained provision specifically devoted to the protection of minors. Hence, this field had been harmonized by the Directive and Member States may no longer apply their national regulation.*”¹²⁵ According to the opinion of the Court Member States “are prohibited from preventing the reception and retransmission of broadcasts from other Member States, even if they believe that the broadcast does not comply with the Directive.”¹²⁶ The ECJ in interpreting TWF Directive imposed with the De Agostini imposed even harsher restriction on the possibilities of the Member States to regulate broadcasting activities.

These cases cover a whole range of legal problems considering the freedom to provide services and various aspects of interpreting the Television without Frontiers Directive. In deciding these cases the European Court of Justice addressed several important and crucial questions for the process of constitutionalisation of the European Union. ECJ addressed the question of whether the television signals are in scope of the EC Treaty, what are the limits of the Member State in regulating broadcasting. ECJ introduced the notion of public interest and used this concept not only to extend the competence of the European Union in audiovisual field but also to limit the Member State in regulating broadcasting. The ECJ, in the same time, rarely used the traditional constitutional language while broadening the powers of the Union in the audiovisual field. It, more frequently, used the language of “deliberation” in order to promote more crucial steps forward stronger Union.

¹²⁴ C-34/95 Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and C-35/95, C-36/95 TV-Shop i Sverige AB, ECR 1997, I-03843

¹²⁵ Ibid

¹²⁶ Barendt, E.M., Media law : cases and materials, Harlow, England ; New York : Longman, 2000, page 183

4.2. Current trends

The last subchapter will give the overview of the more recent cases considering audiovisual sector that was decided in front of the European Court of Justice. One thing is sure. The legitimacy of the Union is established in the field of the audiovisual media services and most of the new cases are dealing the specific issues raised by the implantation of the “Television without Frontiers” Directive in the national legal systems and question raised by the new techniques in advertising. The structure of litigants is the same as before: national courts and business litigants in reference for preliminary ruling. Most of the new cases, as it is already said, are about advertising and the new techniques of advertising (cases such as 89/04 “Mediakabel BV v Commissariaat voor de Media”¹²⁷ dealing with interactive services and competence of the Member State to regulate interactive services or new ways of advertising in C-429/02 “Bacardi France SAS, formerly Bacardi-Martini SAS v Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and Girosport SARL”¹²⁸ or about advertising breaks in audiovisual works in C-245/01 “RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk”¹²⁹. We can conclude that the litigations in audiovisual services in the European Union are going in the quieter waters but the adoption of the new, “Audiovisual media services” Directive, will, probably, create more litigations in front of European Court of Justice.

¹²⁷ C-89/04, Mediakabel BV, ECR 2005, I-04891

¹²⁸ C-429/02, Bacardi, ECR 2004, I-06613

¹²⁹ C-245/01, RTL Television, ECR 2003, I-12489

5. Conclusion

Once unimaginable thing happened, the audiovisual sector, one of the last bastions of the national sovereignty cuddled by the State as a Governmental device in promoting political, economic and cultural aims of the National State, now is part of internal market of the European Union. Liberated from the Government's strings audiovisual sector became a vibrant and a highly competitive area of Community life. In more that a 30 years from Sacchi decision of the ECJ and 18 years from the adoption of "Television without Frontiers" Directive, European audiovisual scene is transformed in a unprecedented manner. The proposal of new "Audiovisual media services" Directive will harmonize the sector more while it will expend the competences of the Union in regulating content of audiovisual services to "non-linear" services such as Internet, video on demand or peer-to-peer exchanges of audiovisual content. The road to more involvement of the European Union in the audiovisual field, as it was explained on previous pages, was two folded: first by the activity of the European Court of Justice through widening the scope of basic freedoms of movements and through application of the competition law of the Union. The process of expanding the powers of the Union was part of low intensity constitutionalisation of the Union. Low intensity constitutionalisation was good in promoting the concept of constitutionalisation as a deliberation. The ECJ was reluctant to promoting the other two concepts of the constitutionalisation, especially the question of the polity. In rear occasion when it address the question of the nature of the polity, the ECJ moved back to stress the intergovernmental nature of the Union. The activity in the field of audiovisual sector latter was accompanied with activity of the Commission. The Television without Frontiers Directive and Maastricht Treaty boost the efforts in liberalizing and harmonized audiovisual sector and was accompanied with European Union entering in the field of regulations of technical aspects of the audiovisuals sector in 2002 with adoption of the Regulatory Framework for Electronic

Communications Services and Networks. In the same time, the process of constitutionalisation of the European Union moved from the low intensity which was limited both in scope and in achieving further aims. The low intensity constitutionalism was used to justify the normative authority of the Union and to resolve conflicts between competing visions. In the audiovisual sector the ECJ was proving exactly this. ECJ was trying to resolve conflicts between supranational competition rules and national broadcasting rules in trying to stop the interstate broadcasting or to keep the monopoly of the national broadcasters. The aim of this thesis was to show how the concept of the low intensity constitutionalism can be seen in the light of regulations of the audiovisual sector. The first chapter established link between traditional constitutional tools for trade and relevant provisions in the founding treaties and when the link was established it analyzed the concept of constitutionalism and low intensity constitutionalism especially. The second chapter analyzed the relevant provision of the primary and secondary legislation searching to establish link with the previously analyzed low intensity constitutionalism. The link was established in a secondary legislation of the EU, particularly in the TWF Directive which established several supranational principles latter confirmed by the ECJ. The fourth chapter proved the one of the major premises of low intensity constitutionalism, one about the major role of the ECJ in promoting supranational character of the Union by widening the scope of the freedoms of movements while not touching what was thought to essence of the Union – its intergovernmental structure of decision making. Is the low intensity constitutionalism behind us? The current problems in adopting of the EU Constitution and the bigger question behind - of the nature of the polity of the Union, gave us reasons not to think that the low intensity constitutionalism is a very distant past of the Community legal order.

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