

**Concentration in the Electronic Media and Its Effects
on Media Pluralism**

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This dissertation contains no materials accepted for any other degrees in any other institutions and no materials previously written and/or published by another person unless otherwise acknowledged.

/s/Valentina Bratu

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Abstract

Electronic media, particularly television broadcasting, plays an important role in forming cultural, social and political trends. Electronic media enhances democratic decision-making and increases public participation. Only a diverse electronic media properly serves a democratic society and gives rise to pluralism of opinions. In this context, the relationship between the owner of the broadcasting company and the editorial line of the company is crucial. If such a relationship weighs in favour of the owner's interests, then concentration in the electronic media endangers democracy and pluralism of opinions. Not only this relationship, but other features of the media market and the media product command a careful evaluation of the impact that media concentration has on media diversity.

Chapter One frames the issue of the media concentration and its effects on the diversity of opinions. It is a mostly theoretical chapter that provides the background for the future discussion. Definitions of the media diversity as well as of the other concepts used in this paper are attempted. Chapter One analyzes the current state of the media industry, the effects that advertising has on the nature of the media product and the regulatory implications of the new technologies. The relationship between the media owners and the diversity of the media content is evaluated.

Chapter Two introduces a history of broadcasting in the United States. It discusses the constitutional treatment of issues related to media diversity, especially minority media and cable. The media ownership restrictions in general and the Federal Communications Commission's review in 2003 that led to more deregulation on the market are described. The chapter analyzes the Telecommunications Act in theory and its application in the federal regulatory agency's decisions. Antitrust's (limited) contribution to media diversity is also presented.

Chapter Three focuses on Europe. Article 10 of the European Convention on Human Rights is analyzed to evaluate the extent to which it may protect the media diversity. The chapter synthesizes some implications of the case law of the European Court of First Instance and the Court of Justice of the European Communities for the protection of media diversity. Further, several countries, such as France, Germany, Italy and Romania both converge and diverge in their approach to electronic media concentration. The role played by the constitutional courts in shaping the broadcasting law and the efficiency of the cooperation of the rule making institutions in the field should make the real difference when it comes to media diversity protection. However, the constitutional requirements (reflected to a certain extent in broadcasting statutes) remain at a theoretical stage and their effect on the market is limited. The extent to which on the one hand competition law norms and on the other hand specifically designed legal instruments benefit media diversity is discussed.

This paper analyzes the legal instruments that national authorities employ to tackle this complex issue. It correlates the market realities with the legal framework. It offers models from different jurisdictions, reviewing their strength and their weaknesses. In spite of the calls for total deregulation of the media industry, I propose a legal compromise, arguing that regulation is still necessary and that a comprehensive and

efficient model combines regulation with antitrust law. An understanding of the manner in which these regulatory strategies develop, evolve and persist is crucial to an analysis of the implications of the electronic media concentration for the freedom of speech. This analysis contributes to the current debate on whether electronic media regulation is still needed. While antitrust law is efficient in tackling pure market issues, the nature and the importance of electronic media qualifies it for special protection. In this sense, constitutional courts should be at the forefront of the legal protection for media diversity. As illustrated throughout this paper, the best legal strategy to protect media diversity is by addressing the issue from all three angles: constitutional, regulatory and antitrust. This is because by doing so the three legal regimes may complement each other and supplement the other's potential failure. The following lines briefly introduce the reader to the three chapters of this paper mentioned above.

Introduction

My doctoral thesis overall argumentation calls for a definition of the concept of “diversity.” The diversity in the media is a concept that, although seemingly self-evident, it is ambiguous, imprecise and multifaceted and it hence necessitates some elaboration. Two definitions are favored here: both internal and structural pluralism, and source and viewpoint diversity¹. Media pluralism is both a political² and normative choice³ in the countries discussed here.

The preliminary considerations section further points to the subject of my paper and to its contemporaneity. Second, it briefly mentions the literature on the subject – pointing out that the United States is at the frontispiece of the debate, with the European scholars actively trying to catch up with their Northern American counterparts. The trend towards concentration and the regulation/deregulation debate section first shows which are the media companies that currently dominate the global media market. This showing is meant to point out that concentration happens both horizontally – currently they are a handful of media companies on the market – and vertically – most if not all of these media companies hold shares in both content production and distribution markets.

The consequence of horizontal concentration for media diversity is that newly formed entities have a stronger position on the market, may increase prices for

¹ Viewpoint diversity and source diversity are two concepts found in the work of Professor C. Edwin Baker. See, C. Edwin Baker, “Media Concentration and Democracy. Why Ownership Matters,” Cambridge University Press, 2007, for instance, at p. 15.

² See, also, Vincenzo Zeno-Zencovich, “La libertà d’espressione, Media, mercato, potere nella società dell’informazione,” (“Freedom of expression. Media, market, power in the information society”) il Mulino, 2004, at p. 43.

³ See, for instance, C. E. Baker, “Media Concentration and Democracy. Why Ownership Matters,” at p. 13, putting forward the ideas of “democratic distributive value” and “democratic safeguard values” in support of media ownership related policies. See, *ibidem*.

consumers, impose discriminatory conditions for the other competitors and even drive them off the market. Perhaps most importantly, they can dictate the amount, quality and diversity of the content supply and especially if few distributors are on the market they can impose their conditions on content suppliers. In the case of vertical integration, the effect on the media diversity is more complicated since the integration of content and distribution within one company may actually increase the new company's potential to invest in new technologies. Still, the possibility for the newly formed entity to favor its own content or its own distributors to the detriment of other competitors leads to the strengthening of the company's power on the market as well as to the decrease in the available content. The media concentration phenomenon and the regulatory response are seen within the broader contexts of the market models (*laissez faire* and state intervention to correct market failures) that inspired them.

Before going into the more technical aspects of this paper, I considered necessary to discuss the various freedom of speech theories that encompass media diversity and that outline its value for a democratic society and that, ultimately, support my choice of this subject. Besides the classical theories, two new doctrines that reformed the understanding of the traditional free speech theories - the corporate threat to free speech/corporate free speech – are analyzed in view of their implications for media diversity protection. It is important to pay careful attention to how these new doctrines will evolve and how they influence the courts' treatment of the media concentration's effect on media diversity. Depending on who the addressee of the freedom of speech is, media diversity may lose much of the constitutional ground it acquired. Further, classical freedom of speech

theories should be expanded to incorporate the private, corporate threat to media diversity.

The introductory chapter continues with an analysis of the regulation/deregulation debate, a debate with yet no winner, which makes this discussion even more necessary and acutely contemporary. In this context, some of the regulatory models that were advanced in the literature are discussed. Since this thesis argues that media concentration conducts to less media diversity, several assumptions that lead to this argument need to be if not permanently solved, at least evaluated. Thus, a definitive answer has not yet been reached to questions such as whether network owned media companies produce content that is more uniform than independently owned companies, whether owners have an influence over the editorial line of a company and whether advertising distorts the relationship that the media entities should have with their public. Further, the impact of the new technologies on the market and especially whether they would make the media diversity a fully realized ideal in the absence of any regulation remains an open question, with more evidence to the contrary. Because of the mixed results to different studies and because of the fact that still, less diversity is observed on the market, as well as because it would be more difficult to out-do the wrong created through allowing more deregulation, this thesis is in favor of a more cautionary approach.

The following chapter focuses on the structural norms that protect media diversity in the United States. The different outcomes of constitutional challenges to the minority and women media ownership policies, the ownership restrictions and the must carry provisions are analyzed. The role that the evidentiary support plays in these different outcomes is emphasized. I also mention the current state of these rules and their

predictable future. The ease with which mergers are cleared is explained in part by the role that the antitrust plays in the regulatory review performed under the public interest standard.

The Third chapter of this paper is dedicated to several European countries and institutions' approach to media diversity's legal protection. I start with article 10 of the European Convention on Human Rights that encompasses, according to the European Court of Human Rights, the media diversity. Further, the role of the constitutional courts in protecting this fundamental right is analyzed against the political and social background that influenced legislation and case law in France, Germany and Italy. Romania's constitutional court does not appear in this analysis because it minimally addressed the issue of media diversity. After a discussion of the constitutional treatment of the media diversity, I look into the role that the regulatory and antitrust agencies has in protecting it. Whereas the regulatory measures are designed to advance media diversity, the antitrust laws contribute, albeit indirectly, to its protection.

I finish with conclusions that mainly affirm the belief that the current deregulatory trend of the media ownership restrictions especially needs to be stopped. I further argue that the triumvirate: constitutional/antitrust/regulation should be kept and should be reinforced to protect media diversity. In light of the many unknown variables that the media industry has, such as the role that the new technologies will have on the diversity of opinions, viewpoints and sources of information, or the real extent of the influence that the owners, networks and advertisers have on the editorial line, the dangers of media concentration and the accompanying relaxation of current rules is not a prudent approach.

The risk of less media diversity on the market is one of the most important concerns that the legislation and the jurisprudence in a democratic society needs to address.

My thesis' contribution to the current research on the effects that media concentration has on media diversity stems both from observations and conclusions that this thesis puts forward and from future inquiries and studies that it encourages. I argue that a broader understanding of the scarcity concept would indeed better serve media regulation, and especially media diversity goals⁴. In this sense, economic, political, social or psychological factors should be taken into account when assessing the need for diversity on the media market and when, based on this assessment, policies are designed to further media diversity⁵.

I consider that at the core of the media regulation is the importance of this media product for the democracy. From this perspective, the current approach of the United States courts that demand evidentiary background to ownership restrictions may lead to a further dilution of the media regulation. I also agree that if one considers that censorship could come from the private enterprise as well as from the state, then a case for a positive understanding of the freedom of speech and for positive state action starts to take shape. These aspects are emphasized at appropriate times throughout this paper.

This thesis also tried to show the degree of antitrust's contribution to the media diversity protection. Although antitrust is relatively foreign to non-economic goals, this thesis highlights that some of the outcomes of antitrust review may add to the realization of the media diversity ideal. I also looked into the very detailed, almost "flamboyant"

⁴ See, for instance, C. E. Baker, "Media Concentration and Democracy. Why Ownership Matters," at p. 89 et seq.

⁵ See, for instance, for "policy proposals," C. E. Baker, "Media Concentration and Democracy. Why Ownership Matters," at p. 171 et seq.

picture that the French legislation and regulatory instruments offer, in contrast with the much more modest United States' approach to the role of the state in recommending the broadcasters, and the people, what to watch on TV. This is however an unsurprising difference considering the opposite historical course that broadcasting had in these two general jurisdictions.

Another contribution stems from the fact that relatively little legal scholarship exists available in English on the approach to media concentration and to media diversity protection in some of the European countries discussed here. I tried to add my input to make these issues a more important concern and a main part of the scholarly interest in the European region. I attempted a contribution to both the theoretical and practical approaches to media concentration's effects on media diversity in Europe (and comparatively within some European jurisdictions) as compared to the United States.

Besides these contributions, in the course of writing my thesis I reached several issues capable of prompting future research. Thus, how would I approach my research question - what is the best legal solution to protect media pluralism - differently? First, I would look more into the previous debates in the United States that accompanied the broadcasting industry since its inception. I would look to see how the concern over media concentration dates back in history, and it appeared almost concomitantly with the industry itself. I would thus focus on regulatory history. Keeping in mind that this could make the subject of a whole separate thesis I would research FCC's policies and reports, Congress members' proposals for bills in this field, as well as how courts treated the issue not only at the Supreme Court level but at lower courts level as well. Further, in Europe, the available literature on broadcasting, both legal and in other fields, in the English

language, is still scarce. Particularly in countries such as Romania, it should be encouraged.

Now I turn to this thesis' limitations. My thesis proved to be extremely broad – both in theoretical foundations and in jurisdictional choice. This is the reason that although I initially included United Kingdom in my jurisdictional choice, I subsequently decided that, besides exaggeratedly widening the scope of my research⁶, the UK broadcasting system would better fit into a public broadcasting focused paper. Attempting to cover a whole range of considerations related to the media regulation aimed at enhancing media diversity inevitably lacks in proper detail that may prove sometimes crucial to the debate. It is though of significant importance to understand the broad regulatory context in which media diversity enhancing rules function.

Another important concern that this thesis could not comprehensively address was the media's various social, political and psychological implications. I hinted at some of them, but I did not devote them an in depth analysis. However, depending on their potential future findings I would dare to assert that media diversity should be seen in a larger perspective and be understood as significant for the life of the individual and of the community. Further on the technical limitations, some of the research for my thesis – the part on Germany – suffered from the author's lack of German language skills.

Another part that requires further inquiry is the substitutability of broadcasting means. Due to technological progress this part of my paper needs to be re-examined constantly. Although history can teach us something, it does not necessarily mean that it will repeat itself. Thus, the concentration that plagues the media at this point could stay away from new media. However, since this is doubtful, I strongly believe that at least we

⁶ For the same reasons I decided not to analyse India and Spain.

should pay permanent and close attention to how the media industry evolves so that we do not lose track of the importance that a diverse media has for the individual and the society as a whole.

Although we are left with the impression that there is today a variety of means of transmission and that the people have access to a multitude types of content, the real market situation is different if one sees media diversity as a representation of the rich cultural, social, political and economic background that a democratic society has. My research stays strong in the belief that the media concentration is still an important concern for policy makers and courts. It should be addressed constantly, through all the legal means at their disposal, regulatory, antitrust and constitutional, in order to ensure the existence of the media diversity on the market. In order to do so, perhaps some theoretical concepts and doctrines need to be minimally changed, to reflect new market developments. However, the technological boom that we witness does not (at least not yet and presumably might never) give us the leeway to throw away or to drastically diminish media regulation aimed at protecting media diversity.

“If a democracy is, by definition, the constant search for truth and liberty, then free speech must be an essential ingredient if a democracy is to thrive⁷.”

Chapter I. Introductory chapter. Framing the issue

I. 1. Preliminary considerations

The concept of media diversity, how media diversity factors in the functioning of democracy and how media concentration may disrupt the functioning of democracy are central issues in this paper. My thesis focuses on media diversity; however it is impossible to “see” media diversity in an epistemological vacuum⁸. Thus, the importance of media diversity for a workable democracy intertwines with the importance that the media generally carries in a democratic society. I am referring here to the “vital role in helping, through its powers of investigation and exposure, to reduce the risks of official incompetence and abuse, to convey information about the affairs of government, and to serve as a forum for citizens to communicate among themselves⁹.” Part of the “vital role” that the media has in a democratic society is the media’s role in “represent[ing] the opinions of different groups,¹⁰” which is perhaps the most important aspect that composes the notion of media diversity and, which is further elaborated throughout this paper with reference to the national legal jurisdictions covered.

⁷ See, Robert J. Wagman, “The First Amendment Book,” Pharos Books, 1991, at p. 1.

⁸ “[F]reedom of speech does not exist in the abstract.” Justice Brennan, dissenting in *Columbia Broadcasting System, Inc. vs Democratic National Committee*, 412 U.S. 94, 193 (1973), in Bruce M. Owen, “Economics and Freedom of Expression. Media Structure and the First Amendment,” Ballinger Publishing Company, 1975, at p. 1.

⁹ See, Lee C. Bollinger, “Images of a Free Press,” The University of Chicago Press, 1991, at p. 44: “Decision after decision has restated and refined this image of the American press. Within this working image, the press is conveyed as playing a noble, even heroic, social and political role. [] The stakes are defined in very high terms indeed: a good press is a necessary condition of a good democracy.”

¹⁰ Bollinger, *ibidem*.

Pluralism means that freedom of speech should be speech for everyone. Pluralism is a political and normative choice because it is embedded in the very structure of the constitution¹¹. If one assumes that the media is one manner in which this right is realized, then all interests and opinions should be protected. Further, if law is to draw life from the real world¹², media is a reflection, a mirror of the multicolored society. Media diversity is thus almost a metaphor for all the people in a society.

With the European scholars groping for common ground on media issues and with the United States scholars focused on the very energetic American debate over the future of the media, comparative studies on the various issues and possible solutions to the media concentration in these two parts of the world become more than necessary¹³. Such studies should point to differences in media history¹⁴ and to specificities in economic history and culture that ultimately influenced a distinct legal treatment of the media concentration in the European Union (and its countries) comparative to the United States¹⁵. Further, such a comparative study allows the reader to immerse herself in the richness of the debate on both continents and thus offers a potential resolution to the

¹¹ See, for a deconstructivist understanding of the United States Constitution, Jacques Derida, in Peter C. Caldwell, "Popular Sovereignty and the Crisis of German Constitutional Law. The Theory & Practice of Weimar Constitutionalism," Duke University Press, 1997, at p. 85. I believe that Derida's understanding of the manner in which "we the people" legitimizes the Constitution may be expanded to include the value of pluralism as an intricate value embedded in the Constitution.

¹² See, P.C. Caldwell, *ibidem*, at p. 74, on how the German Weimar Constitution's rights "did, in fact, seem to describe all aspects of German life."

¹³ See, for a comparison between legal approaches to media diversity in Australia, United Kingdom and United States, Lesley Hitchens, "Broadcasting Pluralism and Diversity. A Comparative Study of Policy and Regulation," Hart Publishing, 2006.

¹⁴ The first obvious difference being that while the European broadcasting was initially nationalized in the government's hands, in the United States it appeared and developed as a private enterprise. See, Ithiel de Sola Pool, "Technologies of Freedom," The Belknap Press of Harvard University Press, 1983, at p. 109-112.

¹⁵ See, Paul Starr, "The Creation of the Media," Basic Books, 2004. On page 17 the author notes how the development of broadcasting happened in the United States under the laissez faire approach to economy and market forces, while in Europe it witnessed more regulation and state intervention. However, Starr mentions how publishing in the United States before the Civil War was not entirely left to the free market, but it was determined by various political decisions reflected in various regulations. See, Starr, *ibidem*, at p. 146.

media concentration problem. As we shall see in the national jurisdictions that we will discuss, the ways to cope with media concentration are not fundamentally different. Because of the peculiarity of the media markets, a proper assessment of their concentration involves economic and non-economic aspects, such as media pluralism, which as pointed out in the literature, have not yet been comprehensively explored¹⁶.

At the crossroad of constitutional/competition/regulatory norms, this thesis explores the legal solution to the problems posed by media concentration that best protects media pluralism.¹⁷ A preliminary solution emerges: a mixed system of regulation and competition/antitrust law with two separate monitoring/supervising agencies under the wise patronage of an active constitutional court. It is this thesis' statement that this mixture of legal instruments will best protect media diversity first because they could supplement each other in providing different types of regulatory coverage for different issues that threaten media diversity (with the downside of possible overlapping) and second because, as Professor Baker pointed out in our various discussions on the subject¹⁸, the three legal actors, i.e., the regulatory agencies/courts involved would check on each other and thus avoid abuse.

I proceed here to lay a background against which to discuss the plethora of implications that the different legal solutions in the jurisdictions I chose to analyze have for the protection of media diversity. I first define several important concepts used in this paper. I second look at the media concentration as an ongoing phenomenon in order to stress out the contemporaneity of the issue. I further mention the freedom of speech

¹⁶ Oliver Budzinski, Katharina Wacker, "The Prohibition of the Proposed Springer – Prosiebensat. 1 Merger: How Much Economics in German Merger Control?," *Journal of Competition Law and Economics*, 3(2), 281-306, June 2007.

¹⁷ The terms diversity and pluralism are used interchangeably.

¹⁸ Discussions with late Professor C. Edwin Baker.

theories, where actually the idea of the importance of media diversity for democracy finds its roots. These freedom of speech theories encompass, by extrapolation, the justifications for legally protecting the media diversity. I then point to the regulation/deregulation debate that sparked around the media concentration issue and I show how this debate parallels (and in the same time originates in) the general economic thought. I make a brief overview of the pro and counter arguments since this debate accompanies the reader of this thesis throughout the whole unfolding of the various national legal approaches to media concentration in the subsequent chapters. The influence that media owners/networks have on media content and its distribution is a significant consideration (and assumption) of this thesis and it is thus discussed. I also discuss the peculiarity of two of my epistemological subjects – the media product and the media market – which in turn would determine the elaboration and application of a special legal treatment. Last but not least I focus on what implications (if any) the technological convergence and technological progress have for media diversity.

I conclude by advocating in favor of an eclectic system of legal instruments to best protect media diversity. This solution emerges further in this thesis by analyzing various legal jurisdictions and their approach to the issue of media concentration and media diversity.

I. 2. Terminology and interdisciplinary limitations

Considering the indubitable importance that the media diversity has for democracy¹⁹, my paper discusses the effects that media concentration has on media

¹⁹ For the importance of media for public opinion formation and contribution to the proper functioning of democracy, see, Juergen Habermas, “The Structural Transformation of the Public Sphere,” The MIT Press,

diversity²⁰. I pin down here the understanding that I give to these three main concepts – media, media diversity and concentration.

Media refers to different types of media - television, radio, Internet, printed press as well as to the various means of transmission of content – cable, terrestrial and satellite²¹. Since each of these types and means could make the object of a separate thesis, I limit myself to dealing mainly with television and radio (and even here mostly with television) and cable (considering that terrestrial is almost under its way to history books and that satellite involves the different regulatory regime of international satellite communications²²). However, when necessary, especially since one of my thesis most important grounds of debate is that these types of media and these means of transmission are interchangeable – I do touch upon the extent to which this interchangeability furthers media diversity. Further and in relation to this substitutability aspect, I look at different media within the context of cross ownership restrictions that were enacted to protect media diversity as well as at new media, a term which is defined in the section on technological convergence.

Cambridge, Massachusetts, 1991. At p. 249, Habermas points out the distinction between the “public” and “mass” opinion, the first referring to the real and effective participation of the people to opinion formation in relation to governmental action and proper and immediate feedback and interaction, with visible effect on the governmental institutions’ work and functioning, the second contrasting to the first because of the people’s passiveness and lack of response from the authorities. See, also, in Farrel Corcoran, Paschal Preston, “Democracy and Communication in the New Europe. Change and Continuity in East and West,” International Association for Mass Communication Research, Hampton Press, New Jersey, 1995, at p. 12.

²⁰ See, for instance, Werner A. Meier and Josef Trappel, “Media Concentration and the Public Interest,” in Denis McQuail, Karen Siune, “Media Policy. Convergence, Concentration and Commerce,” Euromedia Research Group, SAGE Publications, 1998, at p. 38.

²¹ In general, mass communication is the industrialized production, reproduction, and multiple distribution of messages through technological devices. See, Joseph Turow, “Media Systems in Society. Understanding Industries, Strategies and Power,” Longman, 1997, at p. 12.

²² See, for instance, Patrick-Andre Salin, “Satellite Communications Regulations in the Early 21st Century. Changes for a New Era,” Utrecht Studies in Air and Space Law, Martinus Nijhoff Publishers, Kluwer Law International, 2000.

Any discussion on media concentration's effects on media diversity also requires a clear definition of media diversity²³. Almost a "catchcall phrase,²⁴" media diversity is a notion inherently subjective and thus problematic. First, although almost self-evident, a diverse media is first and foremost a free media, and a free media must in turn be a diverse media²⁵. Second, pinning down in precise terms what media diversity really is requires getting into a debate fundamentally subjective²⁶. An attempt to define media diversity is problematic in the sense that it is embedded with so many political and normative choices that it becomes in itself an instrument of constriction²⁷.

I try here to distance myself precisely from this subjective standpoint – that is from defining media diversity by referring to the opposition: quality vs. low standards media. From this subjective perspective, that I briefly analyze here before choosing my own definition of media diversity, "quality" media would then relate to "serious journalism," which in turn means "putting on the front-page foreign affairs, politics, even

²³ See, L. Hitchens, *ibidem*, at p. 9.

²⁴ Tarlach McGonagle, "The Promotion of Cultural Diversity via New Media Technologies: An Introduction to the Challenges of Operationalisation," IRIS Plus, 2008-6.

²⁵ Of course, then the question arises on what is a free media. I propose here in this sense a reference to the four Freedom of House criteria used to assess the degree of press freedom in different countries: the legal, political (media diversity) and economic (ownership structure and transparency) environments criteria. See, Freedom of House, Survey Methodology, 2008, available online at: <http://www.freedomhouse.org/uploads/fop08/Methodology2008.pdf>.

²⁶ "From the perspective of democratic theory, it has been noted that pluralism is currently one of those values to which everybody refers but whose meaning is unclear and far from adequately theorized." See, Kari Karppinen, "Making a difference to media pluralism: a critique of the pluralistic consensus in European media policy," at p. 9 in Bart Cammaerts, Nico Carpentier Ed., "Reclaiming the media: communication rights and democratic media roles," Bristol: Intellect, 2007.

²⁷ "As Habermas put it, rationality in the choice of means often accompanies irrationality in decision-making of its object. With this in mind, all attempts at defining or measuring media diversity will necessarily involve political and normative choices and contestation over the meaningful norms and criteria of setting policy goals that cannot be reduced to mere facts and figures. Thus, attempts to impose common criteria or a certain conceptual framework for analyzing media diversity can be deconstructed as attempts to reach political closure, or as attempts to stabilize the political contestation and hegemonize certain specific criteria and concepts." See, Kari Karppinen, *ibidem*, at p. 23 in Carpentier, Cammaerts, *ibidem*. The work of Jurgen Habermas – "Structural transformation of the public sphere" - and particularly his treatment of the public sphere and civil society - has provided an influential theoretical background and reference point, if not direct starting point, for much contemporary research and debate. See, F. Corcoran, P. Preston, *ibidem*, at p. 12.

political analysis.²⁸” From this standpoint it is difficult to avoid paternalistic nuances. “Serious” media includes the type of media that has the “qualities of a genuinely educational character,” which in turn means that “they stimulate thinking, provoke serious interest in worth – while subjects, and often afford some discipline in taste and emotional discernment²⁹.” However, this is not to say that entertainment could not carry the values of “serious” or “quality” media³⁰. On the contrary, this “cultivation of taste³¹” and spread of knowledge to the wide public could be easier done by “coating” it in a more appealing, entertainment like form³². At this point it is worth pointing out that for instance, although on the one hand much was expected of the television and radio’s contribution to the education of the American public, on the other hand much was feared of the commercial broadcasters natural profit driven incentive to “scale the material down to a fairly low average level, to sweeten it in every possible way, so that the consumer may be pleasantly titillated and entertained³³.” Further, if one argues that media concentration is bad only because it does not promote “serious” media, she misses the point that media concentration is bad even for entertainment (or should one divide even entertainment in serious and light?) because entertainment could be homogenized as a consequence of media concentration as well.

However, “quality” in the sense of “serious” media, although subjective, is important in that it brings forward the various types of functions that the media should and must fulfill. Nevertheless, this less objective aspect is only one little piece of the

²⁸ See, Pierre Bourdieu, “On television,” New Press, 1998, p. 42.

²⁹ See, James R. Angell, “The Scope of Educational Objectives in Broadcasting, ” *Journal of Educational Sociology*, Vol. 14, No. 6, *Education Turns the Dial*. (Feb., 1941), at p. 334-345, available on JSTOR, at p. 339.

³⁰ See, J.R. Angell, *ibidem*, at p. 339.

³¹ See, J.R. Angell, *ibidem*, at p. 340.

³² See, J.R. Angell, *ibidem*, at p. 340 et seq.

³³ See, J.R. Angell, *ibidem*, at p. 344.

puzzle that forms the concept of media diversity. As mentioned above, I prefer then to use more objective (and arguably comprehensive) criteria, some of them consecrated by courts and legislation.

In this paper, I distinguish between two aspects of media pluralism: internal (related to diversity of content) and structural (related to diversity of ownership and means of transmission) pluralism³⁴. In this sense I reiterate here that an adjacent and complementary statement to the main argument of this thesis related to the mixed legal system solution that best protects media pluralism is that a comprehensive understanding of media diversity combines these two aspects of the concept – both structural and content related. Structural and content pluralism are codependent. If one envisages a media market with many content producers and very few distributors of these many and allegedly different content sources then would that market be considered diverse? Few distributors may impose their own contractual terms on the content producers that in turn may both have to cheapen their content supply as well to adjust it to the distributors' requests. Even more, these distributors may demand high prices from consumers. A similar situation could happen if few content producers were on the market and many distributors.

This is precisely why media pluralism must be legally protected both through structural norms – ownership restrictions, must carry and licensing conditions – and content diversity enhancing provisions – obligations imposed on the public (especially) and private broadcasters, generally including time for independent parties, rules for

³⁴ See, also, Richard van der Wurff, "Supplying and Viewing Diversity, The Role of Competition and Viewer Choice in Dutch Broadcasting," *European Journal of Communication* 2004 19: 215-237. <http://ejc.sagepub.com/cgi/reprint/19/2/215>, advancing the idea that media diversity should mainly refer to "programme-type diversity" considering the fact that many media companies (structural pluralism) does not necessarily mean more media diversity.

preserving political pluralism especially during electoral campaigns, but also rules designed to keep at bay political influence, as well as quotas imposed to increase cultural pluralism and content of a different type. Also, it seems judicious to pinpoint here that while structural protection of media diversity may be achieved through both antitrust and regulation, the latter is realized through regulatory mechanisms³⁵.

Another way of looking at the meaning of media diversity is to assess either the “viewpoints” diversity or the “source” diversity, a perspective which led to a recent scholarly debate³⁶. Further, some scholars identified media diversity as including: source (diversity of ownership and workforce employed by media companies), content (diverse programming meeting a variety of interests) and exposure diversity (audience access to different types of media, via a wide spectrum of means of transmission)³⁷. Denis McQuail proposes the following criteria for evaluating media diversity: type of media (such as press, radio or television), function or type (such as entertainment or information), the level of operation (national, regional, local), the audience aimed at and reached (differentiated by income, age, etc.), language, ethnic or cultural identity, and politics of ideology³⁸. An attempt to provide a more objective view on what media diversity is comes from the Media Diversity Institute, which elaborated “diversity

³⁵ For an undistinguished (“workable regulation of the structure of the electronic communications industry”) understanding of media regulation, see Kurt Borchardt, “Structure and Performance of the U.S. Communications Industry. Government Regulation and Company Planning,” Division of Research, Graduate School of Business Administration, Harvard University, 1970, at p. 6 - 7.

³⁶ See, C. Edwin Baker, “Viewpoint Diversity and Media Ownership,” *Federal Communications Law Journal*, vol. 60, p. 651 and Daniel E. Ho, Kevin M. Quinn, “The Role of Theory and Evidence in Media Regulation and Law: A Response to Baker and a Defense of Empirical Legal Studies,” *Federal Communications Law Journal*, vol. 61, p. 673.

³⁷ Gracie Lawson-Borders, “Media organizations and convergence: case studies of media convergence pioneers,” Mahwah, N.J.: Lawrence Erlbaum Associates, 2006, at p. 33.

³⁸ See, Denis McQuail, “Mass communication theory: an introduction,” London: Sage Publications, 1994, at p. 143. Furthermore, “media should proportionally reflect the actual distribution of whatever is relevant (topics, social groups, political beliefs, etc.) in the society or reflect the varying distribution of audience demand or interest. The differentiation of media provision (content) should approximately correspond to the differences at source or to those at the receiving end.” *Ibidem*.

reporting tips.³⁹ Another journalistic guide's "purpose is to help journalists make news coverage more inclusive and representative of their communities"⁴⁰. Diversity is to be understood as the voices of minority members of the community as a whole. All the interests of particular social groups (groups, which are grouped on economic, social, economic, ethnic, sexual, religious, cultural and political criteria) in the community should be reflected in the coverage⁴¹.

As part of the whole picture of what media diversity is one should further mention the existence of public and private broadcasting,⁴² which is arguably part of the structural pluralism. Tangentially, the public interest standard that the public broadcasting institutions had to abide to since the beginning of broadcasting – they were supposed to provide ample news and educational programming, and access to religious and other civic groups⁴³ – offers more insight into what media diversity is. Back in times the

³⁹ See, David Tuller, "Reporting Diversity Manual," London, October 2002, A Media Diversity Institute publication with the support of the European Union, <http://www.periodismosocial.org.ar/documentos/Manual%20sobre%20Diversidad.pdf>. The manual includes sections on "ethnicity" (at p.22), "religion" (at p. 42), "gender" (at p. 50), "people with disabilities" (at p. 66), "socially disadvantaged groups" (at p. 76), "elderly people[]" (at p. 84), "refugees[]" (at p. 88), "sexual orientation" (at p. 98), "political [] dissidents" (at p. 106) and "photography and images" (at p. 114). Each section contains reporting "tips" and detailed analysis of articles taken from newspapers from South East Europe, Western Europe and the United States. See, *ibidem*. In another study, journalists need to acknowledge differences based on "race, class, gender (or sexual orientation), generation and geography." See, "Reality Checks. Content Analysis Kit," Maynard Institute for Journalism Education, <http://mendota.english.wisc.edu/~danky/realitychecks.pdf>, at p. 1. However, they must not emphasize them, they must treat them as natural phenomena. See, *ibidem*.

⁴⁰ See, in this sense, "Reality Checks. Content Analysis Kit," *ibidem*.

⁴¹ See, in this sense, "Reporting Ethnicity and Other Diversity Issues. A Manual for Discussion Leaders and Journalism Trainers," <http://www.media-diversity.org/pdfs/reporting%20ethnicity.pdf>. Media diversity is briefly described elsewhere as: "expresiones representativas de los grupos sociales, culturales y politicos representativos en el seno de la sociedad (the expressions of the society's representative social, cultural and political groups)." See, Ernesto Villanueva, "Derecho Comparado de la Informacion," Universidad Iberoamericana, 1998, at p. 289. Such a model is followed for instance by the public broadcasting in Germany.

⁴² Ben H. Bagdikian, "The media monopoly," Boston: Beacon Press, 1997, at p.249. Bagdikian would in this sense praise the European broadcasting models, especially the British BBC.

⁴³ See, on the role of the public broadcasting throughout the world (and the challenges it faces), Cinzia Padovani and Michael Tracey, "Report on the Conditions of Public Service Broadcasting," Television New Media 2003; 4; 131, <http://tvn.sagepub.com/cgi/content/abstract/4/2/131>. See, also, Trine Syvertsen,

fairness doctrine “required broadcasters to devote a reasonable time to discussion of controversial public issues, and to permit reasonable opportunities for opposing views to be heard if an adversarial position was presented⁴⁴.”

The concept of media diversity appears in all the countries that I plan to discuss in my paper, although sometimes under synonyms such as “plurality” or “pluralism.” In France the *Loi relative a la liberté de communication*⁴⁵ refers to restrictions necessary to preserve “*le caractere pluraliste de l’expression des courants de pensée et d’opinion*.”⁴⁶ When dealing with the competences of the Conseil Audiovisuel de l’Audiovisuel, the *Loi* refers to “diversity” as well as to the protection and the representation of the French language and culture. Further on, in the licensing process great importance is placed upon the public interest in the preservation of the diversity of the social – cultural trends, of the diversity of the operators on the market and in the necessity to avoid the abuse of dominant position on the market as well as the practices impeding upon the free exercise of competition⁴⁷. The German Federal Constitutional Court addressed the issue of plurality in the Television cases⁴⁸. In Germany the concept is twofold - there exists an internal and an external pluralism. The former refers to “the governing boards of the broadcasting stations, [which are] composed of representatives [of] all significant

“Challenges to Public Television in the Era of Convergence and Commercialization,” *Television New Media* 2003; 4; 155, <http://tvn.sagepub.com/cgi/content/abstract/4/2/155>.

⁴⁴ Ben H. Bagdikian, “The media monopoly,” *ibidem*, at p.248.

⁴⁵ Loi 86-1067 du 30 septembre 1986 (“Loi Leotard”). The French legislative sources that I use in the thesis are available at <http://www.legifrance.gouv.fr>.

⁴⁶ “...the pluralistic characteristic, the expression of the currents of thought and opinion ” – article 1, Loi Leotard.

⁴⁷ See article 28-4, Loi Leotard.

⁴⁸ See, Donald P. Kommers, “The constitutional jurisprudence of the Federal Republic of Germany,” Durham, N.C.: Duke University Press, 1997. The issue of diversity is dealt with in the Interstate Broadcasting Agreement of 1991 (last amended by the 13th amendment on the 13th of April 2010).

political, philosophical and social groups⁴⁹”. The latter applies especially to the private, commercial broadcasters and it refers to the number of the players on the market. The general picture is of a dual system, adjusted to the forces of the free market so long as the overall effect of both public and private broadcasters is one of multiplicity and balance⁵⁰. In the United States we understand diversity by reference to the Federal Communications Commission’s (FCC) discourse. The concept of diversity encompasses multiple facets: “viewpoint, program, outlet, source, minority and women ownership⁵¹.” The European Court of Human Rights already placed the principle of pluralism as one of the fundamentals of a democratic press⁵². Further, the Preamble of the new European Merger Regulation⁵³ states it was inspired by the necessity to “meet the challenges of a more integrated market and the future enlargement of the European Union⁵⁴.” It keeps the “plurality of the media” as a legitimate interest justifying the member states decision not to comply with certain measures required by this Regulation⁵⁵.

What becomes clear from the above considerations is that the diversity in the media is a slippery concept. This is not to say that it cannot be defined, it is to say that it

⁴⁹ See, First Television case, cited in Kommers, *ibidem*, at p. 405.

⁵⁰ See for instance, the Television IV case, *infra*, discussed in section III.2.3.2.

⁵¹ Report and Order and Notice of Proposed Rulemaking, June 2, 2003, In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, at para. 18. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.doc. In the radio sector the criteria for defining diversity are the number of the owners in a local Metro market and the program diversity, meaning distinct radio formats. George Williams, Scott Roberts, “Radio Industry Review 2002: Trends in Ownership, Format, and Finance,” September 2002, Federal communications commission, media bureau staff research paper, Media Ownership Working Group.

⁵² Case of Informationsverein Lentia and others v. Austria (24/11/1993), para 19.

⁵³ See, ECMR, *infra*, discussed in section III.4.1.

⁵⁴ See, ECMR, para. 6.

⁵⁵ See, art. 21, ECMR.

is sufficiently complex as the medium it applies to⁵⁶. In this sense some of the less legal and more journalistic solutions appeal precisely because of their comprehensiveness. James Curran proposes a “working model,⁵⁷” which would potentially achieve diversity at its “realistic” maximum.

The discussion on the various contributions to the definition of the media diversity is an intellectual exercise that shows the importance of the subject for the legal field as well as for other disciplines. The preciseness and clarity necessary for legal regulation and legal analysis demand however that this concept be objectively defined. I consider the different approaches taken to media diversity as helpful insights that may in the end add to the criteria that courts use when assessing the media concentration’s effects on the market. As the main concept used in this paper, media pluralism refers to both structural and content pluralism, these two secondary concepts being themselves described by reference to case law, legislation and doctrinal approach.

The term “media concentration” is taken from competition law and it refers to mergers and acquisitions in the media market that lead to fewer and fewer media companies competing with each other⁵⁸. This paper does differentiate, in line with competition law commandments, between antitrust and mergers⁵⁹ – noting also that the

⁵⁶ James Curran, “Media and power,” London: Routledge, 2002, at p. 237.

⁵⁷ This model is composed of: civic, social and professional media, as well as private and public broadcasters. See, J. Curran, *ibidem*.

⁵⁸ I consider this definition as simply focusing on the process occurring on the market. Other definitions, such as the one in the Hutchins Commission Report of 1947, which shall be discussed in the part of my paper dedicated to the United States jurisdiction, and which reads: the “decreased proportion of the people who can express their opinions and ideas through the press,” describes the effect of this process and not the process itself. See, the Hutchins Commission Report of 1947, quoted by C. Edwin Baker, in “Media Concentration and Democracy,” Cambridge University Press, 2007, at p. 2.

⁵⁹ See, Terry Calvani & Thomas Evans, “Regulation of Mergers & Monopolization,” in *International and Comparative Competition Laws and Policies*, 2001, Kluwer Law International, at p. 119.

term competition law is mostly used in the European context⁶⁰ and the term antitrust in the United States⁶¹. While covered by different legal regimes, mergers are connected to antitrust⁶² in that they may lead to both anticompetitive behavior and to decreased competitors on the market⁶³. It is often the case that consolidation in the media industry increases the possibilities of media companies to employ anticompetitive practices to the detriment of other competitors⁶⁴ – practices which are exactly the dangers to media diversity that this thesis addresses. Concentration refers both to ownership of the same type (horizontal integration) of media and to cross-ownership (vertical integration). From a free speech perspective the latter may potentially endanger democracy to a greater degree⁶⁵.

Similarly to other businesses, media companies merge for efficiency reasons⁶⁶. They merge to cut costs, to benefit from a larger market, to exploit at its maximum their

⁶⁰ See, Marjorie Holmes, Hugh Mercer QC and Ian Quirk, the chapter on Europe in Marjorie Holmes, ed., "Competition Law and Practice. A Review of Major Jurisdictions," Cameron May International Law and Policy Publishing, 2009, at p. 109.

⁶¹ See, Michele Floyd, the chapter on the United States, in Marjorie Holmes, *ibidem*, at p. 341. See, for a comparative treatment of the antitrust regimes in both countries, Femi Alese, "Federal Antitrust and EC Competition Law Analysis," Ashgate, 2008.

⁶² See, also, Martyn D. Taylor, "International Competition Law. A New Dimension for the WTO?," Cambridge University Press, 2006, at p. 84.

⁶³ See, Maher M. Dabbah, "The Internationalisation of Antitrust Policy," Cambridge University Press, 2003, at p. 49.

⁶⁴ See, also, H. Peter Nesvold, "Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions," *HeinOnline* -- 6 *Fordham Intell. Prop. Media & Ent. L.J.* 781 1995-1996, at p. 783.

⁶⁵ The largest media companies today are vertically integrated. For Time Warner's holdings, see, <http://www.timewarner.com/corp>. For Disney Media Networks' holdings, see: <http://corporate.disney.go.com/index.html>. For Viacom's holdings, see, <http://www.viacom.com/aboutviacom/Pages/default.aspx>. For News Corporation's holdings, see, www.newscorp.com. For Sony Corporation of America's holdings, see, <http://www.sony.com/SCA/index.shtml>. For the New York Times Company's holdings, see, <http://www.nytc.com/company.html>. For Gannett Co., Inc.'s holdings, see, <http://www.gannett.com/map/gan007.htm>. See, also, Senator Paul Wellstone, "Growing Media Consolidation Must be Examined to Preserve our Democracy," *HeinOnline* -- 52 *Fed. Comm. L.J.* 551 1999-2000.

⁶⁶ See, in general, on business reasons (including corporate law and practical advice) for mergers and acquisitions, Edwin L. Miller Jr., "Mergers and Acquisitions. A Step-By-Step Legal and Practical Guide," John Wiley & Sons, Inc., 2008, at p. 11 et seq.

capacities⁶⁷. Further, technological convergence⁶⁸ would enhance the industry profits, since it would permit cross-promotion and cross-advertising as well as reaching larger audiences. The benefits that companies aim for when they merge⁶⁹ are visible in arrangements to reach vertical concentration, such as exclusives, packaging and related limitations (when a program producer insists that certain programs be taken together as a package), in anticompetitive practices, such as the refusal to carry (or non-competition requirement, when a producer of a popular program conditions imposes on the distribution network⁷⁰ the condition of not carrying a competitor's program).

Mergers and anticompetitive behavior may restrict some companies (and consumers)' access to attractive content. As noted in this paper⁷¹, access to premium content is essential for the existence of many, successful, competitors on the market. In this context antitrust rules are well equipped to solve the economic problems of

⁶⁷ G. Williams and S. Roberts, *ibidem*. The paper observes the trend in increased concentration of ownership: for example, while in 1996 the two largest radio group owners consisted of fewer than 65 radio stations each, by 2002 the leading radio group Clear Channel Communications owns approximately 1200 stations, and Cumulus Broadcasting Inc. owns 250 stations.

⁶⁸ The Telecommunications Act of 1996 allows local phone companies to carry video programming, which then reach television sets or computers. Cable providers may deliver telephone and Internet services. Video is also transmitted over Internet (cable-based Internet or DSL-based Internet). See, Thomas F. Baldwin, D. Stevens McVoy, Charles Steinfeld, "Convergence: integrating media, information, & communication," Thousand Oaks, CA: Sage Publications, 1995, at p. 16: "capital might be more easily acquired, and the process of building full service wired networks quite deliberate, if monopoly markets were allowed." See, also, Tim Yeo, "It's time to deregulate. Globalisation and the speed of technological change are making our media ownership rules look archaic," *Guardian* - 26/11/2001. http://www.conservatives.com/tile.do?def=news.show.article.page&obj_id=23515.

⁶⁹ Concentration affects both the market of content producers and the distributors' market. The benefits to the content producer are: access to large audience, which allows a quicker and higher return on fixed production costs and larger investments in programming, and the possibility to advertise its own content across multiple broadcasting networks, which ultimately puts the respective company at advantage against competitors. The distributor may benefit as well from attracting premium content to the detriments of its competitor and in general higher returns on its investment because it may be able to sell the content received from the content producer at lower costs (considering that it has a large distribution network). See, in this sense, John H. Barton, "The International Video Industry: Principles for Vertical Agreements and Integration," *Cardozo Arts and Entertainment Law Journal*, 2004, 22 *Cardozo Arts & Ent. L.J.* 67.

⁷⁰ A Multiple System Operator (MSO) [in the United States but the definition could be extrapolated to include large cable operators in any country] is a large cable company that operates cable system across a country. See, Roger L. Sadler, "Electronic Media Law," Sage Publications, 2005, at p. 117.

⁷¹ See, *infra*, for instance, in section II.5.3.2.

concentration.⁷² However, as this thesis suggests, the media product and the media market are special in the sense that they involve meta-economic considerations and therefore require a specifically tailored legal regime that encompasses more than antitrust.

Crucial to a discussion of the amount of competition on the market is a discussion of market power. In the United States as well as in Europe⁷³, the antitrust tool used for the calculation of the market power is the Herfindahl – Hirschman index⁷⁴. This index is found by adding the square of the each firm's market share⁷⁵. The result is a number between 1000 and 1800, correlated to a lower or higher degree of market concentration⁷⁶.

⁷² "Issues, Memorandum on Pluralism and Media Concentration addressed to the members of the European Parliament's Intergroup on the Press, Communication and Freedom," 1st March 2005 - Media concentration and pluralism: "The European Publishers Council fully supports the measures taken by the Member States to ensure that media pluralism is guaranteed, and agrees that the full rigors of competition policy should be applied at both national and European level. However the EPC is opposed to any new legislation at the European level to regulate media concentration and pluralism [...]". <http://www.epceurope.org/issues/MemorandumPluralismMediaConcentration.shtml>. See also, "Adjusting the Picture: Media Concentration or Diversity?," by James L. Gattuso, Benjamin Compaine, Robert Okun, Chris Core, October 7, 2003, Heritage Lecture, no. 798. The authors argue that antitrust rules are enough to cope with the existing media concentration. Even more, in light of the structural development of the market, it seems that competition is well served by the existing rules. However the description of the market is in my view purely simplistic and it does not take into account any other variables except for the number of suppliers. <http://www.heritage.org/Research/InternetandTechnology/HL798.cfm?renderforprint=1>. J. Curran, *ibidem*, at p. 233 challenges the "archaic understanding of the polity," referring to Jurgen Habermas' model of media as a public sphere. See, *ibidem*.

⁷³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/C 31/03), Official Journal of the European Union, C 31/5 of 5.2.2004, at para. 16.

⁷⁴ See, United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines. Revised in 1997. Section. 1.5. Available at: http://www.justice.gov/atr/public/guidelines/horiz_book/15.html

⁷⁵ See, United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section. 1.5.

⁷⁶ See, United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section. 1.51.

In calculating this index, the FCC takes account of the shares, whether they are spread equally in the market and the number of the firms in the industry.⁷⁷

Finally, the issue raised in this paper involves aspects related to economics⁷⁸, finances, telecommunications and technology, as well as issues dealt with by psychology and sociology. Although an in depth analysis of these sources is not required for my purposes, some elements are necessary to understand and assess the way that the changes in the media ownership structure – resulted from media concentration – can have an impact on the diversity of available information. An increase in ownership concentration means a decrease in the quality of the news and, generally, of the media content⁷⁹. Simple application of the economic principles to the media' situation shows us that this sector has social externalities that it takes no steps to internalize. I am referring to the influence that different topics presented in all of the media' branches, either radio, TV, newspapers or Internet have on the society⁸⁰. The lack of diversity in information is another form of externality that could determine a homogenous public opinion, which

⁷⁷ The criteria used in the Department of Justice Merger Guidelines are similar. See, Roger J. Van den Bergh, Peter D. Camesasca, "European competition law and economics : a comparative perspective," Antwerpen : Intersentia, 2001, p. 329. See, also, G. Williams and S. Roberts, *ibidem*.

⁷⁸ See, for example, Andrew S. Wise (Media Bureau, FCC) and Kiran Duwadi (International Bureau, FCC), "Competition Between Cable Television and Direct Broadcast Satellite – It's More Complicated Than You Think," January 2005. The research paper analyses the substitutability of the Direct Broadcast Satellite for basic cable service. See, also, Keith S. Brown, Media Bureau, FCC, "A Survival Analysis of Cable Networks," December 2004. This is a presentation of the cable market, showing the increase in the diversity of content that they provide (transmit) to the public. Again, this is an economic analysis that emphasizes that producing content can be extremely expensive, however the revenues from the distribution of this content rise with the increase in the number of subscribers, while the cost to distribute the content is low. The paper concludes that a cable network needs a large number of subscribers in order to survive. However this could be improved if the cable networks could be carried by the satellite networks. The paper also comprises a full list of the cable networks, the number of subscribers and the manner that this number fluctuated over time. *Ibidem*.

⁷⁹ See, Project for Excellence in Journalism, "Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality," available at: <http://www.journalism.org/sites/journalism.org/files/ownership.pdf>.

⁸⁰ For a discussion on the topic, see, Douglas Gomery, "The FCC' s Newspaper – Broadcast Ownership Rule" (2002), March 1, 2002, Economic Policy Institute, Washington DC.

tends to undermine the basis of democracy⁸¹. Although I do not intend to dig deeper into sociological or psychological aspects, the link between media and how people perceive reality⁸² is almost unquestionable nowadays⁸³. It is similarly unquestionable that there is more than legal analysis attached to the media concentration's effects on media diversity. Any legal analysis on this issue is performed within the broader scientific context constructed by many other fields⁸⁴.

I. 3. The trends towards media concentration. Market models and how they fit in the regulation/deregulation debate

The trend towards concentration and the regulation/deregulation debate section first shows which are the media companies that currently dominate the global media market. Concentration happens both horizontally – currently there are a handful of media companies on the market – and vertically – most if not all of these media companies hold shares in both media content production and distribution markets. The phenomenon of the media concentration⁸⁵ although not new, increased recently against the backdrop of

⁸¹ Robert Kuttner in "Everything for Sale," New York, Alfred A. Knopf (1996) links the erosion of civic life with the decrease in the quality of the information presented in the media.

⁸² See, for instance, J. Michael Sproule, "Propaganda and Democracy. The American Experience of Media and Mass Persuasion," Cambridge University Press, 1997.

⁸³ D. McQuail and K. Siune, "Media policy: convergence, concentration and commerce," ibidem, at p. 38. See, also, J. Turow, ibidem, at p. 25.

⁸⁴ See, also, Robert Trager and Joseph A. Russomanno, "... The Whole Truth ...": The First Amendment, Cultural Studies, and Comparative Law," Journal of Communication Inquiry 1995; 19; 16, at p. 19, <http://jci.sagepub.com>, opposing Geoffrey C. Hazard, Jr., "Limitations on the Uses of Behavioral Science in the Law," Case Western Reserve Law Review 19 (1987): 76-77, who questions the efficiency of using science in legal policy making and David L. Faigman, "To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy," Emory Law Journal 38(1989):1005- 95, who considers that humanities and science may contribute to such decision making.

⁸⁵ See, for a brief account of these handful of media owners in the United States, Matthew Miller, "The Rise Of Ron Burkle," 12.11.06, an article in Forbes magazine, at: http://www.forbes.com/free_forbes/2006/1211/104.html.

regulatory relaxation, aspect discussed throughout this paper. This consolidation fits within broader economic market models⁸⁶ that are summarized below.

The media market today is dominated⁸⁷ by several media companies⁸⁸, including Time Warner (which owns⁸⁹ CNN, AOL⁹⁰, Turner, HBO, Warner Bros), AT&T⁹¹, Bertelsmann (including the content providers - RTL Group and Random House – and the distribution network Arvato)⁹², Walt Disney (which owns Disney – ABC Television Group)⁹³, General Electric (which owns NBC, Telemundo, Universal Studios⁹⁴), News Corporation (which owns television (such as Fox TV), cable and direct satellite broadcasting (SKY in Italy, United Kingdom, Germany) , as well as movie studios – Twentieth Century Fox Television and Twentieth Century Fox Film)⁹⁵, Sony⁹⁶ (which owns Sony Pictures, including Columbia Pictures⁹⁷), Viacom (which owns MTV Networks – including VH1, Paramount Pictures),⁹⁸ CBS Corporation⁹⁹ and Vivendi Universal (which owns Universal Music Group – music distribution and music rights,

⁸⁶ See, also, Edward S. Herman, “Market System Constraints on Freedom of Expression,” *Journal of Communication Inquiry* 1991; 15; 45, <http://jci.sagepub.com>.

⁸⁷ Shelton A. Gunaratne, “Freedom of the Press. A World System Perspective,” *International Communication Gazette* August 2002 vol. 64 no. 4 343-369.

⁸⁸ See, also, Ronald V. Bettig, “Concentration in the Copyright Industries,” in Peter K. Yu, ed., “Intellectual Property and Information Wealth. Issues and Practices in the Digital Age,” Praeger Perspectives, 2007, at p. 365.

⁸⁹ See, the company’s profile at: http://www.timewarner.com/corp/aboutus/fact_sheet.html.

⁹⁰ Although Time Warner announced recently AOL’ spin off that would result in the legal and structural separation of the two companies. See, “Time Warner Declares Spin-Off Dividend of AOL Shares,” November 16, 2009, at: <http://www.timewarner.com/corp/newsroom/pr/0,20812,1939809,00.html>.

⁹¹ For a description of the various products that AT&T offers to its customers, see: <http://www.att.com/gen/general?pid=7456#4>.

⁹² See, for a brief description of Bertelsmann’s holdings in both content and distribution: http://www.bertelsmann.com/bertelsmann_corp/wms41/bm/index.php?ci=3&language=.

⁹³ See, <http://corporate.disney.go.com/corporate/overview.html>.

⁹⁴ http://www.ge.com/products_services/media_entertainment.html.

⁹⁵ See, News Corporation’s official website at: <http://www.newscorp.com/index.html>.

⁹⁶ See, for a company’s profile in the United States, <http://www.sony.com/SCA/corporate.shtml>.

⁹⁷ See, <http://www.sonypictures.com/corp/corporatefact.html>.

⁹⁸ See, <http://www.viacom.com/aboutviacom/Pages/default.aspx>.

⁹⁹ See, <http://www.cbscorporation.com/ourcompany.php?id=11>. CBS spun off from Viacom on December 31, 2005. See, <http://www.viacom.com/investorrelations/Pages/separationfromcbs.aspx>.

Group Canal+ – content producing and distribution especially in France and telecommunications holdings in various countries)¹⁰⁰. This paper asserts that the trend towards media concentration is first a consequence of both business economics¹⁰¹ and regulatory relaxation, and second it is not a relatively new phenomenon, considering that it goes way back in broadcasting history. Third, it is not strictly circumscribed to the media market since it fits in the globalization/capitalism¹⁰² context. The discussion of these assertions (as much of the analysis in this introductory chapter of my paper¹⁰³) is mainly based on the United States experience.

In the United States, media concentration takes amplitude in the 80s¹⁰⁴ and it continues with the passage of the 1996 Telecommunications Act. Long before however, the Hutchins Commission on Freedom of the Press in 1947 stated that “the concentration of ownership had limited the variety of sources of news and opinion and that the freedom of press could remain a right of those who publish only if it incorporates into itself the rights of the citizen and the public interest”¹⁰⁵. Another study, the International Commission for the Study of Communication Problems (MacBride Report¹⁰⁶) warned

¹⁰⁰ See, the company’s profile at: <http://www.vivendi.com/vivendi/-Group->.

¹⁰¹ In the business environment companies merge for efficiency reasons. They merge to cut costs, to benefit from a larger market, to exploit their capacity to the maximum extent. The same happens on the media market. See, G. Williams and S. Roberts, *ibidem*.

¹⁰² See, R.V. Bettig, *ibidem*, at p. 365.

¹⁰³ It is worth pointing out here the disproportion in volume that I noted between the European and United States literature on the media concentration subject.

¹⁰⁴ Robert Pike, Dwayne Winseck, “The Politics of Global Media Reform, 1907-23,” *Media Culture and Society*, September 2004 vol. 26 no. 5 643-675, Sage Publications. The article traces the history of cable back to 1850 and shows how the domestic US telegraph systems become linked to a global cable network. Cable networks like Eastern and Associated Companies contributed to the growth of global news agencies like Reuters and Associated Press. See, *Ibidem*. See, also, Douglas Gomery, “A History of Broadcasting in the United States,” Blackwell Publishing, 2008, at p. 295. The author mentions FCC Chair, Mark Fowler, who made of radio station license renewal an almost automatic process. In the television sector, the author points out to the fact that by 2004 all television networks vertically integrated with Hollywood studios. See, Gomery, *ibidem*, at p. 300. See, also, Charles H. Tillinghast, “American broadcast regulation and the First Amendment: another look,” Iowa State University Press, 2000.

¹⁰⁵ See, S.A. Gunaratne, *ibidem*.

¹⁰⁶ See, in, S.A. Gunaratne, *ibidem*.

about the concentration of media ownership's influence on the broadcasting industry, including the effects of advertising on the industry¹⁰⁷. After the MacBride Report, "the concentration of media ownership has become more pronounced¹⁰⁸" in the context of the free-market philosophy (under the United States' leadership) taking over the world¹⁰⁹. Media consolidation¹¹⁰ is a natural consequence of economic/business dynamics and needs and it fits into the trend towards globalization,¹¹¹ industry consolidation, and power – wealth concentration¹¹².

As such, media concentration emulated the laissez faire approach that started at some point in history to characterize the whole economic policy in the developed world. This free market approach comes under scrutiny recently, as it happened in the '23 - '33 period, due to the economic crisis. My paper does not aim at analyzing the economic theories that inspire the different macro policies at some point in time. However, it is worth mentioning that many of the policies designed to curtail media concentration stem from general economic thought, mostly from the Keynesian approach. Keynes favored

¹⁰⁷ See, S.A. Gunaratne, *ibidem*. See, also, "Many Voices One World," Report by the International Commission for the Study of Communication Problems, Unesco, 1980, available online at: <http://unesdoc.unesco.org/ulis/cgi-bin/ExtractPDF.pl?catno=40066&look=default&ll=1&display=1&lang=eb&from=1&to=379>.

¹⁰⁸ See, S.A. Gunaratne, *ibidem*.

¹⁰⁹ See, S.A. Gunaratne, *ibidem*. See, also, André Lange, "The Fragmented Fragmentation, The diversity of regional television in Europe," Presentation for the 19th Conference of CIRCOM Regional (Porto, 21-23 June 2001) <http://www.obs.coe.int>. The study documents the enormous difference between revenues from American productions and revenues from European productions.

¹¹⁰ Broadly and commonly speaking, media consolidation and media concentration refer both to the same process. See, Michael J. Copps, "The "Vast Wasteland" Revisited: Headed for More of the Same?," Federal Communications Law Journal, May, 2003, 55 FCLJ 473. I consider however that media concentration is more accurate in describing this legal process.

¹¹¹ See, Alan B. Albarán and Sylvia M. Chan-Olmsted, "Global media economics: commercialization, concentration, and integration of world media markets," Ames: Iowa State University Press, 1998, at p. 3.

¹¹² Some authors frame media consolidation into the much broader context of globalization. Back at the beginning of the nineteenth century power/wealth concentration was seen as a potential danger for democracy. Advocates of a diverse media argued that the state as well as the corporations endangered the democratic global media system. See, Pike and Winseck, *ibidem*. Even inside the industry, the pressures of political or corporate power come from various sources and are linked to power roles within the media industry which are identified by Turow. See, J. Turow, *ibidem*, at p. 26.

the state intervention to correct market failures, which he did not see as an antithesis to the market ideal of the classical liberalism¹¹³, but as its supplement¹¹⁴. In fact, the belief in the market's ability to regulate itself is what distinguished the classical liberals (and neoliberals¹¹⁵) from the Keynesian followers¹¹⁶. Many thinkers tried to have a more realistic¹¹⁷ approach on this issue and admitted that a certain degree of state intervention is not only necessary but even desirable¹¹⁸.

Media regulation policies evolve around questions on whether the marketplace of ideas is actually a realistic view on how the media market operates. Thus, Coase questions the validity of the argument that while the markets for ordinary products may be regulated in order to correct market failures and promote or protect competition, in the “market for ideas” the state intervention is viewed with skepticism¹¹⁹. Coase judiciously, yet ironically, argues that this “ambivalence¹²⁰” or “strange situation¹²¹” may be justified

¹¹³ Classical liberal theory advocated free trade, unrestricted competition and state nonintervention and it is based on the utilitarian thought that puts the individual at the center and as the measure of all things in a society. See, Gheorghe Popescu, “Evolutia gandirii economice” (“The Evolution of the Economic Thought”), Ed. C.H. Beck, 2009, at p. 242, 451 and on Adam Smith, at p. 186.

¹¹⁴ See, G. Popescu, *ibidem*, at p. 827. This conciliatory approach was embraced and further developed by Friedrich Wilhelm Hegel who suggested the state intervention to create institutions that would regulate mechanisms of harmonization between various individual interests and between individual interests and state interest. Hegel considered that the man would achieve its full potential both as a citizen and a “homo economicus,” See, G. Popescu, *ibidem*, at p. 606. Others, such as Johann Gottlieb Fichte put an accent on the society as providing the context and the means to full individual realization. See, G. Popescu, *ibidem*, at p. 605.

¹¹⁵ See, the Chicago School, advocating a reduced state role in the market, in G. Popescu, *ibidem*, at p. 926. See, also, on Friedrich August Hayek, in G. Popescu, *ibidem*, at p. 1141.

¹¹⁶ Such, also, in G. Popescu, *ibidem*, at p. 891 et seq, on Joseph Alois Schumpeter, who considered that the capitalism would collapse due to the destruction of its own institutions.

¹¹⁷ See, also, on Friedrich List, who considered liberalism a “theoretical speculation that presents the human society as a perfect reality in which individuals live in permanent harmony and peace, in which each and every one equally benefits of the advantages of the generalization of the liberalism, in which they are no distinct nations, only the humanity in its ensemble as a universal republic.” See, in G. Popescu, *ibidem*, at p. 459, paraphrasing F.List, “Sistemul national de economie politica” (“The National System of Economic Politics”), Ed. Academiei R.S.R., Bucharest, 1973.

¹¹⁸ See, in G. Popescu, *ibidem*, at p. 960, on Paul Anthony Samuelson, who offered a more realistic picture of the economy as a “mixed” economy composed of both state “commandment” and private decision.

¹¹⁹ See, R.H. Coase, “The Market for Goods and the Market for Ideas,” (1974) in John H. Garvey and Frederick Schauer, ed., “The First Amendment,” West Group, 1996, at p. 74 et seq.

¹²⁰ See, Coase, *ibidem*, at p. 76.

by the intellectuals' overblown ego¹²². Further, he challenges the "consumer ignorance" that justifies state intervention in the market for goods and dismisses this intervention in the market for ideas (hard to believe people would be more able to "evaluate competing views on economic and social policy than to choose between different kinds of food¹²³"). Even if I understand the validity of these arguments, however, I believe that we should *not* "use the same approach for all markets when deciding on public policy¹²⁴." The main underlying issue with Coase's proposal is that it would disregard the profound democratic implications of the market of ideas. And, while in the market for goods state intervention might be easier to quantify, measure and thus it would be more transparent, in the market for ideas these state intervention monitoring tasks will be more difficult. Who is to say that, as he points out, the "false and misleading [politicians'] statements¹²⁵" can be verified for accuracy and a priori banned from public debate (Coase points out to the governmental intervention in banning false advertising)? The bottom line is that speech, contrary to other products, is not an exact science and thus economic implications cannot properly address or justify the regulation of the media market. Fiss picks up on this idea and asserts that the concept of market does not comprehensively manage the "essential conditions of democracy¹²⁶." It is then when the state should intervene to "correct" the

¹²¹ See, Coase, *ibidem*, at p. 76.

¹²² Coase makes an interesting point in arguing that the reason for treating the state intervention in the market for ideas with reluctance is because the intellectuals are biased in favor of a field they profess: "That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating." See, Coase, *ibidem*, at p. 75 et seq.

¹²³ See, Coase, *ibidem*, at p. 77.

¹²⁴ See, Coase, *ibidem*, at p. 76.

¹²⁵ See, Coase, *ibidem*.

¹²⁶ See, further, Owen Fiss, "Why the State?", 100 Harv. L.Rev. 781 (1987), in Garvey and Schauer, *ibidem*, at p. 77.

market by supplementing it with the kind of speech products that it would not produce by itself¹²⁷.

As any other market, the media market was and is shaped by politics¹²⁸. Today's scheme of broadcasting ownership is in fact the result of a perpetuated, though governmentally altered, historical ownership¹²⁹. For instance, initially in the United States the cable industry was dominated by one company, the Telegraph Construction and Maintenance Company (TC&M), and its monopoly was permanently reinforced by large rates that only few companies could afford (which of course perpetuated in turn these companies' monopoly)¹³⁰. As such, the press agencies paid high rates to be the first to transmit hot international news¹³¹. The cartels started to be questioned in court, and probably the most noticeable example comes in 1914 when the Sherman Act was used to break Western Union's merger with AT&T¹³². The obvious form of government action

¹²⁷ "The state must put on the agenda issues that are systematically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled." See, Fiss, *ibidem*, at p. 79. Fiss argues that the danger of "circularity" (referring to Charles Lindblom's book, "Politics and Markets," on the possibility that when the state steps in to regulate business markets, then the state might actually be influenced by these markets) can be counteracted with "allocating more power" to "state agencies [that are] more independent of market forces." Fiss, *ibidem*, at p. 80.

¹²⁸ R. van der Wurff, *ibidem*. See, also, Robert W. McChesney, "Rich media, poor democracy: communication politics in dubious times," New York: New Press, 2000. See, further, Edward S. Herman and Robert W. McChesney, "The global media: the new missionaries of corporate capitalism", London: Cassell, 1997; Robert W. McChesney, "The Problem of the Media. U.S. Communication Politics in the 21st Century," Monthly Review Press, New York, 2004; Robert W. McChesney and John Nichols, "Our media, not theirs: the democratic struggle against corporate media", New York: Seven Stories, 2002, Robert W. McChesney, "Theses on media deregulation," Media Culture Society, Jan 2003; 25: 125 - 133.

¹²⁹ See, further, for a link between media related legislative choices and "the larger and more well organized interests," William J. Drake, introduction to "The New Information Infrastructure: Strategies for US Policy," available at: <http://www.tcf.org/Publications/MediaPolitics/informationinfrastructure-synopsis.htm>. See, also, Owen, "Economics and Freedom of Expression," *ibidem*, at p. 114, how the present structure of the American broadcasting is the product of governmental action.

¹³⁰ See R. Pike, D. Winseck, *ibidem*.

¹³¹ See R. Pike, D. Winseck, *ibidem*.

¹³² See R. Pike, D. Winseck, *ibidem*.

in the field of broadcasting is the license requirement¹³³. This requirement accompanied the earliest forms of radio transmission – the United States Secretary of Commerce licensed all form of radio communication¹³⁴. Although paying lip service to non-interventionism, governmental action infuses media development¹³⁵. The link between private investor’s interests and the broadcasting industry is historically documented¹³⁶. Licensing in itself served as a tool of preserving the already acquired broadcasting power, with station owners likely to advocate for deregulation but much less likely to advocate for removal of the licensing requirement¹³⁷.

¹³³ See, also, Ben H. Bagdikian, “The Media Monopoly”, Beacon Press, 1997, at p. 246, stating: “Under the First Amendment, it is unconstitutional for government to require anyone to have a license in order to print or write anything.”

¹³⁴ See, section 6412 of Act no. 264 of 1912, in “Radio Laws and Regulations of the United States,” Department of Commerce, United States of America, Washington, Government Printing Office, 1919, available online at: <http://earlyradiohistory.us/1919reg.htm>.

¹³⁵ The information and communication technology benefited from governmental support. See, Andrew Calabrese, “Stealth regulation: moral meltdown and political radicalism at the Federal Communications Commission,” *New Media & Society*, 2004, Sage Publications. Further, General Electric acquired in September 1919 the American Marconi company (whose parent company was British) and created Radio Corporation of America, which provided GE with the necessary infrastructure to broadcast radio. The American government contributed to the succesful conclusion of this transaction. Further, the radio equipment (mainly the alternator) was patented to RCA, which “gave the Radio Corp. a virtual U.S. monopoly in long-distance point-to-point communications.” See, “History of Communications-Electronics in the United States Navy,” Captain Linwood S. Howeth, USN (Retired), 1963, pages 353-37, available at: <http://earlyradiohistory.us/1963hw32.htm>. For a very detailed history of the early American broadcasting, see, Thomas G. White, “Articles and extracts about early radio and related technologies, concentrating on the United States in the period from 1897 to 1927,” available online at: <http://earlyradiohistory.us/sec019.htm>. AT&T (American Telegraph & Telephone) Company’ sale of its huge radio network infrastructure (telephone lines that allowed a better connection of radio stations and better quality signal) to General Electric, Westinghouse and their joint venture RCA conducted to the creation of the National Broadcasting Company in 1926. See: <http://earlyradiohistory.us/sec019.htm>.

¹³⁶ “Our case-study focuses on the cable barons who molded state policies in their own interest and in ways that fundamentally shaped our international distribution of news and information.” For example, the owner of Atlantic Telegraph Company was financially helped by the owner of New York Associated Press (AP) in exchange for priority for AP messages on the cable network. On this line and because of the intermingled interests the cable company prioritized also the air of government messages. See, Pike, and Winseck, *ibidem*. See, in general, for instances on how politics and business influence media story telling, Chomsky, “Manufacturing Consent”.

¹³⁷ See, Patricia Aufderheide, “Communications Policy and the Public Interest. The Telecommunications Act of 1996,” The Guilford Press, 1999, at p. 25.

The regulation/deregulation debate accompanied the history of broadcasting especially since the 80s¹³⁸ and increased in intensity in light of technological progress. Thus, at the beginning of the 90s the United States legislature started to question whether the cable industry would make the media market so diverse in terms of prices and programming that no regulation would be necessary. Debates ranged from very enthusiastic support for regulation to a “hands off” approach, while some argued for a moderate regulatory take on the issue, preserving the regulatory model until real competition would emerge on the market¹³⁹.

The concentration in the media market received an increasing public attention in the United States after the FCC’s Review of the rules on media ownership in 2003¹⁴⁰. The FCC’s Report and Order led to an elaborated political debate both in the House and in the Senate. This debate encompassed both pros and cons of media regulation. There were on the one hand those who limited themselves to only proclaiming the need for regulation¹⁴¹ and those that proposed a return to the fairness doctrine or some other measures to

¹³⁸ See, D. Gomery, “A History of Broadcasting in the United States,” at p. 295.

¹³⁹ See, Cable Television Regulation, Part I, Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce House of Representatives, one hundred first congress, second session, March 1 and April 19, 1990, Serial No. 101-158, printed for the use of the Committee on Energy and Commerce, US Government Printing Office, Washington, 1990. A certain Mr. Markey preaches regulation. A Mr. Rinaldo has exactly the opposite view. A representative of the Cable industry, Bill Richardson argued, unsurprisingly, on the same line: “the cable television industry played the major role by continually reacting to the whims and desires of the public at large. In short, we spoiled them! We continue to spoil them by offering them fun-fare viewing for young and old, educational viewing for young and old, ethnic programming, around the clock viewing of weather, news, sports, financial reports, and variety entertainment.” For a moderate view, arguing for “interim regulation,” see Mr. Edward R. Madigan. Ibidem.

¹⁴⁰ See, for instance, http://www.house.gov/watson/issue_media.html.

¹⁴¹ “[Rep. Louise Slaughter] blame[s] the loss of fair broadcasting on the ongoing consolidation of newspapers and broadcast outlets, resulting in few owners controlling much of America’s information. Media consolidation is the most critical issue facing the American people today: whether to allow a handful of people to determine what information we receive and influence the decisions we make,” says Rep. Maurice Hinchey. “In a free and open society, in a democratic republic, you need a free and open discussion of the issues. We don’t have that today.” See, Eric Boehlert, “Fair and balanced? Some Democrats are using Bush’s pay-for-say media scandals to push for a new Fairness Doctrine for broadcasting.”

<http://www.slaughter.house.gov/HoR/Louise/Hidden+Content/salon.com+article.htm>.

promote competition in the media and to restore public interest considerations as part of the FCC's agenda.¹⁴²

There were on the other hand those that looked ahead for the exciting prospects of the future, the changes that needed the "help" of a "more" deregulated market. The proponents on this side of the barricade envisaged actually a combination of the regulatory mechanisms with the laissez-faire approach¹⁴³. While the 2003 review did not entirely survive¹⁴⁴, the scholars/FCC/industry debate continues to nowadays when the

¹⁴² See, proposals such as: "The Media Act (Meaningful Expression of Democracy in America)", <http://www.slaughter.house.gov/HoR/Louise/Issues/Legislative+Record/108th+Congress/H.R.+4710.htm>. "To require the Federal Communications Commission to report to Congress regarding the ownership and control of broadcast stations used to serve language minorities, and for other purposes." - 1/4/2005--Introduced. National Minority Media Opportunities Act <http://www.congress.org/congressorg/bill.xc?billnum=H.R.148&congress=109#summary>. "To enforce the public interest obligations of broadcast station licensees to their local communities." 2/1/2005--Introduced. Fairness and Accountability in Broadcasting Act <http://www.congress.org/congressorg/bill.xc?billnum=H.R.501&congress=109>. "To amend the Communications Act of 1934 to prevent excessive concentration of ownership of the nation's media outlets, to restore fairness in broadcasting, and to foster and promote localism, diversity, and competition in the media." 7/14/2005--Introduced. Media Ownership Reform Act of 2005 <http://www.congress.org/congressorg/bill.xc?billnum=H.R.3302&congress=109>. the full text of the proposed bill: <http://www.congress.org/congressorg/webreturn/?url=http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3302>.

¹⁴³ See, proposals such as: "A bill to establish a market driven telecommunications marketplace, to eliminate government managed competition of existing communication service, and to provide parity between functionally equivalent services." 7/27/2005--Introduced. Broadband Investment and Consumer Choice Act "To amend the Small Business Act and the Communications Act of 1934 to increase participation by small businesses in spectrum auctions conducted by the Federal Communications Commission." 4/14/2005--<http://www.congress.org/congressorg/bill.xc?billnum=H.R.1661&congress=109>. "To prohibit municipal governments from offering telecommunications, information, or cable services except to remedy market failures by private enterprise to provide such services." 5/26/2005 <http://www.congress.org/congressorg/bill.xc?billnum=H.R.2726&congress=109>. "To promote deployment of and investment in advanced Internet communications services." 1/4/2005<http://www.congress.org/congressorg/bill.xc?billnum=H.R.214&congress=109>. "To promote deployment of competitive video services and eliminate redundant and unnecessary regulation." 6/30/2005 <http://www.congress.org/congressorg/bill.xc?billnum=H.R.3146&congress=109>. the full text of the proposed bill is available at: <http://www.govtrack.us/data/us/bills.text/109/h3146.pdf>. "A bill to promote deployment of competitive video services, eliminate redundant and unnecessary regulation, and further the development of next generation broadband networks." 6/30/2005 <http://www.congress.org/congressorg/bill.xc?billnum=S.1349&congress=109#summary>; the full text of the proposed bill is available at: <http://www.govtrack.us/data/us/bills.text/109/s1349.pdf>.

¹⁴⁴ Back in 2003, an amendment, in the sense of limiting the national ownership cap from 45% to 39%, was proposed to the new Appropriations Bill on the Federal Budget (see, Amendment sought to prohibit funds to the Federal Communications Commission for implementing new media ownership rules, proposed by Mr. Hinchey on 7/22/2003, CR H7278-7284, H7284-7288, H7298-7299; text: CR H7278) and it was later

FCC prepares itself for the 2010 biennial review of media ownership rules (except for the national cap). In the workshops preceding the rulemaking both sides met to offer arguments in favor/against regulation that did not excel through novelty but through solidification and expansion¹⁴⁵.

A global concern related to the concentration of the media refers to the information divide¹⁴⁶ – how media, being owned by companies in developed countries, pays little attention to what is happening in less developed countries and advances the developed countries' agenda. Thus, the media has been criticized for a biased and unfair representation of the majority of developing nations and for being oblivious to expressed concerns of Third World countries¹⁴⁷. Further, it has been long pointed out that, paradoxically, "the rise of each new form of technology has led to further inequalities in access."¹⁴⁸

These lines outlined the current media market situation and the fact that the media concentration is not a new phenomenon, although it recently increased in size and it sparked more intellectual debate over the means to address its effects on the media diversity. The manner of addressing this issue must be seen within the context of market models, such as the free market and state intervention in case of market failure, an aspect

introduced in the 2004 Consolidated Appropriations Act. Further, courts sent other 2003 rules back to FCC for further review. For the state of the ownership rules at present, see, *infra* in the United State Chapter.

¹⁴⁵ The arguments presented are hardly new, but they became more structured and solid. See, the workshops' webcast, on FCC's website, Media Ownership division.

¹⁴⁶ See, Pike, and Winseck, *ibidem*. See, also, Maria Michalis, "The Debate over Universal Service in the European Union: Plus ça change, plus c'est la même chose," *Convergence* 2002; 8; 80, at p. 90, <http://con.sagepub.com/cgi/content/abstract/8/2/80>.

¹⁴⁷ See, Zixue Tai, "Media of the World and World of the Media," *International Communication Gazette* October 2000 62: 331-353, 2000. His study compares the rankings of the top 10 world news events among 11 news organizations representing seven countries (China, Japan, UK, France, Costa Rica, Nigeria and the US) within the last eleven years.

¹⁴⁸ See, Stephen L. Carter, "Technology, Democracy, and the Manipulation of Consent," *The Yale Law Journal*, Vol. 93, at p. 599 (1984), in Eric Barendt, ed., "Media Law," New York University Press, Reference Collection (1993), at p. 169, referring to Ithiel de Lola Pool, "Technologies of Freedom" Harvard Press, 1983.

that ties in with the regulation/deregulation debate and the “special nature” of the media product¹⁴⁹. The role of the regulation in the initial creation of some of the media companies’ monopoly¹⁵⁰ and in their subsequent development intends to show that broadcasters’ argument that they should be deregulated is almost a hypocritical one. It serves their interests now, but regulation came in handy when they started to operate and as they acquired more and more market power¹⁵¹. Last but not least, globally, the issue of media concentration should be seen as increasing the poor/rich countries divide not only in terms of imbalanced access to new technologies but also in terms of weak representation of the poorer countries’ interests in the global media. Before going any further, I discuss the freedom of speech theories where the media diversity as a democratic value finds its roots. These theories contribute at outlining the importance of keeping media regulation as a means of preserving media diversity.

I. 4. Freedom of speech theories and media diversity. The corporate speech doctrine

Media diversity as a democratic concern stems from freedom of speech theories that are discussed here. Protection of freedom of speech is based on four main theories, mentioned here not necessarily in the order of their importance for either constitutional courts or the sensitive ordinary citizen (even if the author of this thesis has a deep bias

¹⁴⁹ See, C. E. Baker, “Media Markets and Democracy,” 2002, at p. 7 et seq.

¹⁵⁰ See, also, James Schwoch, “The information age: the AT&T settlement— corporatism-in-the-making,” Media Culture Society 1984; 6; 273, at p. 282. <http://mcs.sagepub.com>.

¹⁵¹ See, also, Alan Wolfe, “America’s Impasse: The Rise and Fall of the Politics of Growth” (New York: Pantheon Books, 1981), cited in Robert G. Picard, “State Intervention in US Press Economics,” International Communication Gazette 1982; 30; 3, Instituut voor Perswetenschap, Amsterdam, at p. 8. <http://gaz.sagepub.com>. Wolfe describes how the belief in the role that corporations’ growth may have for economic and societal welfare became the ideology dominating US politics after the Second World War.

towards the order enunciated here¹⁵²): individual self – fulfillment, attainment of truth¹⁵³, participation in decision making and “balance between stability and change”¹⁵⁴. I intend to present the various First Amendment theories in order to show that the “refurbished” theory of the First Amendment, a “corporate First Amendment”¹⁵⁵ that places the broadcasters at the center of the First Amendment protection, undermines the very foundation that spurred the elaboration and contributed to the timeless endurance of these theories¹⁵⁶. Media concentration raises great concerns about the traditional role that mass media plays in a democratic society, the dangers of news’ politicization and

¹⁵² This bias is based on the belief that a fully developed person (unique in his/her own self and in his/her own relation to the outer world) is the precondition for the achievement of the other freedom of speech goals. This person will be an active citizen, wholeheartedly dedicated to participating in the life of the community and to enriching the marketplace of ideas. See, also, Lindsley Armstrong Smith, “Johann Gottlieb Fichte’s Free Speech Theory,” *American Communication Journal*, Volume 4, Issue 3, Spring 2001, at p. 5.

¹⁵³ See, Frederick Schauer, “Free Speech: A Philosophical Enquiry,” (1982) in J. H. Garvey and F. Schauer, *ibidem*, at p. 65. Schauer challenges the argument that the value of the truth attained in the marketplace of ideas lays in the very process of open discussion and search for the truth: “it is the process and not the result that matters.” The author argues that the casual link between truth and open debate should be demonstrated and not presumed. He makes reference to Mill’s, “On Liberty” that judiciously points out to the manner in which the possibility for the ideas to be challenged and defended contributes to the attainment of truth. Further, open debate might not lead to a permanently or absolutely “certain” truth, however it is still desirable as an “epistemic advance.” Schauer, *ibidem*, at p. 66 et seq.

¹⁵⁴ Or a “theory of social control.” See, Thomas I. Emerson, “Toward A General Theory of the First Amendment,” Vintage Books, 1966, at p. 11. See, also, Wojciech Sadurski, “Freedom of Speech and Its Limits,” Kluwer Academic Publishers, 1999, at p. 8-35. Sadurski speaks of the function of the free speech to promote “tolerance” towards the speaker, so that the society as a whole becomes more tolerant towards all kinds of speech.

¹⁵⁵ In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) the Supreme Court decided that the corporations had a right under the First Amendment to financially contribute to political campaigns. At the time, Chief Justice Burger’s dicta referred to the risk that media corporations might influence public opinion especially since they were becoming more and more concentrated. See, Catherine B. Roach, “Media Conglomerates, Antitrust Law and the Marketplace of Ideas,” *Mem. St. U. L. Rev.* 257 1978-1979. Paradoxically however the recognition that corporations had a right to “speak” through political campaign expenditures are now used to protect media corporations from regulation. See, for example, Edward S. Herman and Robert W. McChesney, “The global media: the new missionaries of corporate capitalism”, London: Cassell, 1997; Robert L. Kerr, “Subordinating the Economic to the Political: the Evolution of the Corporate Speech Doctrine,” *Communication Law and Policy*, 2005, 10 *Comm. L. & Pol’y* 63.

¹⁵⁶ The sources for the various theories behind the First Amendment are, among others: Dorsen Norman, Rosenfeld Michel, Sajo Andras, Baer Susanne, “Comparative Constitutionalism” *Cases and Materials*, Ed. Thomson West, 2003, Thomas I. Emerson, “Toward a General Theory of the First Amendment”, 1966, Sunstein R. Cass, “Democracy and the Problem of Free Speech”, the Free Press, 1995, Sullivan Kathleen M., Gunther Gerald, “First amendment law”, New York: Foundation Press, 1999, Wagman R. J., “The First Amendment Book,” 1991, Stone Geoffrey R., Seidman Louis M., Sunstein Cass R., Tushnet Mark V., “Constitutional Law”, Little Brown and Company, 1991, Sadurski W., “Freedom of Speech and Its Limits,” 1999.

commercialization being already shown by a number of scholars¹⁵⁷. In light of their assessments, it is now evident that the First Amendment is protecting definitely different interests than the one that the Founders envisaged¹⁵⁸.

In the beginnings of the First Amendment the greatest threat to the free speech was the government¹⁵⁹. From this perspective, it is a judicious observation that relying on the First Amendment to tackle the adverse effect that media concentration has on media diversity might be a “fundamental point of confusion¹⁶⁰.” However, “what distinguishes [the present media] era is that the main threat to free expression has shifted from government to private corporate power”¹⁶¹. The already existing economic and political interests¹⁶² are about to become even bigger and the marketplace of ideas tends to be an outdated concept. This is because the information that the public receives loses diversity and it is one-sided, tending to homogenize the discourse¹⁶³. As we shall see further in this

¹⁵⁷ Thomas Emerson has pointed to the danger of placing “more and more control in the hands of a small group that owns and operates the mass media” that could lead to the disintegration of the marketplace of ideas as in the end only “a single point of view with minor variations can find an outlet”. See T. I. Emerson, *ibidem*, at p. 111.

¹⁵⁸ David Croteau, William Hoynes, “The Business of Media”, Pine Forge Press, 2001, at p. 8, says: “The media that the authors of the First Amendment knew were radically different creatures than the ones we have today”.

¹⁵⁹ See, First Amendment of the United States Constitution: “Congress shall make no law.”

¹⁶⁰ See, Robert D. Joffe, at p. 4 in Symposium, Panel I: “The Changing Landscape of Jurisprudence in Light of the New Communications and Media Alliances,” 6 *Fordham Intell. Prop. Media & Ent. L.J.* 427 (1996).

¹⁶¹ See, George Gerbner, Hamid Mowlana, Herbert I. Schiller, “Invisible Crises. What Conglomerate Control of Media Means for America and the World”, Westview Press, 1996, at p. 16. Ben Bagdikian argues that “a small number of the country’s largest industrial corporations has acquired more public communications power [] than any private businesses have ever before possessed in world history”. See, Bagdikian, “The Media Monopoly,” 1997, at p. ix. He argues that in 1996 the media market was controlled by 10 media companies. See, Bagdikian, “The Media Monopoly,” 1997, at p. xiii. See, D. Croteau, W. Hoynes, *ibidem*, at p. 108-109, referring to Bagdikian’s book “The New Media Monopoly” (2004), which decreased to five the number of the largest media companies. *Ibidem*.

¹⁶² For a history of the way that media did in fact overlooked the responsibilities that are incumbent upon it and that come with the privileges under the First Amendment, see Ben H. Bagdikian, “The Media Monopoly”, at p.174.

¹⁶³ <http://mediaaccess.org/programs/diversity/fcc.html#newspaper>.

paper¹⁶⁴, the new technological convergence (between the means of transmission on the one hand and means of transmission and content on the other hand) might not contribute to a flourishing competition in the marketplace of ideas¹⁶⁵, instead it might make the situation even worse as huge companies could acquire even more shares and therefore a dominant position on the market¹⁶⁶. The situation of the United States' press – an example *par excellence* of a concentrated media market – is now compromising the basis of any form of democracy and it is in the same time contradicting the manner that the freedom of expression has been understood in the American legal tradition¹⁶⁷. I am referring to the belief in the marketplace of ideas that could form a public opinion sufficiently informed in order to hold the government responsible (accountable)¹⁶⁸.

The solution to this process of concentration of information is seen as part of a process to “recover rights”, not an easy process, as even the Founder of the First Amendment, James Madison warned¹⁶⁹. The proposals for a reform that can increase the diversity required by the First Amendment borrow from the past regulations that allowed for public funded broadcasting¹⁷⁰ and they point to further regulation so that a full tier of

¹⁶⁴ See, *infra*, section I.7.

¹⁶⁵ For a recent scandal on payola, thought to be long time forgotten (this term was used at the beginning of radio to define the situation when a DJ was broadcasting a certain musical piece in return of a payment, see McChesney, “Rich media, poor democracy: communication politics in dubious times”), see Statement of Commissioner Jonathan Adelstein, August 8, 2005 http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260453A1.doc, and Statement of FCC Chairman Kevin J. Martin, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260446A1.doc

¹⁶⁶ See Nicholas Johnson, “Freedom, Fun, and Fundamentals: Defining Digital Progress in a Democratic Society”, in “Invisible Crisis”, *infra*, *ibidem*, at p. 82.

¹⁶⁷ In James Madison's words, “A popular Government without popular information or the means of acquiring it, is but a prologue to a Farce, or a Tragedy, or perhaps both”. See Robert W. McChesney & John Nichols “Our Media, Not Theirs. The Democratic Struggle against Corporate Media”, An Open Media Book, 2002, at p. 24.

¹⁶⁸ The influence that media has over the political process results also from the fact that politicians use media to construct their public persona. See Ben H. Bagdikian, “The Media Monopoly”, *ibidem*, at p.5.

¹⁶⁹ James Madison expressed his concerns about the fate of the democratic experiment, warning about “a real domination of the few under an apparent liberty of the many.” See “Renewing Tom Paine's Challenge” by Noam Chomsky, in Robert W. McChesney & John Nichols “Our Media, Not Theirs”, *ibidem*, at p. 15.

¹⁷⁰ See B. H. Bagdikian, “The Media Monopoly”, at p. 248.

low-power noncommercial community radio and television stations¹⁷¹ be built, so that the existing antitrust law be applied in a stricter manner and that the FCC strengthens its public comments procedure to determine fair media ownership regulations across all sectors¹⁷².

The marketplace of ideas is in dire straits. Giving the people what they want¹⁷³ became a mantra for not advancing any other normative choice¹⁷⁴. The marketplace of ideas defines now conformity to a widely accepted taste. It should however be a market where a diversity of tastes are given the chance to get educated¹⁷⁵. “Autonomy and self-development in an intellectual vacuum are impossible. Thus, a multiplicity of voices is central to achieving individual autonomy and not only to the more obviously social goods, democracy and truth.¹⁷⁶” All the arguments for freedom of expression demonstrate and underline the centrality not of speech simply but of discussion, debate, diversity of ideas and sources of information. They point to the multiplicity of voices as their central and unifying theme. In all these arguments state noninterference on the media market is still essential to avoid any form of censorship¹⁷⁷. However, the appropriate question is whether the state should intervene in order to set up a proper background for the

¹⁷¹ See, FCC Report and Order of 20 January 2000, MM Docket No. 99-25.

¹⁷² McChesney, Nichols, “Our Media Not Theirs”, *ibidem*, at p. 134.

¹⁷³ See, C. Edwin Baker, “Giving the Audience What It Wants,” 58 Ohio St. L.J. 311 1997-1998.

¹⁷⁴ See, in this sense, for a recent re-affirmation of the dangers that this mantra carries for media pluralism, C. Edwin Baker’s remarks at the Media Ownership Workshop - Policy Scholars’ Panel, Washington, DC - 11/2/09, available at: <http://www.fcc.gov/ownership/workshop-110209.html>.

¹⁷⁵ D. Lacy, “Freedom and Communications” 69 (1961), cited in Jerome A. Barron, “Access to the Press – A New First Amendment Right,” 80 Harv. L. Rev. 1641 1966 – 1967, at 1645.

¹⁷⁶ See, Judith Lichtenberg, “Foundations and limits of freedom of the press,” in Denis McQuail, “McQuail’s reader in mass communication theory,” London : SAGE, 2002, at p. 179. See, also, Elihu Katz, “Publicity and pluralistic ignorance: notes on the spiral of silence” in D. McQuail, “McQuail’s reader in mass communication theory,” *ibidem*, at p. 379. The author argues that a pluralistic media will expose the individuals to a multitude of opinions and by doing so it will also encourage the individuals to express their own, no matter how original or controversial ideas (this is turn because people need reinforcement and encouragement from others in order to step in the public debate and expose their viewpoints).

¹⁷⁷ See, J. Lichtenberg, *ibidem*, at p. 181.

existence of a pluralistic media¹⁷⁸. This question is reiterated and attempted to be answered in the chapter on United States Supreme Court's "attitude" towards media diversity, in the context of the constitutional issues surrounding affirmative action and equal protection. The European courts also shed more light into whether media diversity enhancing regulation outweighs the dangers associated with state intervention on the media market.

One of the consequences of an absolute, negative understanding of the First Amendment (the state should not intervene on the market) is that it pushes the corporations' agenda in the sense that they have a paramount free speech right as well – a paramount right against any type of regulation. In recent years the corporate First Amendment doctrine, which recognizes corporations as entities entitled to First Amendment protection, received increased attention from both scholars and courts¹⁷⁹. The corporate speech doctrine is part of the debate over commercial speech¹⁸⁰ and corporate political speech protection under the First Amendment¹⁸¹. This doctrine¹⁸², which although not the subject of this thesis still presents significant implications for the future of media regulation, is worrisome as it opens the gates to a twofold result: conferring to commercial speech the same protection as political speech under the First Amendment and allowing media companies and corporations in general to expand their

¹⁷⁸ See, J. Lichtenberg, *ibidem*, at p. 181.

¹⁷⁹ See, Robert L. Kerr, "The Corporate Free – Speech Movement. Cognitive Feudalism and the Endangered Marketplace of Ideas," LFB Scholarly Publishing LLC, New York, 2008. Recently, the United States Supreme Court recognized the corporate free speech doctrine as valid under the First Amendment: see, *Citizens United v. Federal Elections Commission* 130 S. Ct. 876 (2010).

¹⁸⁰ See, Nicholas Wolfson, "Corporate First Amendment Rights and the SEC," Quorum Books, 1990. See, also, Edwin P. Rome and William H. Roberts, "Corporate and Commercial Free Speech. First Amendment Protection of Expression in Business," Quorum Books, 1985.

¹⁸¹ See, also, Edwin P. Rome and William H. Roberts, "Corporate and Commercial Free Speech. First Amendment Protection of Expression in Business," Quorum Books, 1985, at p. 201 et seq.

¹⁸² See, also, Robert L. Kerr, *ibidem*.

communications power by investing huge amounts of money that would support a certain political viewpoint to the detriment of others' viewpoints whose supporters could not invest an equal amount of money in the propagation of their speech¹⁸³. Further, extrapolating the corporate First Amendment beyond political expenditure¹⁸⁴ leads to two more potential consequences: the journalists' editorial freedom will become more of a myth than it already is and structural regulation of the media industry – which is not submitted to the strict scrutiny applied to content regulation – may have to overcome a strict constitutional standard of review. However, related to this second potential consequence, whether the addressee of the First Amendment may become a decisive factor in the choice and application of a constitutional standard of review (along with nature of speech and restriction type) is still to be explored. In broadcasting law cases, the courts seemed to be more focused on “the right of the viewers and listeners, not the right of the broadcasters.”¹⁸⁵ However, this might change. There are many shortcomings in the

¹⁸³ See, participants to the debate of Professor Calvin Massey of University of California Hastings College of the Law and Professor Tamra Piety of University of Tulsa Law School, “Do Corporations Have a Right to Free Speech?,” University of California, Hastings College of the Law, February 8, 2010. See, Kathleen M. Sullivan, “Political Money and Freedom of Speech,” in Vikram David Amar, ed., “The First Amendment Freedom of Speech. Its Constitutional History and the Contemporary Debate,” Prometheus Books, 2009, at p. 267. See, also, Kerr, *ibidem*, at p. 164-165, criticizing *First National Bank of Boston v. Bellotti* (435 U.S. 765 (1978)). Kerr argues that the Supreme Court “misinterpre[te]d [] the central principles from *Meiklejohn* and *Sullivan*.” See, Kerr, *ibidem*, at p. 165.

¹⁸⁴ See, for a discussion, Brian K. Pinaire, “The Constitution of Electoral Speech Law,” Stanford Law Books, 2008, at p. 201. The author discusses *Buckley v. Valeo* and *Nixon v. Missouri*, two cases in which limits on political campaign contributions were upheld (the Supreme Court recognized in *Missouri* however that these restrictions needed to be kept at a certain limit – an “imprecise construction” as Pinaire notes on p. 237 – this limit was considered too low in *Randall v. Sorrell* and thus constitutionally impermissible – see, Pinaire, *ibidem*, at p. 236 et seq.). Note that in *Buckley* and *Nixon* the Supreme Court differentiated among political expenditures and contributions, restrictions on the former being constitutionally impermissible. In *Nixon* the dissenting Justices (Kennedy, Thomas and Scalia) showed themselves prepared to overrule *Buckley*, which they saw as essentially limiting political speech in a time – electoral campaigns – when it was most needed. See, Pinaire, *ibidem*, at p. 212-213.

¹⁸⁵ *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

corporate First Amendment theory¹⁸⁶, and it is clear that the scholarly debate is only starting on this issue and its implications for the future of free speech¹⁸⁷.

This paper rejects the theory advanced by the media companies that they have, as corporations, a right to free speech¹⁸⁸. Accepting such a theory would turn the free speech theories upside down and would constitute an abuse of a right that was designed only for the furtherance of the human being's ideals and not corporations¹⁸⁹. Reclaiming or recovering the First Amendment to today's media is at most a "romantic"¹⁹⁰ or a creative view on an almost taboo subject. This part of my paper forwards a theoretical pleading

¹⁸⁶ In general, acknowledging corporations as "beneficiaries of human rights law" entered the scholarly discourse only recently (the discourse is mostly concerned with whether corporations should abide to human rights instruments). See, Marius Emberland, "The Human Rights of Companies. Exploring the Structure of ECHR Protection," Oxford University Press, 2006, at p. 2.

¹⁸⁷ One obvious criticism is that the First Amendment was drafted to protect humans and not corporations. Only humans have a "moral attachment" to the First Amendment that "non-human entities" (i.e., corporations) do not have – argument raised during the discussion of Professor C. Massey and Professor T. Piety, *ibidem*. A possible counterargument to this is that corporations represent their shareholders' interests as Professor Massey mentioned. Another argument is that media corporations may "speak" politically - as Professor Massey pointed out during this discussion.

¹⁸⁸ See, Laurence H. Winer, "Telephone Companies Have First Amendemnt Rights, Too: the Constitutional Case for entry in to cable," in Peter K Yu, *The Marketplace of Ideas: Twenty Years of Cardozo Arts and Entertainment Law Journal*, Kluwer Law International, 2002, at p. 59, arguing that telcos have a First Amendment right to speak and that they should be allowed to speak "in the absence of a demonstrated and compelling need effectuated only by narrowly tailored means." See, further, Mark S. Fowler, Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," 60 *Tex. L. Rev.* 207. See, also, Martin H. Redish, Howard M. Wasserman, "What's Good for General Motors: Corporate Speech and the Theory of Free Expression," 66 *Geo. Wah.L.Rev.* 235. Redish and Wasserman argue among other that the argument that corporations do not further self-realization (one of the tenets of the freedom of speech doctrine) is extremely weak considering that the corporations have social responsibility (see, however, for an argument that in fact the media itself created and "sold" a vision of a socially responsible corporation, Peter Dreier "The Corporate Complaint Against the Media," in Donald Lazere, ed., "American Media and Mass Culture. Left Perspectives," University of California Press, 1987, at p. 64, from the Quill, November 1983).

¹⁸⁹ See, for a counter-argument to corporate personhood: Carl E. Schneider, "Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti," 59 *S.Cal.L.Rev.* 1227. See, further, Glenn B. Manishin, "An Antitrust Paradox for the 1990s: Revisiting the Role of the First Amendment in Cable Television," 9 *Cardozo Arts & Ent. L.J.* 1 (1990), in Peter K. Yu, "The Marketplace of Ideas: 20 Years of Cardozo Arts and Entertainment Law Journal," Kluwer Law International, 2002, at p.115: "Applying the First Amendment as a shield against governmental regulation, as well as a sword to attack restrictions on their right to enter new markets, cable television and telephone companies have been using the free speech principles of the Constitution to do the work the antitrust laws did in the pre-Bork times." Manishin argues that cable operators "act more like grocers than speakers." See, *Ibidem*.

¹⁹⁰ See, Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 *Harv. L. Rev.* 1641 1966 – 1967. The difficulty of accepting today E.C. Baker's approach to media concentration was pointed out to me by Professor Eleanor Fox, in a discussion at New York University, 17th of August, 2007.

for breathing new life into the old theories so that they continue to protect people and not companies.

Some of the most famous theories that constitute the background of free speech were elaborated at a time when media was less concentrated and thus they mainly focused on protection from state intervention. These theories legitimate and keep the right to free speech alive and constitute the cornerstone of the argument for media diversity. However, since the first free speech theories centered on protection against state intervention, this thesis argues that such theories should be extrapolated to include protection against overreaching private interests and at the same time adjusted to allow the state's limited intervention¹⁹¹ to ensure a certain level of media diversity on the market. I proceed to discuss how the arguments involved in the regulation/deregulation of media markets debate fit into the free speech theories' framework and these arguments' implications for the achievement of the goal of media diversity.

I. 5. The regulation/deregulation debate

Considering media's importance for a democratic society¹⁹² today's trend towards concentration¹⁹³ is worrisome and it gets permanently increasing attention from legal

¹⁹¹ I argue in favor of the "promotional state," which is a state that reacts to the continuous challenges of the media context, striving to promote its policies, such as media diversity. See, Abramson Bram Dov, "Media Policy after Regulation," International Journal of Cultural Studies, 2001, Sage Publications.

¹⁹² The importance that media has in a democratic society is self-evident. See, Opening Remarks of Commissioner Kathleen Q. Abernathy, Broadcast Ownership En Banc, Richmond, Virginia, February 27, 2003, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231596A1.doc. See, further: "[...] a press that performs a vital role in helping, through its powers of investigation and exposure, to reduce the risks of official incompetence and abuse, to convey information about the affairs of government, and to serve as a forum for citizens to communicate among themselves." See, also, Bollinger, *ibidem*. However, as Professor Powe pointed out in 1976, "the premise itself is considerably older" – referring to *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) : "press as a vital source of public information." See, L.A. Powe, Jr., "Or of the [Broadcast] Press," Texas Law Review, vol. 55, p. 40, FN. 10, in E. Barendt, "Media Law," at p. 82.

scholars and policy makers. The intellectual and policy making exercise has at its core the regulation/deregulation debate. The literature on the issue is abundant with the United States at the frontispiece of the debate¹⁹⁴, while the European scholars¹⁹⁵ actively try to catch up with their overseas counterparts. It is not surprising that the literature on the media concentration is more evolved in the United States than in Europe, considering among other things the active role that the courts¹⁹⁶ and the FCC had in the former on issues of media ownership. These and other considerations will be discussed at length in this paper. The scholars that covered the media concentration in Europe are not many

¹⁹³ On the trend towards concentration affecting the radio market, see, Fairchild Charles, "Deterritorializing radio: deregulation and the continuing triumph of the corporatist perspective in the USA," *Media, Culture & Society*, July 1999 vol. 21 no. 4 549-561.

¹⁹⁴ See, for a historical discussion of the law on radio and television, Harry P. Warner, "Radio and Television Law. A Standard Reference Book on the Legal and Regulatory Structure of the Radio Industry," Matthew Bender & Company, 1948, copyright, 1949, 1953, published on demand by University Microfilms International, 1976. Published in five parts, the last two are more on copyright issues. As far as legislation goes, the first three parts cover up to the 1934 Communications Act, including the 1952 Amendments.

¹⁹⁵ See, Peter J. Humphreys, "Mass media and media policy in Western Europe," European Policy Research Unit Series, Manchester University Press, Manchester and New York, 1996; Ingrid Nitsche, "Broadcasting in the European Union: The Role of Public Interest in Competition Analysis," TMC Asser Press, 2001; Christopher T. Marsden, Stefaan G. Verhulst, "Convergence in European Digital TV Regulation," Blackstone Press Limited, 1999. See, also, Giovanni Cordini, "The Society of Information and Constitutional Laws," 30 *SILULJ* 429 (2006); Alison Harcourt, "The European Commission and Regulation of the Media Industry," 16 *CDZAEIJ* 425 (1998); Helen Darbishire [et. al.], "Media and democracy," Strassbourg: Council of Europe Publishing, 1998; Kenneth Dyson and Peter Humphreys, "Policies for New Media in Western Europe: Deregulation of Broadcasting and Multimedia Diversification," in Kenneth Dyson and Peter Humphreys, "The Politics of the Communications Revolution in Western Europe," Frank Cass, 1986, at p. 98 and, also, Wolfgang Hoffmann-Riem, "Law, Politics and the New Media: Trends in Broadcasting Regulation," in K. Dyson and P. Humphreys, *ibidem* at p. 125. See, also, Shalini Venturelli, "Liberalizing the European Media. Politics, Regulation, and the Public Sphere," Clarendon Press, Oxford, 1998, especially the chapter on Audiovisual Battleground and Conflict of Regulatory Models, at p. 187. In general on European Union media markets and law, Sebastian Farr, Vanessa Oakley, "EU Communications Law," Palladian Law Publishing Ltd, 2002, David Goldberg, Tony Prosser and Stefaan Verhulst, "EC Media Law and Policy," Longman, 1998; Emmanuel E. Paraschos, "Media Law and Regulation in the European Union. National, Transnational and U.S. Perspectives," Iowa State University Press/Ames, 1998; Rachel Craufurd Smith, "Broadcasting Law and Fundamental Rights," Clarendon Press, Oxford, 1997. See, further, for a description of European telecommunications markets and law, Cristopher Watson, Tom Wheadon and The Communications Practice, "Telecommunications. The EU Law," Palladian Law Publishing Ltd, 1999 and Christian Koenig, Andreas Bartosch and Jens-Daniel Braun, ed., "EC Competition and Telecommunications Law," Kluwer Law International, 2002.

¹⁹⁶ Erwin G. Krasnow, Lawrence D. Longley, "The Politics of Broadcast Regulation," St. Martin's Press, 1978, at p. v.

and there is more debate on broadcasting law in general¹⁹⁷ than on the specificities of media competition and diversity¹⁹⁸. Further, some of the books that address the problem of media concentration in Europe do so less in a comparative manner, but more by descriptively outlining the situation in separate legal jurisdictions¹⁹⁹. The impetus to continue Professor Humphreys' comparative approach²⁰⁰ exists particularly in the works of scholars like Harcourt²⁰¹ and Katsirea.²⁰² The analyses on European media law do not focus specifically on the media concentration issue, which is seen as a tangential concern and generally not worth a book dedicated entirely to the subject.

This is of course not true in the United States, where the scholarly debate on the issue is more focused and it broadly falls under the pro regulation/pro deregulation dichotomy²⁰³. I refer to this dichotomy in relation to the justifications for measures that enhance media diversity, however the "division" between an "absolutist" First Amendment and "reasonable regulation" accompanied for a long time the "American constitutional debate over freedom of expression."²⁰⁴ Keeping in mind the perils of media concentration, many scholars are not necessarily fond of the current trend and they debate the constitutional and public policy legitimacy of the efforts to deregulate the media

¹⁹⁷ See, David Goldberg, Tony Prosser, Stefaan G. Verhulst, "Regulating the changing media: a comparative study," Clarendon Press, 1998.

¹⁹⁸ See, Eric Barendt, "Broadcasting Law. A Comparative Study," Clarendon Press, Oxford, 1993. The author considers the aspects of broadcasting regulation in different countries, dedicating a small chapter to the issue of media competition – see, E. Barendt, "Broadcasting Law," at p. 121-143.

¹⁹⁹ Some under the form of compendiums: see, for instance, "The Media in Western Europe, Euromedia Handbook," Sage Publications (1992).

²⁰⁰ See, Peter J. Humphreys, "Mass media and media policy in Western Europe," *ibidem*, *supra*.

²⁰¹ See, Alison Harcourt, *ibidem*.

²⁰² See, Irini Katsirea, "Public Broadcasting and European Law. A Comparative Examination of Public Service Obligations in Six Member States," Wolters Kluwer, 2008.

²⁰³ See, for a recent discussion, Natascha Just, "Measuring media concentration and diversity: new approaches and instruments in Europe and the US," Media Culture Society 2009; 31; 97, available at: <http://www.mediachange.ch>.

²⁰⁴ See, Cass R. Sunstein, "Free Speech Now," in Vikram David Amar, ed., *ibidem*, at p. 102. See, also, on "modern theories of First Amendment construction," Jonathan W. Emord, "Freedom, Technology, and the First Amendment," Pacific Research Institute for Public Policy, San Francisco, 1991, at p. 101.

market²⁰⁵. Professor Yoo categorizes these debates²⁰⁶. Thus, some focused on whether the goal of media diversity prompted the enactment of structural regulations²⁰⁷. Others are concerned with how media concentration has a general negative impact on the realization of free speech as a constitutional fundamental right²⁰⁸. Some others focus on narrow topics and choose only one type of structural regulation disregarding in their analysis the justifications for structural regulations in general²⁰⁹. Robert W. McChesney argues that “to have anything close to competitive markets in media requires extensive government regulation in the form of ownership limits and myriad other policies.”²¹⁰ He claims that on the one hand, the motives on why to deregulate point to the fact that the market is the

²⁰⁵ See, Andrew Jay Schwartzman, Cheryl A. Leanza, and Harold Feld, “The Legal Case for Diversity in Broadcast Ownership,” in Robert McChesney, Russell Newman, and Ben Scott, “The Future of Media. Resistance and Reform in 21st Century,” Seven Stories Press, 2005, at p. 149. See, also, Mark Cooper, “Reclaiming the First Amendment: Legal, Factual, and Analytic Support for Limits on Media Ownership,” in McChesney [et al.], “The Future of Media,” at p. 163.

²⁰⁶ Christopher S. Yoo, “Architectural Censorship and the FCC,” *Southern California Law Review*, March, 2005, 78 SCALR 669.

²⁰⁷ See in Yoo, “Architectural Censorship and the FCC,” *ibidem*, at FN11, citing the following: Jonathan W. Emord, “The First Amendment Invalidity of FCC Ownership Regulations,” 38 *Cath. U. L. Rev.* 401 (1989).

²⁰⁸ See, in Yoo, “Architectural Censorship and the FCC,” *ibidem*, at FN11, citing the following: C. Edwin Baker, “Media Concentration: Giving up on Democracy,” 54 *Fla. L. Rev.* 839 (2002); Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access,” 52 *Fed. Comm. L.J.* 561 (2000); Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, “Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas,” 2000 *U. Ill. L. Rev.* 813. See also, Christopher S. Yoo, “The Rise and Demise of the Technology-Specific Approach to the First Amendment,” 91 *Geo. L.J.* 245, 306-46 (2003).

²⁰⁹ See, in Yoo, “Architectural Censorship and the FCC,” *ibidem*, at FN11, citing the following: C. Edwin Baker, “Merging Phone and Cable,” 17 *Hastings Comm & Ent. L.J.* 97 (1994); Stuart Minor Benjamin, “The Logic of Scarcity: Idle Spectrum as a First Amendment Violation,” 52 *Duke L.J.* 1 (2002).

²¹⁰ See, Robert W. McChesney, “Theses on media deregulation,” *ibidem*. On the same line see, Cheryl Leanza, Harold Feld, “More than a Toaster with Pictures: Defending Media Ownership Limits,” *Communications Lawyer Fall, 2003, Point, 21-Fall ComLaw* 12. “Because the connections that allow large corporate interests to influence content are complex and subtle, structural rules that protect diversity by fragmenting ownership are essential. [...] ownership restrictions offer a far more effective means of achieving the needed diversity to ensure a robust democracy with less damage to the First Amendment.” Solution proposed by the McChesney: “decentralising ownership defuses the threat to democracy. Maximising the number of media owners does not eliminate the influence of economic interests, but at least multiple owners will have different interests.” *Ibidem*.

best means to rule media and to the new technologies²¹¹. On the other, the reasons behind a regulatory approach refer to the peculiarity of the media and therefore its inadequacy to an absolute appliance of economic analysis: “The media system is not simply an economic category; it is responsible for transmitting culture, journalism and politically relevant information²¹².” Since the media product is a special type of product, the economic principles (especially the supply/demand correlation and the consequences deriving from it) are not entirely applicable.²¹³ Another concern is that applying strict economic rules to the media market leads to the danger that advertisers might influence media content²¹⁴.

The most ardent dedication to the discussion of the media concentration issue is likely to be found C. Edwin Baker’s books, “Media, Markets, and Democracy” (2002)²¹⁵ (which discusses the impact of advertising support and local concentration on content) and “Media Concentration and Democracy. Why Ownership Matters” (2007)²¹⁶ (which apart for advancing several justifications for why media dispersal ownership is beneficial to democracy and apart for proposing and analyzing some possible solutions to the issue of media concentration, considers the impact that a very important distinction between viewpoint and source diversity has on the whole media concentration debate). Professor

²¹¹ However, at another place in his article he argues that “there are no economic reasons to justify concentration in the industry, as the physical cost of transmission is very low.” Robert W. McChesney, “Theses on media deregulation,” *ibidem*, at 129.

²¹² See, Robert W. McChesney, “Theses on media deregulation,” *ibidem*, at 130.

²¹³ See, *ibidem*. See, further, Edwin C. Baker, “Media, Markets and Democracy,” Cambridge University Press (2002) in which the author presents the catalog of externalities that media products, as “public goods,” lead to (*ibidem*, at p.44). The different nature is due also to the fact that both the advertisers and the audiences pay for the media products. E. Baker, *ibidem*, at p. 8. Baker refers to the process of “edification,” which “includes education, exposure to wisely selected information, or wise opinion and good argument.” (Baker, *ibidem*, at p.12)

²¹⁴ See, in general on this, C. Edwin Baker, “Media, Markets and Democracy.”

²¹⁵ See, C. Edwin Baker, “Media, Markets and Democracy.”

²¹⁶ C. Edwin Baker, “Media Concentration and Democracy. Why Ownership Matters,” Cambridge University Press, 2007.

Baker judiciously summarizes this multifold trend in his in depth analysis in “Media Concentration: Giving Up Democracy.”²¹⁷ The author evidences the switch of trend in the policy adopted by the various regulatory actors²¹⁸. The FCC moved towards deregulation and the courts reject the legislative structural policies within the media²¹⁹. In the new media era the market became the “measure of value.”²²⁰

Several scholars however, favor, with good cause sometimes, deregulation.²²¹ In the following lines, by discussing some of these scholars’ assertions, the arguments for media regulation are also considered. Some of these scholars question the constitutional soundness of certain types of structural regulations, such as access regulations, although

²¹⁷ C. Edwin Baker, “Media Concentration: Giving Up on Democracy,” *Florida Law Review*, December, 2002, Article, 54 FLLR 839.

²¹⁸ *Ibidem*.

²¹⁹ For supporters of this trend, see, for example: John W. Berresford, Media Bureau, FCC, “The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed,” March 2005. The research paper starts with the history of the scarcity rationale, which is to be found in cases such as *NBC v. United States*, 319 U.S. 190 (1943) and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The author of this paper goes on to detail the consequences of this scarcity rationale in terms of the broadcasters’ role within the society. This rationale also served as a justification for preserving the diversity of ownership. The scarcity rationale lost justification in 1984, in the *League of Women Voters* case, 468 U.S. 1205 (1984). The FCC embraced the new trend in its decisions. See, *ibidem*. Berresford’s paper argues that in light of the fact that the scarcity rationale lost its justification the FCC should step back from unduly regulating broadcasting. There is no scarcity, either in terms of physics, either in terms of economics, and especially in the light of the Internet development. Interesting in this paper is that the author argues that the increasing number in channels leads to a democratic America, with more and more voices to be aired and to be heard. Berresford considers the number of available channels to be a sign of competition, of individual and autonomous choice of consumers, independent of any tendency to be manipulated by the big media companies owners. In sum, he considers that there is no danger for the big networks to have an impact on the diversity of opinions, and therefore there is no need to regulate the industry. See, *ibidem*.

²²⁰ E. C. Baker, “Media Concentration: Giving Up on Democracy,” *ibidem*, at p. 2.

²²¹ Lili Levi brings these pro deregulation scholars under the “regulatory failure” model. See, Lili Levi, “Reflections on the FCC’s Recent Approach to Structural Regulation of the Electronic Mass Media,” 52 *Fed. Comm. L.J.* 581, at p. 605 (2000). See, quoted in Lili Levi, *ibidem*, at p. 593, FN41: Jim Chen, “The Last Picture Show (On the Twilight of Federal Mass Communications Regulation),” 80 *Minn. L. Rev.* 1415, 1419 (1996), Jonathan W. Emord, “The First Amendment Invalidity of FCC Ownership Regulations,” 38 *Cath. U. L. Rev.* 401 (1989), Thomas W. Hazlett, “Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker,” 29 *Conn. L. Rev.* 217, 220 (1996), Thomas W. Hazlett, “Physical Scarcity, Rent Seeking, and the First Amendment,” 97 *Colum. L. Rev.* 905 (1997), Thomas W. Hazlett, “The Rationality of U.S. Regulation of the Broadcast Spectrum,” 33 *J.L. & Econ.* 133 (1990). See, further, Brian Winston, “Emancipation, the media and modernity: some reflections on Garnham’s Kantian turn,” *Media Culture Society* 2005; 27; 495, available online at: <http://mcs.sagepub.com/cgi/content/abstract/27/4/495>.

the main reasons for such questioning: the chilling effect on journalistic coverage of some social issues, the potential for state interference in the editorial line, and the potential for a regulatory slippery slope that would take over the entire media industry²²², could be arguments against any regulation that furthers media diversity. For instance, Powe believes that neither the power theory nor the scarcity rationale could justify regulation²²³. He rejects the power theory because it does not provide sufficient empirical support for its claims²²⁴ and the scarcity rationale because it is in fact only a justification²²⁵ for some other motives for regulating broadcasting more than the printed press. Professor Powe questions the statement that the electronic media is a “medium of unique power” considering the following arguments: the “power” that the media has is largely dependant on the significance that the listener/viewer attaches to it, people are not only recipient of information without filtering it, and there is not enough evidence to confidently support the idea of television’s “powerful partisanship²²⁶.”

However, Professor Powe’s assertions should be seen within a broader analytical context. The first argument is weakened by the available data²²⁷ that show that people

²²² See, Lee C. Bollinger, Jr., “Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,” *Michigan Law Review*, vol. 75 (1976), at p. 29-31, in Eric Barendt, “Media Law,” *ibidem*, at p. 137-139.

²²³ See, Powe, *ibidem*, at p. 62, in Barendt, “Media Law,” *Ibidem*, at p. 104.

²²⁴ See, Powe, *ibidem*, at p. 58, in Barendt, “Media Law,” *ibidem*, at p. 100.

²²⁵ See, Powe, *ibidem*, at p. 58, in Barendt, “Media Law,” *ibidem*, at p. 100. See, also, on how the scarcity rationale was comfortably used as a justification for the regulatory restraints on broadcasting (in spite of the fact that broadcasting is entitled to First Amendment protection), Paul B. Matey, “Abundant Media, Viewer Scarcity: A Marketplace Alternative to First Amendment Broadcast Rights and The Regulation of Televised Presidential Debates,” *Indiana Law Review*, vol. 35 (2003), at p. 109.

²²⁶ See, Powe, *ibidem*, at p. 58, in Barendt, “Media Law”.

²²⁷ *Autorità per le garanzie nelle comunicazioni* (Communications Regulatory Authority), Presentation by the President of the Authority Corrado Calabro, Annual Report on activities carried out and work programmes (2008), Rome, 15 July 2008, at p. 4. In 2008, 43% of the audience was reached via terrestrial television, 38% via cable and 17% via satellite. Television via Internet accounted for still a very small 2% of the market. See, in this sense, Report of the Italian Communications Regulatory Authority, Annual Report on activities carried out and work programmes, elaborazioni Autorità su dati Idate, at p. 30. The global television market was worth 272 billion euro, increasing since the previous year. See, *ibidem*, at p.

rely heavily on television. Second, much has been written on media's effects on people's perception of reality, which however does not fall under the remit of this paper²²⁸. The third argument loses in strength if one considers the documented examples²²⁹ on how the media chooses what stories and events to cover²³⁰ and generally, the media's influence on shaping news and information²³¹ and how the same media, especially during electoral campaigns, tilts in favor of one or another political party²³².

While not accepting that people could be totally passive in front of the information they receive, and although I do not entirely dismiss this possibility as well as the possibility that the media could heavily affect what people "think", I tend to agree more with the opinion that the media is instrumental in "displaying" in front of the public a variety of issues and thus influence what people "think about"²³³. This approach would

31. The Report is available at: <http://www.agcom.it/default.aspx?message=visualizzadocument&DocID=3239>.

²²⁸ See, for instance, P. Bourdieu, *ibidem*. See, also, Marshall McLuhan, "Understanding Media. The Extensions of Man," McGraw-Hill Book Company, 1964, at p. 320, considering how the "movie viewer is more disposed to be a passive consumer of actions, rather than a participant in reactions" and how the political candidates' appearance on television in front of the public – whether he can "look" "a dozen [] things all at the same time" or whether his or her looks are "classifiable," with the former ensuring more appeal to the general public and thus, more potential for political success. See, *ibidem*, at p. 330. Further, McLuhan notices the paradox of television: "it involves us in moving depth, but it does not excite, agitate or arouse." He ironically concludes that "Presumably, this is a feature of all depth experience." See, McLuhan, *ibidem*, at p. 337. This stands in opposition with what another writer, Chomsky urges us to do, that is to "read [] skeptically" (this not being our own natural instinct, according to McLuhan). See, Noam Chomsky, Peter Rounds Mitchell and John Schoeffel, ed., "Understanding Power. The indispensable Chomsky," The New Press, 2002, at p. 323.

²²⁹ See, also, Tom Luljak "The Routine Nature of Journalistic Deception," in David Pritchard, ed., "Holding the Media Accountable. Citizens, Ethics and the Law," Indiana University Press, 2000, at p.11.

²³⁰ See, Noam Chomsky, "Media Control. The Spectacular Achievements of Propaganda," An Open Media Book, Seven Stories Press, 2002; Edward S. Herman and Noam Chomsky, "Manufacturing Consent. The Political Economy of the Mass Media," Pantheon Books, 2002.

²³¹ See, in general, Cynthia Crossen, "Tainted Truth. The Manipulation of Fact in America," Simon & Schuster, 1994. See, Matthew Robinson, "Mobocracy. How the Media's Obsession with Polling Twists the News, Alters Elections, and Undermines Democracy," Forum, 2002, on how the "polls can be manipulated for stories," in the sense that they can be interpreted to mean or to appear to be meaning what the news station wants them to mean (*ibidem*, p. 17).

²³² See, for instance, discussed in this paper, the regulatory agencies' monitoring reports of the media coverage of different political candidates during campaigns, in section III.3.3.1.

²³³ See, Paul Starr, "The Creation of the Media. Political Origin of Modern Communications," Basic Books, 2004, at p. 398. See, also, D. Lacy, *ibidem*.

in turn be in line with the argument for more varied sources of news and information²³⁴ – another aspect of the media diversity concept that relates to media ownership and it is easier quantifiable.

Closer to the “literalist perspective²³⁵” and borrowing heavily from the more teleological perspective of the “narrow intentionalist perspective²³⁶” but keeping itself away from the “relativist” understanding of the First Amendment that embraces “new meanings through interpretation,²³⁷” meanings which justify media diversity enhancing regulation,²³⁸ “a new approach²³⁹” emerges: the “preservationist perspective²⁴⁰.” This approach wants to clearly reject any form of government intervention, fearing that such intervention would lead to a slippery slope as well as to censorship or viewpoint discrimination (imagine that the government subsidizes or directs through statute the promotion of a certain viewpoint that the government considers worth to be promoted in the name of the public interest, what happens with the rest of the viewpoints, not to mention that this would resemble censorial interference with editorial freedom). This approach also desires to be technology neutral, that is that the requirement for the

²³⁴ See, E.C. Baker, “Media Concentration: Giving Up Democracy,” *ibidem*, at p. 32.

²³⁵ This perspective refers to an absolutist understanding of the First Amendment. See, J. Emord, “Freedom, Technology and the First Amendment,” at p. 101, referring to Justice Black, “The Bill of Rights,” 35 N.Y.U. L. REV. 865, 867 (1960): “It is my belief that there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’” (quoted at p. 114 in Emord, *ibidem*.)

²³⁶ The “intentionalists” believe that the First Amendment should be interpreted in light of the Framers’ intentions. See, Emord, “Freedom, Technology and the First Amendment,” at p 103 referring to Perry, “The Authority of Text, Tradition and Reason: a Theory of Constitutional Interpretation,” 58 S. Cal. L. Rev. 551, 564 (1985).

²³⁷ E. Chemerinsky, “Interpreting the Constitution,” 60 (1987) quoted by Emord, “Freedom, Technology and the First Amendment,” at p. 105. See, also, Cass Sunstein, “Beyond the Republican Revival,” 97 Yale L. J. 1539, 1540 (1988) in Emord, *ibidem*, p. 107 et seq.

²³⁸ See, Emord, “Freedom, Technology and the First Amendment,” at p. 113 et seq.

²³⁹ See, Emord, “Freedom, Technology and the First Amendment,” at p. 128.

²⁴⁰ See, Emord, “Freedom, Technology and the First Amendment,” at p. 119.

government to not interfere with the freedom of speech under any circumstances should preserve its validity in time and over any novel means of transmission²⁴¹.

What sparked the United States Federal Communications Commission's rules' relaxation was precisely the change in technology that allowed the broadcasting frequencies to accommodate more stations and that finally led to a dramatic change in the market.²⁴² Consequentially, this market change required a proper regulatory adjustment that would "provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace . . . [and] help preserve free local broadcast service."²⁴³ Faithful to the belief in new technologies' potential to make media diversity concerns obsolete, other scholars even put forward the idea of selling the frequencies to private broadcasters and totally eliminating regulation of the industry²⁴⁴. In spite of much having been written, "much of the literature on media concentration has been stronger in commitment than in empirical evidence, on both sides [media concentration activist and opponents]."²⁴⁵ This is precisely why the importance of more studies on this issue will not become obsolete in the foreseeable future.

²⁴¹ See, Emord, "Freedom, Technology and the First Amendment," at p. 128-129.

²⁴² See, Lili Levi, *ibidem*, at p. 604.

²⁴³ See, Chairman William E. Kennard, Remarks at the August 5, 1999 Meeting on Broadcast Ownership Items, quoted by Lili Levi, *ibidem*, at p.590.

²⁴⁴ See, Bruce M. Owen, "Economics and Freedom of Expression," *ibidem*, at p. 185. The author analyses the current regulatory mechanisms employed by the United States' regulatory agency in the media industry – the Federal Communications Commission – and finds them unjustified both from an economic and First Amendment perspective. Allowing people to pay directly for their programs, with no "artificial barriers to channel expansion," would "not produce a perfect result, but they will almost certainly improve matters." See, *ibidem*, at p. 114.

²⁴⁵ See, Eli Noam, "Legal Scholarship Symposium: The Scholarship of Nadine Strossen: Media Scholars as Activists: Media Deconcentration as Social Reform?," 41 *Tulsa L. Rev.* 773 (2006). The author skims through Ben H. Bagdikian's "The Media Monopoly" (Beacon Press, 1992, and 1997 – the '97th edition witnesses a further accumulation of "public communications power" by the United States' "largest industrial corporations" – see at p. ix of Bagdikian's "The Media Monopoly" 97th edition) and Mark Cooper's "Media Ownership and Democracy in the Digital Information Age: Promoting Diversity with First Amendment Principles and Market Structure Analysis" Center for Internet & Society, Stanford Law School (2003) to show that actually the mass media market is first less concentrated than the telecommunications, online cybermedia and information technology markets and second that although this

There may be other further arguments that can be made pro/counter governmental regulation, however I would state that, because it takes a realistic stance on the issue of media diversity and it offers a more flexible and thus easier to implement view, I favor a moderate approach²⁴⁶ including a strong impetus to stop the current trend towards deregulation²⁴⁷. This approach that I put forward and elaborate upon in the following chapters considers that both regulation and antitrust, since they counter the issue of media concentration from complementary angles, should remain part of the legal protection of media diversity, however, with a more keen eye on including media diversity as a deal breaker in the regulatory review of media mergers.

In the previous lines I set up a factual background (the process of media concentration and the state intervention in this process are both empirical phenomena) against which I antagonize the theoretical frame in which the concept of media diversity was born. This in turn will help us understand why is media diversity important for a democratic society and why, *per a contrario*, media concentration goes against the democratic values one tries to protect, especially, in our case, the freedom of speech.

is the case with the concentration on each sub-sector, however, at a macroscopic level, five companies in the United States hold most of the market shares in the overall media. Again, although the mass media sub-sector may be less concentrated, as Noam points out, this does not mean that a lower threshold must be employed in order to assess the concentration on the mass media market. See, Noam, "Legal Scholarship Symposium[]," *ibidem*.

²⁴⁶ "There is a spectrum here, not necessarily of democracy versus authoritarianism, but of active state involvement in the construction of public sphere and of sustaining a national identity on the one hand, or pretending to leave these questions to the market on the other. Only by being reflective about these more complex issues – and not focusing solely on a single model of the democratic state – can Western observers and counselors constructively participate in the task of attempting to democratize and provide greater freedom for broadcasting structures in former socialist states." See, Monroe Price, "Comparing Broadcast Structures: Transnational Perspectives and Post-Communist Examples," 11 *Cardozo Arts & Entertainment L. J.*, 275 (1993), at p. 286.

²⁴⁷ Coase himself seems open to an "intermediate approach." See, Coase, *ibidem*, at p. 77.

I. 6. Media ownership and media diversity

Since it is argued here that media concentration harms media diversity, then it must follow that the more media companies (and owners) there are, the more diverse the media market. Following this line of thought, there should be a link between media ownership and media content.

One manner to inquire into the existence of this link is by conducting empirical studies that look into whether stations that are owned by different ethnic background owners do indeed broadcast more diverse programming, whether networks²⁴⁸ do tend to air homogenized content or whether the owner's political affiliation, business interests²⁴⁹ or sympathies do influence the editorial line. The existence or inexistence of this connection may depend on how one frames the media diversity concept – as viewpoints or source diversity²⁵⁰. It is worth pointing out that even if in the case of viewpoints diversity the connection is improbable from a scientific/empirical point of view, this does not diminish the importance of regulation in protecting media diversity, it calls only for a proper policy adjustment²⁵¹. Another relationship that needs empirical proof is the connection between employing minorities in media companies and the increase in content diversity. The extent to which these studies will help push forward the case for media

²⁴⁸ I use the term media to define an entity that produces content that is broadcast throughout his distribution network. See, for instance, on the market and legal development of television networks, Jonathan Levy, Marcelino Ford-Livene, Anne Levine, "Broadcast Television: Survivor in a Sea of Competition," FCC, OPP Working Series, September 2002.

²⁴⁹ Although the American media might criticize a certain business person about the way he conducts business, the same media will not go against the corporation system. "Above all, the random criticisms of business people in the media that conservative critics complain about do not add up to any fundamental criticism of capitalism or of the political monopoly of our two capitalist parties, which remain givens of American culture, inconspicuous and unquestionable as the air we breathe." See, Donald Lazare, "Conservative Media Criticism: Heads I Win, Tails You Loose," in "American Media and Mass Culture," *ibidem*, at p. 81.

²⁵⁰ See, Baker and Ho's debate, *supra*, at FN 36.

²⁵¹ See, Ho, response to Baker, *supra*, FN 36, at p. 678.

diversity is unclear since such studies were generally inconclusive²⁵². However, some of the courts²⁵³ and all the regulatory agencies in the jurisdictions that I discuss do consider this ownership/content link, either by challenging it or by assuming its existence without questioning its validity. This paper later evaluates the measure in which reliance on empirical findings undermined the goals of media diversity especially in the United States Supreme Court's case law.

It is one of this thesis' assumptions²⁵⁴ that media owners²⁵⁵ have an influence on what type of content media companies produce. This part of my introductory chapter both elaborates on and challenges this assumption. This assumption requires i) an examination of two aspects: a discussion on the extent to which different types of media owned by one single company tend to produce homogeneous content and ii) a closer look into whether media owners that are of different ethnic background (the minorities media) do have a positive impact on the quantity and quality of the minority programming broadcast by their media companies.

In order to assess the networks' influence – I am referring here to networks formed through cross-ownership of broadcasting (television and radio), Internet and printed press by one single company that combines thus the privileges of a huge

²⁵² See, the discussion on the link between women and minority ownership and women and minority viewpoints in the chapter on the United States Supreme Court's treatment of media diversity, section II.3.1. I show there how reliance on empirical findings undermined the goals of media diversity.

²⁵³ Especially the United States Supreme Court, as will be discussed in the United States chapter.

²⁵⁴ Or "presumption." See, Daniel E. Ho, Kevin M. Quinn, "Viewpoint Diversity and Media Consolidation: An Empirical Study" March 11, 2008, 3rd Annual Conference on Empirical Legal Studies Papers. Available at SSRN: <http://ssrn.com/abstract=1121229>, at p. 10. Ho makes an analysis of the newspapers editorials' positions vis a vis United States Supreme Court's decisions (left/right/center or undecided) and how mergers affected these stances. Ibidem.

²⁵⁵ I refer here to owners as both legal and natural persons. Sometimes although, when the requirements of the argument demand it, the term might refer to either a legal person or a natural person.

distribution system with the resources of content production²⁵⁶ – I rely on empirical studies²⁵⁷. These studies lead to vague conclusions as to whether there is any link between media ownership and media content²⁵⁸.

A good starting point for discussing the possible influence that networks have on media diversity is the Federal Communications Commission's working group studies²⁵⁹. One study focuses on the issue of the "extent to which commonly owned newspapers and television stations²⁶⁰ in a community speak with a single voice about important political matters"²⁶¹. This study's results are not necessarily vague, but are inconclusive²⁶². Two explanations are suggested for the tendency to air the same content over both television and the printed press: either the "unseen hand"²⁶³ of ownership control, or the

²⁵⁶ Networks are created either vertically by the convergence of content and distribution or horizontally by the same owner holding shares in several same type media companies.

²⁵⁷ See, Ho and Quinn, *supra*, FN 254 at p. 6.

²⁵⁸ See, Kari Karppinen, "Media Diversity and the Politics of Criteria. Diversity Assessment and Technocratisation of European Media Policy," *Nordicom Review* 27 (2006) 2, p. 53-68.

²⁵⁹ Federal Communication Commission, Media Ownership Working Group, September 2002, David Pritchard, "Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign." www.fcc.gov/ownership/materials/already-released/viewpoint090002.pdf

²⁶⁰ The rule adopted in 1975 prohibited companies to own both broadcast stations and newspapers. The rule was adopted in order to preserve true diversity and in order to avoid the potential manipulation of the public opinion by the owner. The Commission did not however offer any statistical evidence of the negative impact that the common ownership would have on the diversity of opinions in a community. The Commission did grant some waivers from this rule, in general for the newspaper's lack financial viability on the market. See, Amendment of Sections 73.34, 73.240, and 73.636 Commission Rules Relating to Multiple Ownership of Std., FM, and TV Broadcasting Stations, Second Report and Order, 50 F.C.C. 2d 1046, 32 Rad. Reg. 2d (P&F) 954 (1975) in D. Pritchard, *supra*, FN 259.

²⁶¹ See, D. Pritchard, *supra*, FN 259, at p.1. The evaluation covered the news on the 2000 presidential campaign and inquired into whether commonly owned newspapers/broadcasters supported the same candidate. For instance, according to the study, of the four Tribune Company newspapers, two endorsed Bush, one endorsed Gore and one made no endorsement. See, D. Pritchard, *supra*, FN 259.

²⁶² Five television stations broadcasted similarly to the newspapers' coverage and five not. See, D. Pritchard, *supra*, FN 259.

²⁶³ See, D. Pritchard, *supra*, FN 259. See, for an account of the subtle ways to have an input into the editorial line and management of a newspaper, Sarah Ellison, "War at the Wall Street Journal. Inside the Struggle to Control an American Business Empire," Houghton Mifflin Harcourt, 2010, especially at p. 182 and 202. The book details the transaction of Dow Jones and Wall Street Journal from the Bancroft family to Rupert Murdoch.

independent and almost natural tendency of the news in a community to converge²⁶⁴. The study could not therefore conclude in either direction: either that the media networks do tend to air the same programming over the different media they control, leading thus to homogenization of content and less media diversity, or that they do not have this sort of effect on media content and thus they do not pose any issues from a media pluralism perspective²⁶⁵. First, the mathematics of this study were even: five stations in favor, five stations against²⁶⁶; second the study proves that a certain amount of diversity is expected even in the case of commonly owned newspapers and broadcasting stations. Furthermore, while these studies' purpose is to look into the influence that networks have on media content, they study do not and cannot (since they rely on statistical findings based on objective criteria) assess either the quality of the news or the vast range of the viewpoints presented.

Another study²⁶⁷ tries to fill in this gap and it evaluates the performance of network owned and operated stations and affiliates. It monitors the quality and quantity of local news programming against several criteria referring to ratings, possibility to receive prestigious awards (such as the Radio and Television News Directors Association²⁶⁸ and the A.I. DuPont Awards²⁶⁹)²⁷⁰. The study showed that “network

²⁶⁴ See, D. Pritchard, *supra*, FN 259. See, for an account of the subtle ways to have an input into the editorial line and management of a newspaper, Sarah Ellison, “War at the Wall Street Journal. Inside the Struggle to Control an American Business Empire,” Houghton Mifflin Harcourt, 2010, especially at p. 182 and 202. The book details the transaction of Dow Jones and Wall Street Journal from the Bancroft family to Rupert Murdoch.

²⁶⁵ See, D. Pritchard, *supra*, FN 259.

²⁶⁶ See, D. Pritchard, *supra*, FN 259.

²⁶⁷ Thomas C. Spavins, Loretta Denison, Scott Roberts, Jane Frenette, “The Measurement of Local Television News and Public Affairs Programs.” <http://www.fcc.gov/ownership/materials/already-released/measurement090002.pdf>.

²⁶⁸ The Radio and Television News Directors Association is a media industry's professional association. See, <http://www.rtnda.org/pages/about-rtnda.php>.

[owned and operated stations] outperform affiliates²⁷¹.” Elaborating on this finding one may conclude that network owned and operated stations may actually improve their performance when co-owned with newspapers. The contradictory outcomes of these studies only reinforce the need for a proper thorough study to be concluded by the United States’ regulatory agency. Last year the courts questioned again the validity of the FCC’s argument justifying certain aspects of media regulation²⁷². Improvements to these studies could be expected in the FCC’s forthcoming regulatory review²⁷³.

We have looked into the uncertain link between networks and content. We turn now to the other aspect of our discussion here: the influence that owners (in the sense of individual owners – both managers and majority shareholders – or legal entities representing their shareholders) have on media content produced or distributed by their respective media companies. Fundamentally, arguing that media concentration harms democracy implies accepting, at least partially, that media owners’ private interests are reflected in their editorial line²⁷⁴. These private interests are not necessarily of purely individual importance. They may serve a certain small political group or push forward a

²⁶⁹ The A.I. DuPont Awards are awarded by the duPont Center at Columbia University. See, <http://www.journalism.columbia.edu/cs/ContentServer/jrn/1175295296430/page/1175295287279/simplepage.htm>.

²⁷⁰ See, Spavins et al., *ibidem*.

²⁷¹ See, Spavins et al., *ibidem*.

²⁷² See, *Comcast Corporation v. FCC*, US Court of Appeals for the District of Columbia Circuit, August 28, 2009. No. 08-1114. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293154A1.pdf. The 30% national cap on cable ownership is “arbitrary and capricious.” *Ibidem*.

²⁷³ Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding, MB Docket No. 09-182, July 7, 2010.

²⁷⁴ Ho and Quinn’ study challenges the “convergence hypothesis” that is that “any consolidation should be associated with a reduction in viewpoint diversity”. See, Ho and Quinn, *supra*, FN 254, at p.37. The study’s conclusion is that the evidence in favor of an existing ownership/content link is scarce and contradictory – what is called the “heterogeneity of effects” (see at p. 63 in Ho and Quinn, *ibidem*, *supra*) and that the “convergence hypothesis” is real and thus the FCC rules should be repealed to the extent that the agency cannot empirically show the link between its rules and viewpoint diversity. Since the authors observe that the convergence of the editorial boards post merger led to a congruence of editorial positions – and thus a decrease in viewpoint diversity – the authors put forward a solution for the FCC to pay attention to and to enforce rules related to editorial independence. See, Ho and Quinn, *supra*, FN 254.

certain economic or social agenda. Furthermore, here I do not refer only to private owners. The public owner of public broadcasting – the state – may sometimes interfere through the decision-making mechanisms that should ideally serve the whole population but instead submit to political partisanship²⁷⁵.

Traditionally, media has been shaped (and the same goes for any other human institutions important enough to attract power related ambitions or money or both) by “invisible power relations.”²⁷⁶ The French sociologist Bourdieu analyzes the case of the French television TF1, which “accumulated a set of specific powers that influence this universe and that are translated into an increased share of the market.”²⁷⁷ My chapter on the European media outlines the development of broadcasting within a broader political and historical context²⁷⁸.

Further, it is worth pointing out that when the media was not owned by corporations, but owned by individuals, these owners were more in tune and in touch with the realities of the communities their media served. Then, a link between content and owners was desirable, provided of course, that several media outlets served that community. Now however, when giant corporations own the media, their connection to the real world is realized through managers that will pursue profits so that the shares of the media company reach higher values on the stock market. In a much less corporate owned media, back in 1946, the FCC favored stations that would integrate ownership and operation – that is the owners would have actively been involved in the “participation in

²⁷⁵ See, on the *lottizzazione* in Italy, the chapter on the European Union.

²⁷⁶ See P. Bourdieu, *ibidem*, at p. 40. See, also, J. Turow, *ibidem*, at p. 25. The author elaborates on the underlying power relations inside the media industry.

²⁷⁷ See, Pierre Bourdieu, *ibidem*.

²⁷⁸ See, *infra*, in section III.2.3.

the day-to-day operation of a station,” which in turn would “better effectuate the station policies and the public interest²⁷⁹.”

Although there are many accounts in communications related studies of instances of interference with editorial freedom,²⁸⁰ as in the case of the networks, the relationship between editorial line and ownership is difficult to assess and difficult to prove²⁸¹. This is because, again, less legal and more communications focused studies show that this type of control would be invisible, even unrecognizable by the journalists themselves, who already internalized it, and due to this very invisibility, more effective²⁸². The subtle influence of commercial interests over the press might thus approach the level of “compulsion”²⁸³.

Not all the control mechanisms require such an eye for psychological introspection. “By far the most important mechanism of ownership control is the power to hire, promote and fire”²⁸⁴. However inconclusive on the issue of the owners’ influence

²⁷⁹ This policy evolved from another policy of preferring local residents in license proceedings. See, Harry Warner, *ibidem*, part. I, at p. 201.

²⁸⁰ See, Noam Chomsky, “Manufacturing consent,” *supra*.

²⁸¹ “Evidence of management control can however be found in the rare instances of conflict that help establish the boundaries of autonomy, and the subtle practices that encourage compliance without direct oversight. An investigation of internal New York Times documents, including the papers of one publisher and three top editors over 50 years, uncovers numerous mechanisms that owners and their editors use to shape the content of the newspaper.” These internal papers prove that the publisher’s influence at the New York Times has been “systematic, persistent and decisive.” See, Daniel Chomsky, “The Mechanisms of Management Control at the New York Times,” *Media, Culture & Society*, 1999, Sage Publications. The author points to letters in which the publishers of the newspaper pointed out to the informal mechanisms of decision in which the chief editor and some of his closest subordinates would decide the course of the paper. One of the publishers, Sulzberger affirmed that “ownership must have the final voice.” This being so the newspaper was very critical of Sulzberger’s enemies. For instance, himself being the owner of a corporation, urged the newspaper to take a critical attitude towards the workers’ unions.

²⁸² The structural forces that limit the autonomy of reporters are to be found in the internal record of the New York Times. The author refers to “the covert character of power.” See, Daniel Chomsky, “The Mechanisms of Management Control at the New York Times.”

²⁸³ The “readers in the western world may never know the extent of press restrictions based on what publishers are willing to print and what advertisers are willing to support” – “the phenomenon of invisible censorship.” See, Shelton A. Gunaratne, “Freedom of the Press. A World System Perspective.”

²⁸⁴ See, Daniel Chomsky, “The Mechanisms of Management Control at the New York Times,” *Media, Culture & Society*, *Media, Culture & Society*, 21(5), 1999, at p. 592, available on SAGE. “The recruitment

on media content, some studies do err on the side of caution and predict dark prospects for editorial freedom: “To the extent that [management influence practices are widespread] news coverage in the mass media will reflect the increasingly narrow values and interests of corporate owners.”²⁸⁵

It is not the purpose of this thesis to conduct a deep sociological (and statistical) analysis of the relationship between media ownership and media content. However, it is this thesis’ purpose to analyze the extent to which the vague conclusions of these studies permeate the judicial decisions in which media diversity issues were dealt with. Thus, in the chapter dedicated to the United States, I discuss how the lack of conclusive evidence in regard to the link between media ownership and media content led the courts to issue decisions that do not protect the media diversity principle.

I. 7. Technological convergence, new media and media diversity

Considering the quick transformation of today’s media, distinguishing old from new media is not easy. One would rather employ the term “emergent media”²⁸⁶ to show precisely this constant development. What is today’s new media²⁸⁷ may in a matter of weeks become tomorrow’s old media²⁸⁸. Therefore, since it is hard to pinpoint an everlasting definition, and even more, to give examples of what the new media is, I refer

of ideologically compatible reporters can help assure that management’s views are reflected in the news.” Ibidem. See, for a recent case in which Fox TV succumbed to Monsanto’s pressures and it fired two journalists that wanted to air a controversial series on the bovine growth hormone produced by the named agricultural company: <http://www.foxbghsuit.com/>. See, also, S. Ellison, “War at the Wall Street Journal,” ibidem.

²⁸⁵ D. Chomsky, “The Mechanisms of Management Control at the New York Times,” ibidem.

²⁸⁶ See, Richard Davis, Diana Owen, “New Media and American Politics,” Oxford University Press, 1998, at p. 3.

²⁸⁷ Or “non-traditional.” See, Richard E. Wiley, “Good Fortune with Great Pictures: HDTV Technology can Foster Multimedia Applications,” in Wadlow, Blakeley, *infra* FN 311, at p.29.

²⁸⁸ See, in this sense, on an account of media that we now consider old, but that used to be considered new, Lisa Gitelman and Geoffrey B. Pingree, “New Media, 1740-1915,” The MIT Press, 2003.

to a broader understanding of the concept: “the new media are quantitatively and qualitatively different from the mainstream press [and] do not simply represent a variation of the established [] media²⁸⁹.” Further, the interactivity characteristic is one of the most important features that differentiate old from new media²⁹⁰ together with, I would add, an increasing trend today towards media mobility.

Do the technological convergence²⁹¹ and the new technologies²⁹² make the concern over the negative effects of media concentration on media diversity obsolete? Considering that the scarcity rationale was the main ground for regulating media, one may be inclined to think that the answer is in the positive. This paper argues, however, that the same temptations to concentrate affect the market of the new technologies²⁹³. Further, one has to remember that although the technological progress is quick, old technologies are still significant sources of information for most people²⁹⁴. The new media’s weak capacity to increase media diversity results also from the fact that the “old”

²⁸⁹ See, David and Owen, *ibidem*, at p. 7.

²⁹⁰ See, David and Owen, *ibidem*, at p. 7. The authors include political talk radio, political talk television and electronic town meetings among other forms of “new” media in ’98. One would hardly consider these formats new today.

²⁹¹ Convergence is defined as “the realm of possibilities when cooperation occurs between print and broadcast for the delivery of multimedia content through the use of computers and the internet.” See, Gracie Lawson-Borders, “Media organizations and convergence: case studies of media convergence pioneers,” Mahwah, N.J.: Lawrence Erlbaum Associates, 2006, at p. 4. See, also, Andrew Calabrese and Janet Wasko, “All wired up and no place to go: The search for public space in U.S. cable development,” *International Communication Gazette* 1992; 49; 121, at p. 135, <http://gaz.sagepub.com/cgi/content/abstract/49/1-2/121>.

²⁹² “New technologies” is a term I use to refer to Internet (although is not new since it was created in 1968 – see A Brief History of the Internet at Internet Society’s website, <http://www.isoc.org/internet/history/brief.shtml>, however it is new only in the sense that it switched to a new direction and put in a new perspective the scholarly debate over media concentration) and to digital technologies. Also, new technology in this sense is interchangeable with new media, if one has in mind that in the field of communications “the medium is the message.” See, for instance, Note: “The Message in the Medium: The First Amendment on the Information Superhighway,” 107 Harv. L. Rev. 1062.

²⁹³ See, Andrew Calabrese, “Stealth regulation: moral meltdown and political radicalism at the Federal Communications Commission,” *New Media & Society*, Vol6(1):106–113, 2004, Sage Publications. Calabrese observes the phenomenon of concentration of ownership among Internet service providers.

²⁹⁴ Free TV still reaches a considerable amount of the US television households. See, FCC, “Eleventh Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,” January 2005, para. 77, in L. Hitchens, *ibidem*, p. 20, FN. 65.

media moved to the Internet and sometimes the most popular Internet content is just a replication²⁹⁵ of traditional media formats²⁹⁶ and editorial line²⁹⁷.

Surprisingly, the media's progress in frequencies' allocation is not entirely new since it was observed sixty years ago²⁹⁸. I say surprisingly because, in spite of the benefits that technological progress obviously brought by expanding the radio's capacity to carry signals, it still did not stop the concern over media concentration's effects on media diversity from growing. Perhaps because, the "technical factor is only one of several factors to be weighed" in media policies' decision making processes²⁹⁹.

Lastly, the future of these technologies and their promised benefits are still unclear³⁰⁰. The inherent shortcomings in the technological development and use of the Internet limit Internet's possibility to create a more diverse substitute of the traditional

²⁹⁵ See, Pavlik, John V., "New Media and News: Implications for the Future of Journalism," *New Media & Society* 1(1), Sage Publications. The article examines the impact of new media, defined as those "digital media emerging from the convergence of computing, telecommunications and traditional media," on four areas of journalism. Ibidem.

²⁹⁶ Many popular TV shows have websites. See, Mia Consalvo, "Cyber – Slaying Media Fans: Code, Digital Poaching, and Corporate Control of the Internet," *Journal Of Communication Inquiry*, 2003, Sage Publications.

²⁹⁷ The television channels' websites reflect the socio-political contexts in which the television stations operate. See, Jill Hills, Maria Michalis, "The Internet: a Challenge to Public Service Broadcasting?," *International Communication Gazette*, December 2000 vol. 62 no. 6, 477-493.

²⁹⁸ See, Robert H. Stern, "The Federal Communications Commission and Television. The Regulatory Process in an Environment of Rapid Technical Innovation," Harvard University, 1950, at p. 195, published by ARNO Press in 1979.

²⁹⁹ The author refers to frequency assignment policies. See, Robert H. Stern, *ibidem*, at p. 198.

³⁰⁰ See, Bruce M. Owen, "The Internet Challenge to Television," Harvard University Press, 1999, at p. 42. The author notes that the Internet might actually be less likely to become the main transmitter of video data. See, Owen, *ibidem*, at p. 41. Further, the author questions the internet's meaningful use for anything else but personal e-mailing services. See, Owen, *ibidem*, at p. 233. Note however that, as the author mentions, in order for the situation to change, the Internet needs to change and to become faster – which happened in the last years (Owen's book was written in 1999). Still, the fact that most people might be using the Internet for sheer entertainment or personal messaging is a significant consideration to take into account. See, also, *Computer/Videogame Benchmark Study: Unveiling a New Home Entertainment Medium*, prepared for Smith Barney Shearson by Alexander & Associates, Inc., Robert C. Alexander, Scott Ishii, November 1993, in Wadlow, Blakeley, *ibidem*, at p. 244. The authors cite a study that found that "43% of PC users report that entertainment is either a primary or secondary use of their home computer system." See, *ibidem*.

media. The strategy of “closing” the open code of the Internet³⁰¹ may lead to the same problem that the traditional media has: a restatement of the adagium freedom of the press for those who own one³⁰².

Although envisioned as an universal service, Internet is not available to all³⁰³. As it was recently mentioned, content providers on the Internet will increasingly start charging for their websites³⁰⁴. The variety of web content challenges the relations of power within limits. These limits stem both from the superficial access given to simpler users to technological tools³⁰⁵ and from the copyright concentration into the hands of few. First, the deepest Internet structures in terms of programming – source code and binaries³⁰⁶ - are still the exclusive domain of a small group of experts.³⁰⁷

A second, related argument borrows from behavioral studies. Although it was hoped for the Internet to increase participation in public debate, the Internet user is mostly a passive user³⁰⁸. The new media was envisioned as a virtual place where all the

³⁰¹ See, Lawrence Lessig, “Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity,” The Penguin Press, 2004, at p. 279 et seq. The author explains how in the beginning of the computers the source code was open to modifications and how with the expansion of the proprietary code this was not the case anymore.

³⁰² See, Mia Consalvo, *ibidem*. See, also, A.J.Libeling, “The Press:” Freedom of the press is guaranteed only to those who own one, quoted in Judith Lichtenberg, “Foundations and limits of freedom of the press,” in Denis McQuail, “McQuail’s reader in mass communication theory,” London: SAGE, 2002, at p. 173.

³⁰³ See, J. Hills, M. Michalis, *ibidem* The authors argue that Internet transmission reaches (compared to the traditional media) only a small proportion of the population.

³⁰⁴ See, Michael Hirschorn, “Closing the Digital Frontier,” in the Atlantic, the Ideas Issue, July/August 2010, vol. 306, no. 1, at p. 76.

³⁰⁵ See, Charles B. Goldfarb, ed., “Telecommunications Act: competition, innovation, and reform,” Novinka Books, 2006, at p. 14, on how “broadband providers’ networks and usage restrictions favored client-server applications” and how “nearly every cable operator and one third of DSL operators restricted end users from operating a server and/or providing content to the public,” citing a study by Tim Wu, “Network Neutrality, Broadband Discrimination,” Journal on Telecommunications & High Technology Law, Vol. 2, 2003, at p. 158-168.

³⁰⁶ See, L. Lessig, *ibidem*, at p. 279 et seq.

³⁰⁷ The use of the tools that go beyond the Internet’s interface and browsing are the domain of professionals and generally not of the layperson. See, Mia Consalvo, *ibidem*.

³⁰⁸ See, J. Hills, M. Michalis, *ibidem*. The study documents this observation with finding an increase in web surfing than participation in chat rooms or webpage creation.

citizens may participate in the community's life³⁰⁹ – a sort of reinvention of the traditional local market or town hall where all the people will have their say in community affairs³¹⁰. The main characteristic of the new media that would have helped the achievement of this goal was its interactivity³¹¹. However, even this characteristic somehow got lost on the way and the interactive sites, in which the ordinary folk would discuss its problems in real time with her political representative, are scarce³¹². The third aspect that limits the Internet's potential impact on media diversity is the concentration that exists in the "copyright industries."³¹³ The two phenomena are interdependent – copyright concentration³¹⁴ favors media concentration³¹⁵. Finally, technological convergence might make the problem of media concentration even more acute since it creates new possibilities for economies of scale.³¹⁶

³⁰⁹ This is one of the aspects considered in the 2003 FCC decision on ownership review. See, FCC Chairman Powell's speech after the 2003 decision, cited in Andrew Calabrese, "Stealth regulation: moral meltdown and political radicalism at the Federal Communications Commission," *ibidem*.

³¹⁰ "It is clear that the vices of people who do not represent commercial interests are critical in such contexts. [] In a city where information sources are few, where official information generally goes unchallenged, where the news media are themselves part of the power structure and have an economic agenda to position themselves ahead of commercial competitors, the need for more and diverse sources of information and the need for avenues of citizen expression is great." See, Lina F. Rakow, "The public at the table: from public access to public participation," *New Media Society* April 1999 vol. 1 no. 1 74-82, Sage Publications.

³¹¹ See, Andy Johnson-Laird, "Multimedia and the Law," in R. Clark Wadlow, Craig J. Blakeley, "Multimedia and the Law," Practising Law Institute, 1994, at p. 10, on a definition of multimedia as "interactive audiovisual computing."

³¹² See, Stephen Coleman, "The New Media and Democratic Politics," *New Media & Society* April 1999 1: 67-74, Sage Publications. The author points to some of the political websites, such as the White House website, which permits the reader to post comments, however does not allow for any real virtual discussion with the representative.

³¹³ See, R.V. Bettig, *ibidem*, at p. 360 et seq.

³¹⁴ Outside the scope of this thesis, however, for an analysis of this issue, see, among others, L. Lessig, *ibidem*.

³¹⁵ See, Bettig, *ibidem*, at p. 364. See, for a brief history of how holding on to their content rights helped media companies consolidate their power, Bettig, *ibidem*.

³¹⁶ For the Internet and telephony convergence, see the approved merger of the Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63 (released August 2005) http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-148A1.pdf and the "Appropriate Framework for Broadband Access to the Internet over Wireline Facilities" (released September 2005) <http://www.fcc.gov/FCC-05-150A1.pdf> – the latter Report and Order and Notice of Proposed Rulemaking states that "facilities-based wireline broadband Internet access service providers [(BOC companies)] are no

The impact that the Internet has or predictions on what it will have on the citizens' participation in democratic decision – making and its influence over public opinion could easily make the object of a thesis – although not necessarily a law thesis – and it is outside the scope of this paper. However, it is worth pointing out here – as mentioned above - that this impact is still unclear³¹⁷. While some believe in the potential for the Internet to contribute to a richer community life³¹⁸, some point out that what has been termed the digital divide – the gap between those who own the means to access information and those who do not, be they individuals or whole countries – may still continue to impair the democratic ideal behind this new technology.

This section tried to outline that the new media escapes a clear definition given the quick pace of their transformation, that at this time they still do not replace in consumers' lives traditional media and that they could still tend to concentrate and make dominant media companies even stronger. The new technologies do not necessarily increase content diversity either, since they sometimes only duplicate traditional formats. Finally, the existence and constant development of new technologies do not make the scarcity rationale invalid if one understands that this concept includes besides physical

longer required to separate out and offer the wireline broadband transmission component [] of wireline broadband Internet access services as a stand-alone telecommunications service[]". Ibidem, at para.5. See, also, for instance, "FCC Issues Inquiry for Annual Report to Congress on Video Competition," August 12, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260525A1.doc. This Notice requests information that will allow the FCC to evaluate "horizontal concentration in the video marketplace, vertical integration between programming distributors and programming services." Ibidem.

³¹⁷ The difficulty to predict the effects of the new media on the society stems from these technologies' constant and dynamic renewal. See, in this sense, Sonia Livingstone, "New Media, New Audiences," *New Media & Society* April 1999 1: 59-66, Sage Publications.

³¹⁸ See, S. Coleman, *ibidem*, affirming his belief in the positive effect that the Internet will have on the democratic process because of its high potential for communicative interaction. The Internet contributed as well to what has been called "democratization," "at least in terms of making visible forms of knowledge and opinions whose domain has been traditionally restricted to higher status groups." See, Sonia Livingstone, "New Media, New Audiences." This connotation linked to the new media is, I believe, far-fetched. This is because "democratization" through access to knowledge is essentially based on economic factors that still marginalize the poor.

scarcity, economic scarcity as well. We turn our attention now to another argument in favor of regulation, the argument that the media is a special type of product.

I. 8. The market/product and the media market/product

The proponents of deregulating the media to the point of not regulating it at all treat the media market and the media product just like any other market/product, asserting that the market for goods and the market for ideas are identical³¹⁹. However, this thesis argues that the media product and the media market are two institutions entitled to special protection. The main arguments in favor of such special regulatory treatment refer to the inherent freedom of speech enhancing functions that the media product has, functions which derive from freedom of speech theories and to the peculiar nature of the media market, which is from an economic point of view, a two-sided market. This means that the advertisers are the ones that deal directly with the media companies while the latter remain disconnected from what the audience wants or needs, which may in turn increase the media companies' incentive to broadcast lighter programming that contributes to the formation of a consumerism oriented audience³²⁰. Related to this, is the argument that the advertising contributes to the formation of economies of scale because it increases the

³¹⁹ See, Aaron Director, "The Parity of the Economic Market Place," 7 J. Law&Econ. 1,3 (1964), in N. Wolfson, *ibidem*, at p. 91.

³²⁰ I am referring here to what has been called "commodification" of the media. See, Robert W. McChesney, "The problem of the media: U.S. communication politics in the twenty-first century," New York : Monthly Review Press, 2004, at p. 77. McChesney refers to the commercial pressure on journalism reflected especially in cutting budget for investigations. Note also, at p. 83, on the "pressure to shape stories to suit advertisers and owners." The author speaks elsewhere of "hyper-commercialism" to meet the advertisers' needs, both in content characteristics and advertisements' quantity. See, *ibidem*, at p. 145. See, further, Robert W. McChesney, "Rich media, poor democracy: communication politics in dubious times," Preface. In the preface to this new edition the author elaborates on the paradoxical title of the book. In order to become rich media played the corporate game and needed therefore to return favors by not covering – or covering – certain stories touching corporate interests. McChesney exemplifies his statements with various real journalism stories. See, in the preface of, and in general in McChesney, "Rich media, poor democracy[]."

incentive of media companies to become networks so that they have better access to a larger audience and advertising money³²¹.

Although advertising is not within the scope of this paper, a small discussion on advertising's influence over media diversity is needed. In the following, I show how the advertising negatively affects programming diversity. The main effect that advertising has on broadcasting is that it disrupts the relationship between the media and the audience, by working as an intermediary (one may even call it an obstacle) between the two. This situation in turn leads to a disconnection between what the audience wants and needs and what the media offers³²².

Therefore I argue here that market economics' assumptions based on the meeting between consumers' demand and suppliers' offer do not entirely work in the media realm and they have to be, to a certain extent, abandoned. Further, this special situation makes the case for media diversity even stronger since it adds up to the special characteristics of the media product and the media market. Thus, the media market is a special market – a two sided market³²³. It is a market in which the broadcasters sell a product to consumers. However, it is not the consumers (viewers) that pay for it, but the advertisers that purchase commercial time from the broadcasters. “This unique disconnection between consumers and purchasers of broadcast television services³²⁴ creates many thoroughly explored market imperfections.³²⁵”

³²¹ See, Robert W. McChesney, “Rich media, poor democracy: communication politics in dubious times.”

³²² See, Keith S. Brown, Media Bureau, FCC and Roberto J. Cavazos, Department of Public Administration, Florida International University, “Empirical Aspects of Advertiser Preferences and Program Content of Network Television,” December 2003.

³²³ See, Simon P. Anderson and Jean J. Gabszewicz, “The Media and Advertising: A Tale of Two-Sided Markets,” available online at: <http://www.virginia.edu/economics/papers/anderson/fullfinaltale.pdf>.

³²⁴ The media market is composed of two product markets: the media content for an audience and the advertisers' access to the audience. See, Alan B. Albarran and Sylvia M. Chan-Olmsted, “Global media

The advertising' say in broadcasted programming was noted even "in the early 1920s³²⁶." Studies³²⁷ show that the broadcasters are more inclined to satisfy the advertisers and to air light content that attracts the audience to their products or into a consumeristic mood³²⁸. Advertisers may even directly influence network programming choices because they "want programming that will put viewers in a receptive mood, and hence not be too depressing.³²⁹" This leads to "programming that is light and unchallenging³³⁰." This also leads to a large portion of the population that has its interests and tastes, desires or aspirations unrecognized and underserved by the media³³¹. It is also a natural consequence of advertising industry's influence on the media that richer audience will have their interests better reflected.³³² However, as the study suggests, the fact that free channels do not broadcast "serious" programming, was seen by other

economics: commercialization, concentration, and integration of world media markets," Ames: Iowa State University Press, 1998, at p. 4.

³²⁵ See, Keith S. Brown, Roberto J. Cavazos, *ibidem*. The study documents some of the "imperfections" of this market: "networks may over-duplicate programs, ignore smaller groups of viewers with intense preferences, air too little or too much advertising, or under-serve viewers that are not desirable to advertisers." *Ibidem*, at p. 5, internal citations omitted.

³²⁶ See, de Sola Pool, "Technologies of Freedom," *ibidem*, at p. 119.

³²⁷ See, Keith S. Brown, Roberto J. Cavazos, *supra*, FN 322.

³²⁸ "Sitcoms earn over \$75,000 more per 30 second commercial spot than [p]olice [d]ramas and news [programs]". See, Keith S. Brown, Roberto J. Cavazos, *supra*, FN 322.

³²⁹ Sunstein Cass, "Private Broadcasters and the Public Interest: Notes Toward a Third Way," University of Chicago, 1999, http://papers.ssrn.com/sol3/paper.taf?abstract_id=143174. On the emotional manipulation of the audience by advertisers, see Ben H. Bagdikian, "The media monopoly," Boston: Beacon Press, 1997, at p.186.

³³⁰ See, Keith S. Brown, Roberto J. Cavazos, *supra*, FN 322.

³³¹ See, Keith S. Brown, Roberto J. Cavazos, *supra*, FN 322.

³³² "Instead of new papers to meet changing political forces, existing papers pushed beyond their municipal boundaries to the new communities and, increasingly, reached not for all the new citizens but for the more affluent consumers." See, Ben H. Bagdikian, *supra*, at p.176, referring the to shift from non-advertising supported media to an advertising supported one. See, also, E.C. Baker, "Media, Markets and Democracy," at p. 75. Professor Baker argues that the media has an incentive to create and maintain "more cheaply stimulated or cultivated desires or preferences," to attract the larger potential audience as this is more profitable ("the incentive is to encourage preferences for the large-audience products, which often translates into an incentive for the media enterprise to encourage preferences for the lowest common-denominator. That is, the market gives the firm the most "bang for the buck" for the "dumbing down" the audience and the culture. " *ibidem*, at p. 91) and to "capture the entrepreneurial benefit resulting from any demand it creates." *Ibidem*, at p. 90-91.

suppliers such as HBO as the proper opportunity to enter the market and to strive successfully targeting a niche audience³³³.

One should, however, be cautious before affirming that pay-TV channels such as HBO might make up for the lack of diversity on free channels. Such an affirmation disregards the fact that not all the population can afford to pay to have their interests and tastes attended to by the media. And, even accepting that only a small portion of the population is interested in “serious” programming, the rest of the population may nevertheless never get the chance of actually finding out whether they like it or not this type of “serious” programming. And since democracy is not only about a small elite that can be illuminated at a certain cost, reliance on pay-TV channels to increase media diversity is, I believe, a far-fetched argument.

The fact, for instance, that television (which is by far the most pervasive and influencing media type³³⁴ due to, I believe, the combination of both sound and image) needs to make profit³³⁵ determines it to broadcast content carrying a certain level of homogeneity. As Bourdieu explains³³⁶ television must broadcast news that appeal to a wide variety of tastes. This news, in order to be appealing to such a wide range of viewers, must contain a smoothing and leveling factor, which finally makes it

³³³ See, Keith S. Brown, Roberto J. Cavazos, *ibidem*. The authors of this study conclude that in the long run the fact that some viewers are under-served leads to new suppliers of media product and finally to more competition on the market.

³³⁴ See, Denis McQuail, “Media Policy. Convergence, Concentration and Commerce,” *ibidem*, 1998, at p.4. See, further, Jerry Mander, “Four Arguments for the Elimination of Television,” Quil, New York, 1978, at p. p.348-349: “Television seems to be addictive. Because of the way the visual signal is processed in the mind, it inhibits cognitive processes. Television qualifies more as an instrument of brainwashing, sleep induction and/or hypnosis than anything that stimulates conscious learning processes. Television is a form of sense deprivation, causing disorientation and confusion. It leaves viewers less able to tell the real from the not-real, the internal from the external, the personally experienced from the externally implanted. It disorients a sense of time, place, history and nature.”

³³⁵ John H. McManus, “Does serving the market conflict with serving the public?,” In Denis McQuail, *Reader*, at p. 272 “Journalism that costs more to produce than it generates in revenues cannot be sustained in the marketplace.”

³³⁶ P. Bourdieu, *ibidem*, p. 44.

uncontroversial, homogenizing the public opinion. Television content is not, therefore and generally, about analysis. It is about catching attention and appealing to emotions³³⁷.

Competition understood thus in the pure economic sense³³⁸ leads to the broadcasting companies generally producing a “mentally neutral” product³³⁹. Because of the constant race for audience ratings media “imposes market pressures on the supposedly free and enlightened consumer³⁴⁰.”

We have become so accustomed to advertising supported media that a world without it seems unimaginable³⁴¹. However, would an advertising free media mean more diverse media? For instance, Bagdikian argues that the 80’s printed media, without the advertising industry acting as an intermediary, quickly and comprehensively mirrored the

³³⁷ “These are some of the most important factors [that contribute to an uniform and uncontroversial media]: (1) more often than not, contemporary news organizations belong to large corporations whose interests influence what gets covered (and, what is probably the most central, what does not) and how. (2) News organizations are driven economically to capture the largest possible audience, and thus not to turn it off with whatever does turn it off – coverage that is too controversial, too demanding, too disturbing. (3) The media are easily manipulated by government officials (and others) for whom the press, by simply reporting press releases and official statements, can be a virtually unfiltered mouthpiece. (4) Characteristics of the media themselves constrain or influence coverage; thus, for example, television lends itself to an action-oriented, nonanalytical treatment of events that can distort their meaning or importance.” Judith Lichtenberg, “Foundations and limits of freedom of the press,” in Denis McQuail, *McQuail’s reader in mass communication theory*, London : SAGE, 2002, at p. 173.

³³⁸ “Media industries operate across [a] continuum of market structure,” from “the closest example of a monopoly” – “cable TV systems and daily newspapers in most local markets” to broadcast TV stations and networks operating in oligopolistic markets and magazines, books and radio industries reflecting the monopolistic competition. See, Alan B. Albarran and Sylvia M. Chan-Olmsted, *ibidem*, at p. 8-9.

³³⁹ “Andre Gide used to say that worthy sentiments make bad literature. But worthy sentiments certainly make for good audience ratings.” P. Bourdieu, *ibidem*, at p. 45. See, also, somewhere else on the dangers of competition in the media: “Some of these dangerous effects derive from the structural effects shaping the competition, which produces a sense of urgency and leads to the race for the scoop.” *Ibidem*, at p. 55.

³⁴⁰ See, Bourdieu, *ibidem*, at p. 67. “In an ideal news market, where consumers act rationally in their self-interest, enjoy a variety of news outlets, can discern the quality of reportage, and include within their self-interest society’s well-being, the same strategy that yields maximum return to investors would maximize public enlightenment. But given the actual news market, and the peculiar nature of news as a commodity, the logic of maximizing return often conflicts with the logic of maximizing public understanding.” See, John H. McManus, “Does serving the market conflict with serving the public?,” in Denis McQuail, *Reader*, at p. 274.

³⁴¹ In the traditional understanding of the negative freedom – freedom from the state – a free press is in fact an advertising supported press. See, U.S. *Proposals for Liberalizing Trade in Services Executive Summary*, 2002, available at: http://www.ustr.gov/assets/Document_Library/Press_Releases/2002/July/asset_upload_file224_2009.pdf.

society.³⁴² A return to those times although recently advocated³⁴³, might be difficult to achieve, however, a proper preservation, through regulatory measures and enforcement mechanisms, of a diverse media might still be possible.

Considering the democratic nature (see the free speech theories and the media functions) of the media product and the two sided nature of the media market, they deserve special legal treatment and protection. Broadcasters follow advertisers's rule, which leads to a disconnection between consumers and advertisers. Pay TV channels may not supplement the lack of diversity in free channels and, further, studies are needed to show the extent of diversity that is present in those pay TV channels. To get out of the mantra that media gives the people what they want³⁴⁴, the importance of exposing people to a variety of subjects and viewpoints must be stressed because only then they will actually, consciously, know what they really want. There is tension between the two lenses through which one looks at the problem of media concentration and tries to find a solution: from an economic theory perspective, arguments are against government regulation of media and in favor of allowing the market to dictate the needs of the industry; from a democratic perspective, there is a call for regulation to maintain the media's role as serving the best interest of the public. The above lines tried to show that pure economic principles do not really fit media, an argument which is explored

³⁴² Ben H. Bagdikian, "The media monopoly," Boston: Beacon Press, 1997, at p.176. Bagdikian compares this past media to the contemporary media, which has a "reduced responsiveness to reader desires." Ibidem.

³⁴³ See, Mark Tapscott, "Government-funded journalism would kill free press," *The Examiner*, July 15, 2010, at p. 19, rejecting the Columbia University's President, Lee Bollinger's argument in favor of providing governmental financial support for selected media companies most likely to fail. Tapscott believes that the Internet's bloggers will deliver the people the much needed diverse and independent information and analysis. See also, Professor Bollinger's article in the *Wall Street Journal*, "Journalism Needs Government Help. Media budgets have been decimated as the Internet facilitates a communications revolution. More public funding for news-gathering is the answer.," July 14, 2010. Available online at: http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704629804575324782605510168.html.

³⁴⁴ See, C. Edwin Baker, "Giving the Audience What It Wants," 58 *Ohio St. L.J.* 311 1997-1998.

throughout this paper from the point of view of its implications in the use of different branches of law to protect media diversity.

I. 9. Further structure. Preliminary conclusion

The aspects analysed above – the media market seen as a special kind of market, the influence that the networks, media companies’ owners and advertising have on the media product, the unclear contribution that technological convergence brings to media diversity – corroborate to form my preliminary statement on the necessity to advance a mixed system of both regulation and competition law tackling media concentration’s consequences related to media diversity. In this sense I am in full agreement with Robert W. McChesney who argues that “to have anything close to competitive markets in media requires extensive government regulation in the form of ownership limits and myriad other policies.”³⁴⁵ I admit that the very finding of a solution and implementing it, is “an ongoing project,” which constantly creates new contradictions and dilemmas³⁴⁶ and therefore my solution, the mixed system of regulation and competition law, is open to future adjustments and amendments³⁴⁷.

³⁴⁵ “Regulation of the media ownership is nothing special, as this market has always been and it is still regulated through other legislative means, such as copyright...There is no reason a society cannot maintain a regulated commercial system, a democratically accountable public media sector...The question is not whether we want regulation, but what type of regulation we want.” R. W. McChesney, “Theses on media deregulation,” *ibidem*. On the same line see, C. Leanza, H. Feld, *ibidem*.

³⁴⁶ See, R. van der Wurff, *ibidem*.

³⁴⁷ There might be an endless input coming in all sorts of forms. See, for instance, Cass R. Sunstein, “Group Judgments: Deliberation, Statistical Means, and Information Markets,” John M. Olin Law & Economics Working Paper No. 219 (2d Series), Public Law and Legal Theory Working Paper No. 72, August 2004. Sunstein argues that group deliberation will unlikely produce the best results if we do not increase participation of members less inclined to participate and prone to “silencing” themselves– people fear to express their ideas if they do not fit the “common knowledge.” One of the solutions will be a “market information” – in which people predict outcomes of certain events and thus bet on those outcomes – with the possibility to win or lose in the process based on the accuracy of their predictions, thus trading information that they hold and in the process engaging in public debate.

This thesis analyses the interplay between the governmental actors and types of laws (constitutional, competition and regulatory/administrative norms) that influence the protection of media pluralism. It compares developments in United States, Germany, France, Italy, Romania, the European Union and the European Court of Human Rights in order to show that the “mixed legal system” of different branches of law that protect media diversity should not be relinquished by any means and it should be in turn preserved and re-enforced³⁴⁸. Constitutional recognition of media pluralism and a strong and active constitutional court should translate into media ownership restrictions, access rules, policies designed to promote minority and women media ownership, internal pluralism related obligations and licensing procedures that safeguard media pluralism. Since it is better equipped for economic tasks, competition law contributes to the protection of media diversity by providing the initial tools to review mergers and asset/shares/control transfers between media companies.

In each chapter I first discuss how that country’s constitutional court’s decisions influenced the protection of media pluralism by the legislator, the regulatory agencies and the other courts. Except for Romania, constitutional courts have been active in proclaiming the media diversity principle, however whether their commandments bear any practical efficiency is a different matter. Regulatory instruments designed to advance

³⁴⁸ See, Ernesto Villanueva, “Derecho Comparado de la Informacion,” Universidad Iberoamericana, 1998 atp. 289, observing similarities and differences in general over the broadcasting regulation. At p.292, Villanueva notes that in the countries under analysis –such as France, Germany, United States, and even Romania – the regulation aimed at avoiding the concentration and the monopolies represents a common factor. Reaching out a bit more on the path towards ensuring media pluralism, he underlines that positive provisions in this sense are “la impronta distintiva de un Estado democratico de derecho (“the distinctive mark of a democratic state of law”).”

media diversity are analysed, together with the antitrust law's potential contribution³⁴⁹. Non-economic factors do not fall within the scope of competition law. It is unsurprising, then, that none of the competition law regulators discussed in this thesis actively consider media pluralism in their mergers' review.³⁵⁰ Although limited by its very nature, competition law does have a role, even if limited in the preservation of a diverse media.

Because competition law is insufficient to ensure media diversity³⁵¹, specially tailored norms and regulatory agencies are necessary to ensure media pluralism. Each country discussed here has an administrative agency that regulates media pluralism³⁵². The agencies promote various, similar rules: both structural pluralism related norms³⁵³ (structural regulation),³⁵⁴ including cross-ownership limits³⁵⁵, minority ownership requirements³⁵⁶, independent productions³⁵⁷ provisions, ownership caps³⁵⁸, and quotas³⁵⁹

³⁴⁹ Antitrust applies to the media market as to any other market. See, *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See, Erwin Chemerinsky, "Constitutional Law. Principles and Policies," Aspen Publishers, 2006, at p. 1168.

³⁵⁰ It is "unlikely" for the United States' antitrust authorities to consider media diversity as part of their review. Professor Barry Hawk, in an interview took on the 21st of August, 2007, New York, on the premises of Skadden Law Firm.

³⁵¹ See also, Eric Barendt & Lesley Hitchens, "Media law: cases and materials," Harlow, England; New York : Longman, 2000, at p. 247; Department of National Heritage, "Media Ownership: The Government's Proposals" (1995): "a free and diverse media are an indispensable part of the democratic process.If one voice becomes too powerful, this process is placed in jeopardy and democracy is damaged. Special media ownership rules, which exist in all major media markets, are needed therefore to provide the safeguards necessary to maintain diversity and plurality." Ibidem.

³⁵² Conseil Supérieur de l'Audiovisuel – France; KEK (Commission on Concentration in the Media) – Germany; Agenzia Nazionale per le Garanzie nelle Comunicazione – Italy, Consiliul National al Audiovizualului – Romania.

³⁵³ The competition law norms are part of the structural pluralism related norms.

³⁵⁴ See, David L. Bazelon, "The First Amendment and the "New Media" – New Directions in Regulating Telecommunications," 31 Fed. Comm. L.J. 201, 202 (1979). Bazelon favors structural regulation over content regulation, considering the lower danger of state interference with speech content. Ibidem.

³⁵⁵ Cross-ownership restrictions prohibit an owner from holding interests and shares in more than one or two types of media. For instance, if a legal or natural person holds participation in a newspaper, she may not hold participation in another type of media, provided that she achieves a certain audience rating or readership, nationally or locally.

³⁵⁶ Minority ownership rules promote media ownership by the representatives of a certain minority group. In the jurisdiction discussed here the minorities are permitted to advance their opinions mainly through rules permitting their access on public channels. See, for instance, section III.3.3.1.

³⁵⁷ See, Jean-Pierre Jezequel (Institut national de l'audiovisuel), André Lange (European Audiovisual Observatory), "Economy of European TV Fiction, Market Value and Producers-Broadcasters Relations," A

and internal pluralism related ones (content regulation) including balance in the presentation of political views, minority and European/national programming quotas, general commandments on impartiality, balance and attendance to a variety of programming genres and social interests³⁶⁰.

By themselves, each of these regulatory prescriptions will not stand any chance against the tendency of the market to concentrate. However, when their work is orchestrated, they may accomplish much better results in protecting media pluralism. Thus, the ideal solution envisioned in this thesis is a combination of a strong constitutional court that informs the rest of the governmental actors of the importance of media pluralism, with competition law blocking anticompetitive practices and media mergers and specially tailored regulations actively and effectively employed to ensure the existence of a pluralistic media.

I start with the United States, where the policies on minority and women ownership media, the ownership restrictions and the must carry provisions are analysed within the broader protection of the freedom of speech. I further look into the role that the public interest standard of review plays in protecting media diversity. Preliminary observations conclude this chapter. Afterwards, the European chapter is divided into the treatment of media diversity as a fundamental right, constitutionally recognized, then as

study carried out by the Institut national de l'audiovisuel (INA) in collaboration with the Eurofiction team for the European Audiovisual Observatory and the Centre national de la cinématographie (CNC). http://www.obs.coe.int/oea_publ/eurofic/tv_eco_summary.pdf.en.

³⁵⁸ All the jurisdictions discussed here restrict media ownership beyond a certain limit – a percentage of the reached audience, at national or local level.

³⁵⁹ Especially in Europe, the broadcasting legislation provides for a certain quota devoted to national or European production (the so-called “*exception culturelle*” in France). The diagonal/conglomerate integration – activities of an enterprise from another economic sector outside the media industries taking certain control in media markets – is generally outside the scope of regulation. See, W.A. Meier and J. Trappel, *ibidem*, at p. 42.

³⁶⁰ See, the chapter on the European Union's countries.

part of regulatory agencies' agenda and further as an unintended result of antitrust law's application.

Chapter II. United States

II. 1. Preliminary considerations

Here is the proper time and space to assess how the issue of media diversity came to be such an important concern for the United States courts and scholars. I argue that this issue came under courts' consideration as part of the free media related case law both under the First Amendment and equal protection³⁶¹ as well as part of the Federal Communications Commission's ambit to regulate the industry under the "public interest"³⁶² standard.

As mentioned in the introductory chapter of this thesis, a diverse press is first and foremost a free press. The courts shaped the "central image of the American ideal of the freedom of the press."³⁶³ "Without [a free press in a democracy] the public cannot receive all the information it needs – about government actions or public issues – to exercise its sovereign powers."³⁶⁴ This part of my paper explores, selectively – with an emphasis on media diversity - the connotations surrounding the free media in the United States jurisprudence. As this is just the raw image of a free press, I try to "unfold" the various

³⁶¹ Although strictly speaking, Fifth Amendment of the United States Constitution applies to the federal government and the Fourteenth Amendment applies to the states, equal protection applies in a similar manner to both state and federal governments. See, in this sense, Chemerinsky, "Constitutional Law: Principles and Policies," *ibidem*, at p. 668-669.

³⁶² See, *infra*, in section II.5.

³⁶³ See, Lee C. Bollinger, "Images of a Free Press," The University of Chicago Press, 1991. The author elaborates on his theory that different types of law played a role in shaping the manner in which the broadcasting industry presents to us today. "But the modern system has not been laissez-faire nor insensitive. The process of widening constitutional protection for the American press has been accompanied by the emergence of the Court as a primary arbiter and definer of its identity. The Court's characterization of the press – as various as a fourth branch of government, a legitimate profession, and a wily Ulysses – together with the creation of extraordinary constitutional exemption from state control may well, in combination, have influenced the nature and development of the media." Bollinger, *ibidem*, at p. 133.

³⁶⁴ See, Lee C. Bollinger, *ibidem*, at p. 1.

“layers of meaning” of the notion of freedom of the press³⁶⁵. In so doing, it is my purpose to show how constructing a certain picture of a free press might have an impact on the manner of dealing with media diversity today.

This chapter shows how the courts, while being offered the chance to take a tough stance on media diversity issues, chose instead to pay lip service to the notion and in fact to circumvent any real discussion of the dangers of media concentration. This happened because of several factors: the countervailing constitutional considerations such as equal protection, the deregulatory trend infused in broadcasting statutes and the regulatory agency’s failure to elaborate a clear and strong case in favor of preserving media ownership restrictions to protect media diversity. It is then natural that the many developments related to media diversity in United States’ jurisprudence careen from acknowledging the importance of a diverse media to accepting without much insightful debate that other considerations take precedence and make the task of judicially protecting media diversity a superfluous endeavor.

In this chapter, I discuss several cases, each one adding a piece to the puzzle of judicial (I would call it constitutional since the media diversity issue is essentially a First Amendment issue) protection (or non-protection) of a free, democratic and diverse press. The first part of the discussion is dedicated to the ambivalent treatment that media diversity protection received in selected Supreme Court cases. Such treatment could be interpreted to define a certain readjustment of the traditional free speech theories, with implications in the theoretical support for media diversity protection. The admission of

³⁶⁵ See, Lee C. Bollinger, *ibidem*, at p. 2. Bollinger takes us on a trip through the jurisprudence that marked the application of the First Amendment to issues such as libel, national security, public access to the press, invasion of privacy, intentional infliction of emotional distress, taxation, free trial and the right to gather news. Through these case a complex image of the free press emerged. See, Lee C. Bollinger, “Images of a Free Press,” The University of Chicago Press, 1991.

the Supreme Court that the private threat to media freedom is real did not follow however with an endorsement of positive state action to promote media diversity. Moreover the rise of the corporate speech doctrine is a factor that will likely affect in time the strength of media corporations when they will try to shield away from regulation. I discuss then how the courts dealt with the constitutionality of the many FCC structural policies designed to further media diversity – the minority and women ownership policies, the rules on cross-ownership, ownership caps and must carry. Where proper understanding of the structural regulations discussed needs references to content regulation, I briefly discuss those. The second bulk of this chapter on the United States is dedicated to how the FCC and the antitrust agencies approach media diversity and media concentration.

II. 2. Shaping the image of a free press³⁶⁶ that includes media diversity

II. 2. 1. Freedom of speech theories readjusted?

As noted above³⁶⁷, the answer to the question of whether positive state action³⁶⁸ is justified to protect the principle of media pluralism requires a slightly different interpretation of the theories behind freedom of speech³⁶⁹ to face the new reality of private concentration of power that might diminish the media diversity³⁷⁰. I discuss some

³⁶⁶ See, Lee C. Bollinger, “Images of a Free Press.”

³⁶⁷ See, *infra*, section I.4.

³⁶⁸ “For the empirical individual, however, experience shows there is not other space for enjoying his freedom besides that which a strong state is able to guarantee him.” See, Carl Schmitt, “State Ethics and the Pluralist State,” in Arthur J. Jacobson and Bernhard Schlink, Ed., “Weimar. A Jurisprudence of Crisis,” University of California Press, 2000, at p. 305

³⁶⁹ See, *infra*, section I.4.

³⁷⁰ See, also, Thomas I. Emerson, “Toward a General Theory of the First Amendment,” *Yale Law Journal Review*, April 1963, p. 877-956, on how “a modern democratic society demands a deliberate and affirmative and aggressive effort [to] be made to support the system of free expression,” paraphrased in “Press and Speech Freedoms in America, 1619-1995. A Chronology,” Compiled by Louis Edward Ingelhart, Greenwood Press, 1997, at p. 158.

of the initial cases that infused the courts' treatment of media diversity protection in future cases discussed later.

In *Miami Herald Publishing Company v. Tornillo*³⁷¹, the Supreme Court noted that the press changed radically since the adoption of the First Amendment noticing the shift from a press that was "broadly representative of the people it was serving"³⁷² to a marketplace of ideas dominated by a handful of media organizations³⁷³. It is worth recalling here two important aspects of the *Miami Herald* decision: first it was about the printed press - thus the courts more strictly scrutinize any of its regulations since the printed press is not, under the traditional justification for regulation, scarce as the broadcasting is - and second it involved another type of structural regulation³⁷⁴ – the right of access, i.e., the right of reply, and not ownership regulations³⁷⁵.

However, *Miami Herald* decision is important to our purposes because it brings to the Court's attention the private threat to free speech. The Court spoke of the times when "the press collectively presented a broad range of opinions to readers."³⁷⁶ Today, to the contrary, "newspapers have become big business and there are far fewer of them to serve

³⁷¹ See, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

³⁷² See, 418 U.S. 241, 248 (1974).

³⁷³ See, 418 U.S. 241, 250 (1974). See, *Bollinger*, "Images of a Free Press," at p. 38.

³⁷⁴ Generally, they are three broad structural policies promoted in the regulation of the electronic media: local broadcasting through licensing and spectrum allocation policies, limits on common ownership or control and limits on the influence that programming networks could have on the content of broadcast stations. See, Michael Botein, "Regulation of the Electronic Mass Media, Law and Policy for Radio, Television, Cable and the New Video Technologies," Third Edition, West Group, American Casebook Series, 1998, at p. 188.

³⁷⁵ "They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced," although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson, *The System of Freedom of Expression* 671(1970)." See, 418 U.S. 241, 254 (1974).

³⁷⁶ See, 418 U.S. at 241, 248 (1974).

a larger literate population.³⁷⁷ After giving hope that the First Amendment may take the direction where the state would protect media diversity considering the potential for censorship coming not only from the government but from the private organizations as well, the Court stood by an absolutist understanding of the First Amendment that prevented the government and the Court itself from intervening in the market's structure³⁷⁸. Thus, the idea that the state should intervene through regulation in order to foster media diversity was dismissed as abruptly as the principle of media diversity appeared in the Court's discourse.

Although it did consider it³⁷⁹, the Court did not want to go too far with a positive understanding of the First Amendment – First Amendment protection of free speech is generally interpreted as a negative freedom in that it requires fundamentally that the state through its institutions does not censor free speech – and broaden this Amendment's sphere to include action taken by the state to ensure speech protection (including media diversity protection). Such reluctance is easy to justify³⁸⁰ – no intervention from the

³⁷⁷ See, 418 U.S. 241, 249 (1974). Furthermore, the Court noted “the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events.” See, 418 U.S. 241, 249 (1974).

³⁷⁸ See, 418 U.S., 241, 254 (1974): “However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.”

³⁷⁹ “[i]t is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the “marketplace of ideas” is today a monopoly controlled by the owners of the market. See, 418 U.S. 241, 251 (1974).

³⁸⁰ The Court's decision is not surprising considering that regulation to further diversity is justifiably constitutionally problematic. See, also, Daniel L. Brenner, “Toward a True Marketplace for the Marketplace of Ideas,” at p. 276 in Daniel L. Brenner, William L. Rivers, eds., “Free but Regulated. Conflicting Traditions in Media Law,” The Iowa State University Press, 1982: “If the market becomes more concentrated, should the government intervene to assure opportunities for more voices? Or is intervention, even in the name of assuring diversity, a well-intentioned abridgment of media freedom?”

state³⁸¹ is the essential role that the First Amendment fulfills. However, other options to look at the First Amendment may be valuable both as an intellectual exercise as well as for their practical judicial consequence.

In strict relation to a readjustment of the free speech theories that would contribute to a theoretical justification for state positive action to protect media diversity, I discuss here the doctrine of corporate speech. In *Red Lion Broadcasting Corp. v. FCC*³⁸², the Court refused to consider the broadcasters as being equal to any other citizen enjoying First Amendment protection³⁸³ and it reiterated in several cases the traditional conception of a First Amendment primarily addressed to individuals³⁸⁴. Several cases show us that “the Court unanimously rejected the industry’s First Amendment claim³⁸⁵, and it has never since backed away from this position.³⁸⁶” In *Red Lion*, the Court identified the primary addressee of the First Amendment: “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”³⁸⁷ Justice White, writing for the majority, explained that the purpose of the First Amendment is to preserve

³⁸¹ “Congress shall make no law [] abridging the freedom of speech.” See, First Amendment of the United States Constitution.

³⁸² *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

³⁸³ The broadcasters argued that “no man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents” and that this right “applies equally” to them. See, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). See, also, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

³⁸⁴ “Because “there is no unabridgeable First Amendment right comparable to the right of every individual to speak, write, or publish to hold a broadcast license, [], Sinclair does not have a First Amendment right to hold a broadcast license where it would not, under the Local Ownership Order, satisfy the public interest.” *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, 284 F.3d 148, 168 (2002).

³⁸⁵ Laurence H. Winer, “Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry Into Cable,” in Peter K. Yu, “The Marketplace of Ideas: Twenty Years of Cardozo Arts and Entertainment Law Journal,” *Kluwer Law International*, 2002, at p. 59.

³⁸⁶ See, C. Edwin Baker, “Media Concentration: Giving up on Democracy,” *Florida Law Review*, 54 FLLR 839, 850 (2002): “The Court of Appeals in *Times Warner Entertainment Co. v. FCC* took the constitutional challenge to this rule very seriously. It observed that the rule “interferes with [the cable owners’] speech rights by restricting the number of viewers to whom they can speak.” quoting *Times Warner Entertainment Co. v. FCC*, 240 F.3d 1129 (D.C. Cir. 2001). See also, Robert H. Sitkoff, “Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters,” *University of Chicago Law Review*, Summer 2002, Symposium, 69 U. Chi. L. Rev. 1103).

³⁸⁷ 395 U.S. 367, 386-380 (1969), quoting *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

“an uninhibited market-place of ideas” rather than to allow control of that market by a few: “It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here.”³⁸⁸

These two cases show how the Court has both contributed to a readjustment of free speech theories – clearly aware of the private threat to free speech, and kept consistent with existing free speech theories – when asked to expand this right to apply to corporations. The Miami Herald offers a good starting point for a discussion on the scholarly argument that the First Amendment should be “viewed instrumentally.”³⁸⁹ Not all speakers are equal and thus a new First Amendment theory should take into account the fact that some speakers have more market power than others.³⁹⁰ Approaching the First Amendment from a utilitarian perspective invites regulation to advance media diversity when the market’s “standard economic theory might not.”³⁹¹

Miami Herald’s language about private threats to media diversity – although the Court there did not go farther than pointing out to the existence of such threats³⁹² - supports such a utilitarian perspective. The Miami Herald dicta indicated that private actors may be threats to media diversity, which if taken further, may be a significant

³⁸⁸ 395 U.S. 367, 390 (1969). See, also, *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 98 S.Ct. 2096 (1978).

³⁸⁹ See, Ashutosh Bhagwat, “Of Markets and Media: The First Amendment, The New Mass Media, and The Political Components of Culture,” *North California Law Review*, Vol. 74, Nov. 1995, No.1, at p. 140. See, also, Laurence Tribe, “American Constitutional Law” (2nd ed., 1988) quoted in Wolfson, at p. 81. Although Wolfson quotes Tribe as an advocate for understanding the freedom of speech as “an end in itself,” (see, Tribe, *ibidem*, at p. 785 in Wolfson, *ibidem*, at p. 81), Wolfson further mentions that Tribe “questions whether truth will prevail “when the wealthy have more access to the most potent media of communication than the poor.”” See, Tribe, *ibidem*, at p. 786 in Wolfson, *ibidem*, at p. 81.

³⁹⁰ “The primary purpose of [First Amendment] is to permit and advance democratic self-government, rather than to advance individual self – actualization or autonomy.” See, Ashutosh Bhagwat, *ibidem*, at p. 177.

³⁹¹ Ashutosh Bhagwat, *ibidem*, at p. 143.

³⁹² See, 418 U.S. 241, 249-250. See, also, 418 U.S. 241, 254-255.

readjustment of free speech theories for the modern age.³⁹³ This relatively new approach to the First Amendment appears as a refutation of the defensive/negative theory of the First Amendment³⁹⁴. This so called “empowering³⁹⁵” approach is based on the premise that the state must make available the proper structures for the fulfillment of individual rights, among which free speech³⁹⁶.

The necessity of these structures that the government must construct for the flourishing of a free and diverse media may be inferred as well from Dewey’s philosophical thought. As mentioned above³⁹⁷, the audience may hardly know what it wants, without being offered the chance to choose. Real freedom of speech stems from the availability of such a wide range of choices, that one’s taste for a certain type of speech (or content) is an informed one. In “Philosophies of Freedom³⁹⁸” John Dewey asserts that freedom of speech is closely interrelated to freedom of thought. Further, both these freedoms, freedom of thought especially, need proper social and economic conditions for their full realization. Dewey rejects the idea that “thinking is [] a native

³⁹³ See, in this sense, Matthew D. Bunker, “Constitutional Baselines: First Amendment Theory, State Action and the “New Realism,” Winter, 2000, 5 Comm. L. & Pol’y 1.

³⁹⁴ See, Laura Stein, “Understanding Speech Rights: Defensive and Empowering Approaches to the First Amendment,” Media Culture Society 2004; 26; 102, available online at: <http://mcs.sagepub.com/cgi/content/abstract/26/1/102>.

³⁹⁵ See, Laura Stein, *ibidem*.

³⁹⁶ See, Laura Stein, *ibidem*. To support her claim, Stein calls in the works of: Thomas Hill Green, (“Lectures on the principles of political obligation: with preface by Bernard Bosanquet,” London; New York, Longmans, 1895, available online at: The Making of Modern Law. Gale. 2010. Gale, Cengage Learning. 24 April 2010 <http://0-galenet.galegroup.com/hopac.uchastings.edu/servlet/MOML?af=RN&ae=F103920276&srchtp=a&ste=14>), John Dewey (“The public and its problems”) and Benjamin R. Barber (“Strong democracy: participatory politics for a new age”).

³⁹⁷ See, *supra*, at p 46.

³⁹⁸ See, John Dewey, “Philosophies of Freedom,” first published in “Freedom in the Modern World,” ed., Horace M. Kallen, New York, Coward-McCann, 1928, in Larry A. Hickman and Thomas M. Alexander, Ed., “The Essential Dewey,” Volume 2, Ethics, Logic, Psychology, Indiana University Press, 1998, at p. 302.

capacity or faculty.³⁹⁹” He believes that thinking as well as speech can happen only in “the open air of public discussion and communication.”⁴⁰⁰

Where Dewey may provide a contribution to our discussion on promoting a diverse media is where he states that the realization of these freedoms as well as other freedoms is dependant upon “social conditions⁴⁰¹” reflected in “laws⁴⁰²” that would “actualiz[e] freedom only when they develop intelligence, not abstract knowledge and abstract thought, but power of vision and reflection⁴⁰³.” This argument combined with Dewey’s conception of freedom that “consists in a trend of conduct that causes choices to be more diversified and flexible, more plastic and more cognizant of their own meaning, while it enlarges their range of unimpeded operation,⁴⁰⁴” could be employed to support the cause of a media that is diverse enough to give enough choices so that one can fully realize her fundamental right to free speech. Benjamin Barber becomes more specific when he advances concrete means to achieve a strong democratic participation by the creation of “television town meetings and a civic communications cooperative⁴⁰⁵.”

The decisions discussed above show a court grappling with difficult free speech issues, and inconsistently protecting media diversity. On the one hand, the Miami Herald Court’s dicta about private actors posing greater threats to diversity is a significant step to the readjustment of free speech theories in favor of a freer, more diverse press, protected from dominant private interests; on the other hand, the non-interventionist holding failed

³⁹⁹ See, Dewey, “Philosophies of Freedom,” in Hickman and Alexander, at p. 313.

⁴⁰⁰ See, Dewey, “Philosophies of Freedom,” in Hickman and Alexander, at p. 314.

⁴⁰¹ See, Dewey, “Philosophies of Freedom,” in Hickman and Alexander, at p. 314.

⁴⁰² See, Dewey, “Philosophies of Freedom,” in Hickman and Alexander, at p. 314.

⁴⁰³ See, Dewey, “Philosophies of Freedom,” in Hickman and Alexander, at p. 314.

⁴⁰⁴ See, Dewey, “Philosophies of Freedom,” in Hickman and Alexander, at p. 311. Dewey emphasis freedom as the possibility to be different: “We are free not because of what we statically are, but inasfar as we are becoming different from what we have been.” Ibidem.

⁴⁰⁵ See, Benjamin R. Barber “Strong democracy: participatory politics for a new age,” Berkeley: University of California Press, 1984, at p. 273.

to protect media diversity. However, the Court, in *Red Lion*, seemed to recognize the danger for media diversity in giving dominant media owners an absolute First Amendment right. The Court stuck with a traditional theory of the First Amendment—it is addressed to individuals, and not corporations. While it at least arguably readjusted free speech theories in *Miami Herald*, the Court resisted an invitation to readjust its free speech theories in *Red Lion*. In relation to *Red Lion* especially, in light of the rise of the corporate speech doctrine in recent years however, it remains to be seen how the courts will balance the rights of the “viewers and listeners”⁴⁰⁶ with the rights of the broadcasters to spend in support of a political candidate’s speech⁴⁰⁷.

II. 2. 2. Motives for keeping the media diversity enhancing rules. An optimistic start followed by a turn towards deregulation

The Supreme Court has been repeatedly called upon to determine the constitutionality of the FCC’s measures aimed at enhancing media diversity. I first discuss the motives that convinced the courts that regulation is needed in spite of what was already beginning to look like a more dynamic and competitive market. I further show how these motives, although acknowledged, never pushed the courts to actually uphold the constitutionality of several of the various FCC policies such as the right of reply in the print media, some of the cross-ownership rules and ownership restrictions. This paradox is to a certain extent solved in the courts’ decisions, while to a larger extent media diversity and concentration related concerns still remain unsolved.

What I call simple human psychology is the first reason why the courts considered that media should be regulated. If one was to push forward the argument that

⁴⁰⁶ See, *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 390 (1969).

⁴⁰⁷ For a brief discussion on this issue, see, *supra*, section I.4.

people may involve themselves in debates naturally, without any impulse, then the case for regulation would become partially moot. However, public debate and public participation does not come naturally, and media plays an important role in engaging people in these two activities found at the core of democracy. Although hard to define⁴⁰⁸, I use the term of democracy to mean “that all power is vested in and consequently derived from the people⁴⁰⁹,” with all the philosophical, political and other implications attached to this concept over time, especially “freedom and diversity”⁴¹⁰ and including the rule of law, the separation of powers, the checks and balances between these powers, and the respect for the individual fundamental rights.

Democracy requires citizens ready and willing to participate in public decision making. In the first case that offers “the fullest, richest articulation of the central image of freedom of the press,⁴¹¹” *New York Times v. Sullivan*,⁴¹² the Supreme Court began the creation of the free press myth and the formation of the citizen’s role in public debate. A free press is a place of “uninhibited, robust, and wide-open debate.”⁴¹³ Professor Bollinger astutely observes the complex web of relations identified by the Court therein.⁴¹⁴ In this complex intertwined paradigm the Court sees the citizenry as a

⁴⁰⁸ See, Dorothy Pickles, “Democracy,” Basic Books Inc. Publishers, New York, 1970, at p. 9.

⁴⁰⁹ Bill of Rights, of the Constitution of the State of Virginia, 1776, in Westel W. Willoughby, “The Ethical Basis of Political Authority,” The Macmillan Company, 1930, at p. 315.

⁴¹⁰ See, Stanley Rosen, “Plato’s Republic. A Study,” Yale University Press, 2005, analyzing Socrates’ views on democracy in Plato’s “Republic”, at p. 314.

⁴¹¹ See, Lee C. Bollinger, *ibidem*, at p. 2.

⁴¹² See, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴¹³ See, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Court emphasized the role of the press in providing the citizens with the possibility to criticize the government and its officials. 376 U.S. at 275 (1964). Because of “the clearer perception and livelier impression of truth, produced by its collision with error,” the marketplace of ideas permits falsehood. 376 U.S. at 279, quoting John Stuart Mill, “On Liberty”.

⁴¹⁴ “The Supreme Court in *New York Times v. Sullivan* saw in this particular application of the common law of libel by the Alabama courts a deep and profound issue of political relationships implicated, and refracted, through the First Amendment. And so the Court built a theory of the political system and a

paradoxical creature: either reluctant to enter the public debate, or too disposed to participate in the heated discussions of the moment⁴¹⁵. The Court used this apparent contradiction to urge the need to “arrange matters so that there is plenty of breathing space for erroneous statements.”⁴¹⁶ The need to arrange matters due to the natural lack of propensity to participate in the public debate could be extended to justify regulation in support of a diverse media. This remains in spite of all the tremendous technological innovations that revolutionized the manner of public participation⁴¹⁷. In finding a legitimization for media regulation a “working psychology of the general citizenry and the legal system⁴¹⁸” is of extreme importance.

The second reason to preserve media diversity regulation is the scarcity rationale. Initially the scarcity rationale made broadcasting more prone to regulation than the printed press.⁴¹⁹ For instance, *Miami Herald*, discussed above,⁴²⁰ outlined in dicta that even if the physical scarcity rationale⁴²¹, that served in other cases as justification for

psychological theory of its members – the state, the press, and the people. In doing so it also defined a role for itself.” See, Bollinger, *ibidem*, at p. 7.

⁴¹⁵ See, also, Benjamin Barber, “Strong Democracy. Participatory Politics for a New Age,” Berkeley University of California Press, 1984, in Philip Green, “Democracy. Key Concepts,” Humanity Books, 1999, at p. 269. At p. 272 of his “Strong Democracy,” Barber speaks on how “participation fosters more participation” and on the importance of townhall meetings for fostering this participation (see, *ibidem*, at p. 273).

⁴¹⁶ See, Bollinger, *ibidem*, at p. 7, referring to *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

⁴¹⁷ See, Jill Hills, Maria Michalis, *ibidem*, on the “passive user” of Internet. See, the discussion in the introductory chapter on the technological impact on media diversity issues, *supra*.

⁴¹⁸ See, Bollinger, *ibidem*, at p. 8, citing Harry Kalven, “The New York Times Case: A Note on The Central Meaning of the First Amendment,” 1964 Sup. Ct. Rev. 191, at 212-13.

⁴¹⁹ See, *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

⁴²⁰ Which declared the right of reply unconstitutional because it interfered with editorial freedom. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁴²¹ Although it refused to decide on its legitimacy, the Court in *Fox v. FCC* advanced a broader understanding of such a rationale: “The scarcity rationale is based upon the limited physical capacity of the broadcast spectrum, which limited capacity means that “there are more would-be broadcasters than frequencies available.” *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002). The Court based this refusal on the Supreme Court’s refusal to decide upon the issue: “The Supreme Court has already heard the empirical case against that rationale and still “declined to question its continuing

regulatory measures⁴²², becomes obsolete, economic scarcity justifies governmental regulation.⁴²³ *Red Lion Broadcasting*⁴²⁴ distinguished between the technological scarcity⁴²⁵ and the economic scarcity. While technological scarcity predictably will diminish or even disappear, economic scarcity will perpetuate⁴²⁶. Because the broadcasting medium could not accommodate the number of individuals wishing to broadcast and considering that broadcasters use a public property, they were seen as public interest trustees.⁴²⁷ This is why the constitutionality of a reasonable access rule requiring broadcasters to provide paid airtime on a reasonable basis to political

validity.” *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002), citing *Turner I*, 512 U.S. 622, 638 (1994).

⁴²² The opinion of the Court in *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943), delivered by Justice Frankfurter, justified the system of broadcasting regulation through the scarcity rationale: “Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”

⁴²³ The regulatory protection was discussed and justified in terms of the difference between the broadcasting and the printed press. The regulatory dichotomy between printed/electronic media surfaced in the Court’s argument that efforts to affect the coverage of public issues in broadcasting “may be permissible where similar efforts to regulate the print media would not be.” *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 800 (1978).

⁴²⁴ Where the Court upheld the constitutionality of the fairness doctrine, including the political editorial and the personal attack rules. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The case involved a radio station required by FCC to provide free airtime – the right to reply – to a writer attacked in a broadcast and a broadcast news organization challenging the requirement that the licensee send to the person attacked copies of the broadcast and give them a time to reply. In the first case the U.S. Court of Appeals for the District of Columbia upheld the regulation’s constitutionality – see, *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir 1967) – while in the second one the Seventh Circuit rejected its constitutionality. This conflict was solved by the Supreme Court, which ruled upon the constitutionality of the fairness doctrine.

⁴²⁵ See, also, Justice Brennan in the dissent of *Federal Communications Commission v. League of Women Voters of California*. Justice Brennan dismissed the extinction of the scarcity doctrine. In this case the Supreme Court decided that section 399 of the Public Broadcasting Act of 1967, which forbade any noncommercial educational station that receives federal funding to engage in editorializing, was unconstitutional because it “extends so far beyond what is necessary to accomplish the goal.” 468 U.S. 364 (1984).

⁴²⁶ Justice White referred to the economic scarcity found in the fact that few individuals or organization can raise the necessary investment to start a broadcasting station, although he did not deal with this argument. 395 U.S. 386, 401 at FN 28 (1969).

⁴²⁷ The Court speaks of “the political broadcasting responsibilities of licensees.” The Court continued: “The FCC’s standards are not arbitrary and capricious, but represent a reasoned attempt to effectuate the statute’s access requirement, giving broadcasters room to exercise their discretion, but demanding that they act in good faith.” *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 379 (1981). See, further for discussion of this case, Bollinger, *ibidem*, at p. 71.

candidates was upheld⁴²⁸. However the Court was cautious and it never went so far so as to say that under the United States Constitution's First Amendment any individual may have the right of access to broadcast time⁴²⁹. Thus, arguing that it cannot encroach upon the editorial freedom, the United States Supreme Court refused to acknowledge as part of the free speech the existence of a right of access to broadcasting in the sense that everybody should be allowed to air their opinions via broadcasting channels⁴³⁰.

The question as to whether newly developed technologies – starting with cable make the scarcity rationale obsolete is not definitively answered and it remains a rather fuzzy concept, the courts relying on Congress to decide on the issue⁴³¹. As it was judiciously mentioned in the literature, congressional inaction on issues “so politically acute, so much a matter of conflict in the community that Congress is unable to formulate a policy⁴³²”, may be interpreted in the sense of congressional “abdication⁴³³” and delegation to the regulatory agency⁴³⁴, in our case, the FCC⁴³⁵. Focusing the regulatory paradigm on the scarcity rationale is in itself (without going into the technical debate over

⁴²⁸ The United States Supreme Court upheld the constitutionality of the reasonable access rule provide by section 312 (a)(7) of the Telecommunications Act of 1934 in *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 395, 401 (1981).

⁴²⁹ See, Kent R. Middleton, Robert Trager, Bill F. Chamberlin, “The Law of Public Communication,” Longman, 1997, at p. 525-526, referring to and quoting *CBS v. Democratic National Committee*, 412 U.S. 94, 124 (1973).

⁴³⁰ See the two cases in which the court held constitutional the refusal to air paid advertisements as part of the broadcasters’ editorial freedom: in one case a radio station refused to sell time to an organization opposed to U.S. military involvement in Vietnam (*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973)); in another the Democratic National Committee asked the FCC to oblige broadcasters to sell airtime for spot announcements advocating positions on controversial public issues (*Democratic National Committee v. FCC*, 717 F.2d 1471 (D.C. Cir. 1983)).

⁴³¹ See, *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), quoted in Robert Corn-Revere, “Red Lion and the Culture of Regulation,” in Robert Corn-Revere, ed., “Rationales & Rationalizations. Regulating the Electronic Media,” The Media Institute, 1997 at p.23.

⁴³² See, Louis L. Jaffe, “Judicial Control of Administrative Action,” Abridged Student Edition, Little, Brown and Company, 1965, at p. 41. See, also quoted in Krasnow and Longley, “The Politics of Broadcast Regulation,” second edition, 1978, at p. 79.

⁴³³ See, Jaffe, *ibidem*, at p. 44.

⁴³⁴ See, Jaffe, *ibidem*, at p. 44, referenced in Krasnow and Longley, *ibidem*, 1973, at p. 62.

⁴³⁵ See, Jaffe, *ibidem*, at p. 49. Jaffe states that the FCC “has never received the slightest positive guidance from Congress, only an occasional critical negative.”

whether scarcity is really a thing of the past⁴³⁶) not a comprehensive justification⁴³⁷. Admitting that other elements – such as economic⁴³⁸ and historical aspects (high barriers to entry due to high cost and due to deeply historically rooted media corporations or business corporations with media holdings⁴³⁹) – lead to market failures that need to be corrected through regulatory mechanisms might make a better argument in support of media regulation aimed at furthering media diversity.

This section aimed at exploring two important reasons for media regulation that refer to the physical scarcity rationale and to the human psychology. These constitutionally acceptable justifications offered the pretexts for a discussion into the real dimensions and the real nature of scarcity, which should be interpreted as both physical and economic, and into the human psyche that needs to be stimulated by a diverse media to both debate over and participate in public affairs⁴⁴⁰. As observed however, these justifications however may not be employed to support an all inclusive right of media ownership. For instance, access to broadcasting for third parties is limited to certain

⁴³⁶ Scarcity was seen as a television related issue. For instance, “while an FM broadcast needs a section of the spectrum twenty times wider than an AM broadcast, a TV signal of picture and sound requires a channel 200 times as wide as an AM station.” See, E. G. Krasnow, L. D. Longley, *ibidem*, at p. 19, referencing Richard W. Taylor, “Government and Business,” in J.W. Peltason and James M. Burns, eds., “Functions and Policies of American Government,” Englewood Cliffs, N.J.: Prentice – Hall, 1962, at p. 243.

⁴³⁷ As Harvard Professor Louis Jaffe points out, “in almost no area of conflict can the ultimate issues be resolved solely by the application of technical criteria.” See, Jaffe, *ibidem*, at p. 50. See, also Fred W. Friendly, “The Good Guys, the Bad Guys and the First Amendment. Free Speech vs. Fairness in Broadcasting,” Random House, 1976, at p. 192. Friendly considers the impact that the disappearance of scarcity in broadcast frequencies would have for media regulation, particularly for the outmoded fairness doctrine; also, if even in the absence of scarcity, the government could justify regulation, then would that follow that the printed press should be submitted to the same type of regulation (Friendly refers to the right of reply). He also calls “the scarcity of channels,” a “prior restraint,” which will make the fairness doctrine unenforceable. See, Friendly, *ibidem*, at p. 236. Note that the fairness doctrine is essentially a content regulation, relevant for a discussion on media diversity protection.

⁴³⁸ See, Krasnow and Longley, *ibidem*, 1973, at p. 20.

⁴³⁹ See, General Motors and its media holdings, *supra*, section I.3.

⁴⁴⁰ See, also, B. Barber, “Strong Democracy,” *ibidem*, at p. 272.

circumstances and it should not be interpreted as enabling all people to have their own broadcasting time.

The following lines look into whether other type of regulation, such as minority and women media ownership are justifiable from a constitutional point of view. These regulations bring into focus the clash that media diversity regulations may raise between equal protection and freedom of speech. In the two main cases discussed below the courts employed the same level of scrutiny, however they reached different results. The main reason for this disparity lays in the ownership/content nexus, aspect which is the focus of more discussion below.

II. 3. Structural norms aimed to further media diversity

II. 3. 1. Minority media and women ownership

II. 3. 1. 1. Preliminary considerations

A new “vision” of the First Amendment⁴⁴¹ and the scarcity rationale leitmotif accompany the jurisprudence in relation to minority and women ownership media. In addition a new trend emerges in which the FCC’s policies failed under the administrative review standard of “arbitrary and capricious⁴⁴²” because of a lack of factual record. The following lines explore mostly this new development.

⁴⁴¹ I call it a new vision also (in addition to recognizing the private threat alongside the state one) because the courts treated the structural regulations under the intermediate scrutiny (the O’Brien test) considering that they only incidentally burden speech. See, Cass R. Sunstein, “The Partial Constitution,” Harvard University Press, 1993, at p. 215. However, for some authors the fact that structural regulations do not directly encroach upon speech is an argument difficult to swallow since media companies do convey messages. See, for a discussion on the standard of scrutiny applicable to media regulation especially in the cable domain, Ashutosh Bhagwat, *ibidem*, at p. 140.

⁴⁴² See, Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (2000), in Dave E. Hutchinson, “Fleeting Expletives” Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation,” *Federal Communications Law Journal*, Vol. 68, December 2008, at p. 231, FN 11. See, further, *ibidem*, at p. 238, FN 50, quoting *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 and 42-43 (1983). Hutchinson points out that in that case the court advanced an arbitrary

Part of the idea to connect media ownership to the broadcasted content or “narrative⁴⁴³,” how Professor Price calls it, are the minority and women ownership policies. The first of these two FCC policies favored minority applicants in the process of licensing⁴⁴⁴ and it also allowed stations in “distress” to transfer their ownership to minority owners,⁴⁴⁵ including a lenient tax treatment applicable to this transaction,⁴⁴⁶ a more attractive alternative than losing their broadcasting license. As to women, they were favored in the licensing hearings more than the other applicants for license,⁴⁴⁷ however they did not benefit from the second part of the minority ownership policy – the possibility to sell them stations in “distress,” including the tax related legal treatment⁴⁴⁸. As Professor Price points out: “The Commission designed these programmes in order to influence the mix of views and images presented by broadcasters and defended them in the Supreme Court on precisely that basis: expanded minority ownership, the Commission argued, would produce more diversity in broadcast speech⁴⁴⁹.”

and capricious standard of review composed of the following elements: i) “rational connection” between facts and decision, ii) Congress’ intent, iii) “clear error of judgment,” iv) “entir[e] fail[ure] to consider an important aspect of the problem,” v) “an explanation for [the agency’s] decision that runs counter to the evidence before the agency,” or vi) such an “implausible conclusion that it could not be ascribed to a difference in view or the product of agency expertise.” See, Hutchinson, *ibidem*, at p. 238-239. See, Hutchinson, *ibidem*, at p. 239, further, quoting *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983): “[w]hen examining . . . [a] scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.” *Ibidem*.

⁴⁴³ See, Monroe E. Price and Jonathan Weinberg, “United States (2),” *Annenberg School for Communication Departmental Papers (ASC)*, University of Pennsylvania, Year 1996, at p. 271.

⁴⁴⁴ See, Monroe Price and J. Weinberg, *ibidem*, at p. 271.

⁴⁴⁵ See, Monroe Price and J. Weinberg, *ibidem*, at p. 271.

⁴⁴⁶ See, Monroe Price and J. Weinberg, *ibidem*, at p. 271.

⁴⁴⁷ See, *Lamprecht v. FCC*, 958 F.2d 382, 384 (D.C. Cir. 1992), quoting *Mid-Florida Television Corp.*, 70 FCC2d 281, 326 (Rev. Bd. 1978), set aside on other grounds, 87 FCC2d 203 (1981).

⁴⁴⁸ See, Monroe Price and J. Weinberg, *ibidem*, at p. 271.

⁴⁴⁹ See, Monroe Price and J. Weinberg, *ibidem*, at p. 271. See, in this sense, also, Paul Siegel, “Communication Law in America,” *Allyn and Bacon*, Boston, 2002 at p. 420, speaking of a FCC tradition to protect the public interest by providing for a wide range of voices. Siegel made reference to *Lamprecht v. FCC*, 958 F.2d 382, 384 (D.C. Cir. 1992) at its turn referring to *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC2d 979 (1978).

In 1990, a majority of the Supreme Court agreed with the Commission⁴⁵⁰. In *Metro Broadcasting Inc. v. FCC*, the Court upheld a measure granting preference to minorities.⁴⁵¹ In upholding the measure, the Court gave weight to FCC and congressional statements finding a link between expanded minority ownership and greater broadcast diversity⁴⁵². It cited evidence that “an owner’s minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities and that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies⁴⁵³.” However, this victory for media diversity was short-lived. As will be discussed below, “[a] 1995 Supreme Court decision disfavouring any sort of racially-defined government preference, though, left the programme moribund⁴⁵⁴.”

In the following lines, I draw upon three cases to analyze the constitutionality of minority and women media ownership as a matter of preferential FCC policy. Minority ownership policies may raise constitutional objections under equal protection (the creation of a special category deserving special legal protection in order to make up for past wrongs or under-representation – what has been called affirmative action⁴⁵⁵). A minority ownership program is a program that grants a preference to minorities in order to increase minority representation amongst media owners. The Court initially applied intermediate scrutiny to these programs. As the cases demonstrate and as discussed below, intermediate scrutiny served as a double standard: while permissive of minority

⁴⁵⁰ See, *Metro Broadcasting, Inc. v. FCC*, 497 US 547, 552 (1990).

⁴⁵¹ See, 497 US 547, 552 (1990).

⁴⁵² See, 497 US 547, 569-84 (1990).

⁴⁵³ See, 497 US 547, 580-81 (1990).

⁴⁵⁴ See, Monroe Price, *The Yearbook of Media and Entertainment Law*, at p. 105, referring to *Adarand Constructors, Inc. v. Peña*, 115 SCt. 2097 (1995).

⁴⁵⁵ See, *Regents of the University of California v. Bakke* 438 U.S. 265, 341 (1978).

media furthering policies, it stopped short of acknowledging that the same reasoning behind accepting such policies should have allowed the passing of constitutional muster of the gender based preference policies.

While this paper cannot surely predict the outcome of any future constitutional challenge to preferences based on race or sex, it attempts to offer a comparative analysis of the cases and to offer possible implications for media diversity. It finally relies on the opinions of several law professors interviewed while doing my research in order to identify potential alternative future directions in constitutional treatment of minority media ownership enhancing regulation. I first start with a brief introduction to the two, in some regards contradictory, cases, and leave the third case involved in this discussion for a separate review.

II. 3. 1. 2. Minority ownership

In *Metro Broadcasting*,⁴⁵⁶ the Supreme Court considered the constitutionality of two minority preference policies adopted by the FCC. Thus, the minorities' ownership and participation in the station's management was considered an additional, favorable factor in the FCC's licensing process⁴⁵⁷. Further, some stations which were in danger of having their license revoked, could have still transferred their station to a minority media company⁴⁵⁸.

Analyzing the wording and implementation of these two policies, the Court held that they did not violate equal protection⁴⁵⁹. The choice of constitutional standard of review was essential in the outcome of the case. Any policy based on racial preference

⁴⁵⁶ See, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

⁴⁵⁷ *Metro Broadcasting, Inc. v. FCC*, 497 US 547, 552 (1990).

⁴⁵⁸ *Metro Broadcasting, Inc. v. FCC*, 497 US 547, 552 (1990).

⁴⁵⁹ "Under the Fifth Amendment." See, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 552 (1990).

would have triggered the application of strict scrutiny, with the burden on the government to prove that these policies were narrowly tailored to achieve a compelling governmental interest. However, the Court chose the intermediate scrutiny, which is also used in the context of an indirect burden on speech⁴⁶⁰.

Several points determined the Court to apply a lower standard of scrutiny: congressional deference⁴⁶¹, noting that these policies “bore the imprimatur of longstanding congressional support and direction and were substantially related to the achievement of the important governmental objective of broadcast diversity,⁴⁶²” media diversity as an important governmental objective, furthered by benign race-conscious policies not unduly burdening non-minorities, proved by factual record and agency deferential nexus between programming and ownership⁴⁶³, and finally, the lack of any stereotypical assumption, given the fact that minority ownership increases media diversity in general, for both minorities and non-minorities.⁴⁶⁴

It is not difficult to imagine that if the Court admitted that the preferential treatment granted to minorities in license awarding procedures created a special

⁴⁶⁰ Given that minority ownership is a structural regulation, the same standard of scrutiny would have been applied under First Amendment (and not equal protection). The intermediate scrutiny includes a showing of three elements: an important governmental interest, this interest must be unrelated to the suppression of speech and the interest must be no greater than necessary to the achievement of the interest. See, *US v. O’Brien* 391 U.S. 367, 377 (1968).

⁴⁶¹ “Benign race-conscious measures mandated by Congress.” *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990).

⁴⁶² *Metro Broadcasting v. FCC*, 497 U.S. 547, 600 (1990). See, also, Final Report, History of the Broadcast License Application Process, Prepared for the FCC as a deliverable for the study of “Estimation of Utilization Rates/Probabilities of Obtaining Broadcast Licenses from the FCC,” prepared by KPMG LLP Economic Consulting Services For Federal Communications Commission, November, 2000. http://www.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt1.txt.

⁴⁶³ Referring to a “host of empirical evidence” on the link between media ownership and media content. See, *Metro Broadcasting v. FCC*, 497 U.S. 547, 580 (1990).

⁴⁶⁴ *Metro Broadcasting v. FCC*, 497 U.S. 547, 579 (1990).

privileged class, constituted on race grounds, strict scrutiny might have applied⁴⁶⁵ and the outcome of the case would have been different. Submitting the regulations to an intermediate standard of scrutiny contributed tremendously to the constitutional acceptance of media diversity as a legitimate purpose for regulatory action⁴⁶⁶. Strict scrutiny would have inquired into whether the minority policies were narrowly tailored to achieve a compelling state interest, with a likely negative outcome for their constitutional validity, especially in light of the recent developments of affirmative action jurisprudence in the United States⁴⁶⁷. However, under intermediate scrutiny, they were substantially related to an important government purpose⁴⁶⁸.

Metro Broadcasting seemed to have given a green light to the minority ownership policies. However, *Adarand Constructors, Inc. v. Peña*⁴⁶⁹ halted their development by raising the standard of review for minority preferences. Though not explicitly dealing with our topic, the case is extremely relevant for showing this change in the applicable standard of review for this type of regulations.

Adarand Constructors involved a successful challenge to rules containing incentives to hire minorities as subcontractors⁴⁷⁰. The Court decided that the standard of review for “racial classifications⁴⁷¹” was strict scrutiny⁴⁷² and in this very regard the

⁴⁶⁵ Please note that while in affirmative action cases the United States Supreme Court says to employ strict scrutiny, it has been argued and I believe judiciously, that in fact the Court applies a lower standard of scrutiny. See, Justice Clarence Thomas’ Dissenting Opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The case involved an unsuccessful challenge to the Michigan Law School’ admission policy, which considered race as one of the relevant factors in admission decisions. The majority held the policy constitutional because race was only one of the factors, while the dissent considered that the policy was in fact a quota.

⁴⁶⁶ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

⁴⁶⁷ See, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 788 (2007).

⁴⁶⁸ See, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁴⁶⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁴⁷⁰ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁴⁷¹ See, for instance, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁴⁷² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 238-239 (1995).

Court expressly stated that it overruled *Metro Broadcasting*.⁴⁷³ Thus, “strict scrutiny is the proper standard for analysis of all racial classifications⁴⁷⁴.” The Supreme Court’s ruling in *Adarand* requires that governmental classifications based on race must be analysed under strict scrutiny, and are constitutional only if such classifications are narrowly tailored measures that further a compelling governmental interest.⁴⁷⁵

This shift of standard had important consequences for media regulation. If *Metro Broadcasting* would have allowed a smoother passage of regulations enhancing minority media ownership through constitutional review because they would have been submitted to a lower standard, after *Adarand Constructors*, FCC policies granting preferences to minorities seem destined to fail because of the high standard applied. However, intermediate scrutiny was traditionally the chosen standard in reviewing gender classifications,⁴⁷⁶ and this is one of the reasons why the striking down of regulations enhancing women media ownership came as a surprise. Gender classifications are subject to intermediate scrutiny, under which the government’s action must be substantially related to the achievement of an important objective.⁴⁷⁷ We dedicate the next section to the constitutional analysis of this type of policies.

⁴⁷³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). See, Erwin Chemerinsky, “Constitutional Law. Principles and Policies,” *ibidem*, at p. 735. See, also, Interview with Professor Michel Rosenfeld on the premises of Cardozo Law School, New York, September 2007.

⁴⁷⁴ See, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Referring to *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), concerned a city’s determination that 30% of its contracting work should go to minority owned businesses the single standard of review for racial classifications should be “strict scrutiny.”

⁴⁷⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The strict scrutiny standard for racial classifications was reaffirmed in the Supreme Court’s decision upholding student body diversity in the context of higher education. *Grutter v. Bollinger*, and *Parents Involved in Community Schools v. Seattle School District No. 1*, both discussed above.

⁴⁷⁶ See, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁴⁷⁷ See, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

II. 3. 1. 3. Women ownership

Metro Broadcasting, as well as *Adarand* considered racial/minority classifications. In the next case to be discussed, *Lamprecht v. FCC*, the DC Circuit Court of Appeals applied intermediate scrutiny to strike down a rule favoring women ownership. I discuss now this policy and the manner in which intermediate scrutiny, a standard that should have allowed for the easier passing of constitutional muster, failed to do so.

In *Lamprecht*,⁴⁷⁸ the DC Circuit used equal protection to strike down a FCC policy considering gender in licensing proceedings. The policy furthered two main FCC goals. “In furthering the first objective, ‘a maximum diffusion of control of the media of mass communications,’ the Commission examines each applicant’s interests in other media properties, taking into account the significance of the other media properties and the extent of the applicant’s interests⁴⁷⁹.” “In furthering the second objective, ‘the best practicable service to the public,’ the Commission awards what it calls ‘quantitative-integration credit,’ a term of art that describes the degree to which prospective owners will participate in their stations’ day-to-day management⁴⁸⁰.” This is where the women ownership criterion factored into the Commission’s decision⁴⁸¹.

Though admitting the legitimacy of the goal of increasing women owned media, the court did not find it important or “pressing” enough to survive intermediate scrutiny. In the words of the court, which strike as I point out above and below in my paper, unjustifiably evaluating the same situation with different criteria:

⁴⁷⁸ *Lamprecht v. FCC*, 958 F.2d 382, 399 (D.C. Cir. 1992).

⁴⁷⁹ *Lamprecht v. FCC*, 958 F.2d 382, 383 (D.C. Cir. 1992).

⁴⁸⁰ *Lamprecht v. FCC*, 958 F.2d 382, 383 (D.C. Cir. 1992).

⁴⁸¹ See, *Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1992).

“Women are a general population group which has suffered from a discriminatory attitude in various fields of activity. On the other hand, it is equally obvious that the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks - women have not been excluded from the mainstream of society as have black people.⁴⁸²”

Further, the court looked for guidance in the Congress’ indirect command to the FCC to stop the women ownership preference policy, which came from not allowing the agency to spend money on such a policy⁴⁸³.

Based on the court’s interpretation in *Lamprecht* of an important governmental objective, women are in an ironical position. It seems somehow that the court is paradoxical: on the one hand women were historically discriminated against, on the other, they are in the mainstream? How would one reconcile these two statements? The court chose to confine its reasoning to pure semantics - the wording does not help the women’ cause either since they are not, indeed, minorities⁴⁸⁴. Both a sense of inclusion, we are all human beings, men and women and therefore we do not see the world differently, and a sense of exclusion, note above that the fact that the court recognized the existence of past discrimination towards women, is “sensed” throughout this decision. The court’s embrace of paradoxes was veiled under the fundamental saving principle of “gender blindness,” noting that

“[I]t simply is not reasonable to expect that granting preferences to women will increase programming diversity. Women transcend ethnic, religious, and other cultural barriers. In their social and political opinions and beliefs, for example, women in fact appear to be just as divided among

⁴⁸² See, *Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1992).

⁴⁸³ See, *Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1992).

⁴⁸⁴ See, *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), citing *National Telecommunications & Information Admin.*, 69 F.C.C.2d 1591, 1593 n. 8 (1978) (petition for notice of inquiry) (stating that “we have not concluded that the historical and contemporary disadvantage [sic] suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation’s population in a preferential category defined by the presence of ‘minority groups’”).

themselves as are men. Therefore it is not reasonable to expect that a woman would manifest a distinctly “female” viewpoint.⁴⁸⁵”

The court of appeal’s reasoning is, I believe, flawed in three respects: first, the policies advancing women based ownership were not fundamentally different in their justification, effect and implementation than the first minority preference policy advocated in *Metro Broadcasting*; second, the Supreme Court’s arguments for upholding the policy at issue in *Metro Broadcasting* could have worked perfectly well when applied to *Lamprecht* – especially the point on under-representation and third, the main novelty that the DC Circuit’s decision adduced, that there is no “female” point of view, is a highly debatable, if not controversial point that requires more than legal analysis and research to be a proven fact (if it can be proven).

Other problems, correlated with these three main ones, permeate the court’s decision. For instance, the court assumed this time, contrary to *Metro Broadcasting*, that there is no manner of admitting the existence of a relationship between women owned media and the content aired over these channels. This discriminatory acceptance of the content/ownership nexus is based here on the assumption that I mentioned as one of the decision’s shortcomings, that there is no “female voice”. Once there is no female voice, upholding a policy that furthers it, is indeed constitutionally suspect. One wonders, however, why a court of law may deny the existence of any difference between how men and women perceive and relate to the surrounding reality. Whether women speak with their own particular voice is a question of science, psychology, sociology and the like, and it would have been appropriate for the court to defer to the FCC’s findings in this

⁴⁸⁵ See, *Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1992).

regard. It does not take the eyes of a strong feminist to spot the “man” measure of things in the court’s reasoning.

Both *Metro Broadcasting* and *Lamprecht* were reviewed under an intermediate scrutiny standard. The cases were, however, different in regard to their explicit objectives, the degree to which the courts called on and were satisfied with empirical evidence, and most surprisingly, the treatment of the two policy factors in question: race and gender. Though one might have expected race to be scrutinized more thoroughly and gender less strictly, the courts seemed happy to reverse the rules of the constitutional game and tradition. Some authors argue that *Lamprecht* illustrates how courts can detrimentally affect appropriate legislative policies when they abandon their appropriate sphere of review and substitute their own judgment for the combined wisdom of the Congress and executive agencies⁴⁸⁶. However, the court in *Lamprecht* did point out the congressional intent not to fund the women ownership policies. Thus, I would argue that the Achilles’ heel is to be found in the courts’ treatment of the ownership/content nexus. In the next section, I turn to discuss this aspect. Based on the foregoing analysis, the author would argue that the ownership/content nexus is the main point that arguably needs to be proven in order for FCC policies to pass constitutional muster.

⁴⁸⁶ See, Guido Calabresi, “The Supreme Court, 1990 Term -Foreword: Antidiscrimination and Constitutional Accountability: (What the Bork-Brennan Debate Ignores), 105 Harv. L. Rev. 80, 82-83 (1991), in “Equal Protection Clause. Judicial Review. D. C. Circuit Invalidates the FCC’s Gender-Based Policies. *Lamprecht v. FCC*, 958 F.2d 382 (D. C. Cir. 1992), Harvard Law Review, Vol. 106, No. 3. (Jan., 1993), p. 804-809, at FN 5. Guido Calabresi has outlined four models of judicial review with respect to fundamental rights. The Type I model advocates judicial supremacy over legislators in order to protect certain fundamental rights. Because the traditional political processes cannot be trusted to ensure equal protection, Type II judges intervene only to protect consistently “underrepresented group[s]” from discrimination. Infringement of rights caused by legislative haste or an unwillingness to make accountable policy decisions triggers Type III intervention. Type IV advocates deference to the majority because “fundamental rights should be defined by the people or their representatives.” The rationales for Type II and Type IV seem to underlie Justice Brennan’s emphasis on deference in *Metro Broadcasting*. Arguably, the *Lamprecht* opinion exemplifies the Type I opponents’ worst fear -that the judiciary will “enforc[e] only their own views rather than the polity’s notions of what the government should and should not do.” Available on Jstor.

II. 3. 1. 4. Ownership/content nexus. The role of science in law

A crucial distinction between *Metro Broadcasting* and *Lamprecht* is the extent to which the reviewing court found an ownership/content nexus. The Court in *Metro Broadcasting* found a “host of empirical evidence⁴⁸⁷” to support the ownership/content nexus. This strong connection contributed to avert an unconstitutional race related bias⁴⁸⁸. The court in *Lamprecht* on the other hand was, by refusing to acknowledge the existence of a strong governmental interest in supporting women media ownership, ultimately suspicious of generalization, stereotyping male/women roles. Applying its standard of intermediate scrutiny in *Lamprecht*, the court required not only that sex-based generalizations be “supported,” but that the support be strong enough to “substantially” advance the legitimating governmental interest.

The whole *Lamprecht* case evolved around finding a link between ownership and content strong enough to support the FCC policy. The court in *Lamprecht* found that there was not enough evidence supporting this link, noting, as discussed above, the nonexistence of a “female voice.”⁴⁸⁹ The analytical background to the *Lamprecht* court’s finding of missing evidence is problematic. There is an interesting comparison in which one might believe the Court was comparing apples with oranges. The court mainly argues that women owned broadcasters might air more women programming, however in a much lesser percentage than the minority groups owned broadcasters would air minority programming⁴⁹⁰. The Court found that “the Commission’s Report, “Minority Programming,” failed to establish any statistically meaningful link between ownership by

⁴⁸⁷ *Metro Broadcasting v. FCC*, 497 U.S. 547, 580 (1990).

⁴⁸⁸ See, *Lamprecht*, 958 F.2d 382, 391 (D.C. Cir. 1992), citing *Metro Broadcasting*.

⁴⁸⁹ See, *Lamprecht*, 958 F.2d 382, 385 (D.C. Cir. 1992).

⁴⁹⁰ *Lamprecht*, 958 F.2d 382, 403 (D.C. Cir. 1992).

women and programming of any particular kind,⁴⁹¹” which would make this type of FCC policy unjustifiable.

Both Metro Broadcasting and Lamprecht agree on finding media diversity as a legitimate governmental objective that FCC is in charge of pursuing. However, it is important to note at this moment that viewpoints diversity and programming diversity is a distinction that bore or should have borne upon the findings of the Lamprecht court in relation to the ownership/content nexus. This is a point that would have perhaps salvaged the women ownership policy in Lamprecht.

Metro Broadcasting recognized the promotion of a “more diverse selection of programming,” or “selection of topics for news coverage and the presentation of editorial viewpoint” in general as an “important” governmental objective⁴⁹². The Court referred in Metro Broadcasting to “diversity of programming” as well. However, “diversity of programming” is not the only type of diversity⁴⁹³; the FCC referred in its Statement of Policy on Minority Ownership of Broadcasting Facilities to “minority viewpoints.”⁴⁹⁴ The emphasis on this distinction is important given the fact that in Lamprecht, the court did not consider, as the dissenting opinion observes⁴⁹⁵, the potential link between women viewpoint diversity and ownership, and took into account exclusively the link between women programming and ownership.

The dissent in Lamprecht offers a competing interpretation of the policy at issue. It notes that the disparity between ownership/content link in the cases of women owned broadcasters and minority owned broadcasters is “understandable because in the case of

⁴⁹¹ See, *Lamprecht*, 958 F.2d 382, 397 (D.C. Cir. 1992).

⁴⁹² See, *Metro Broadcasting v. FCC* 497 U.S. 547, 556, 569, 580 (1990).

⁴⁹³ *Metro Broadcasting v. FCC*, 497 U.S. 547, 578 (1990).

⁴⁹⁴ 68 F.C.C.2d 979 (1978), cited in *Metro Broadcasting*, 497 U.S. 547, 556 (1990).

⁴⁹⁵ See, dissenting opinion of Judge Mikva, *infra* at FN 501.

gender, the effect of ownership on broadcasting is more likely to be manifested in a diversity of viewpoints than in differences in programming⁴⁹⁶.” The majority in *Lamprecht* might have been inclined to accept this argument, however based on the record of this case it could not go into this aspect⁴⁹⁷. This means that in a future case, the FCC might bring in front of a court more convincing evidence supporting this assertion: “Further research may vindicate this intuition; but until the evidence is marshaled, it is hard to see how the preference accorded women in the FCC’s licensing process can pass constitutional muster.”⁴⁹⁸ As an advocate of media diversity, encompassing various aspects of minority media ownership, one hopes that the 2010 FCC request for public comments⁴⁹⁹ and the commissioned studies put forward such evidence⁵⁰⁰.

The issue of evidential support for the link ownership/content was essential in the constitutional fate of both minority and women media ownership policies. The dissent in *Lamprecht* urged for the Metro Broadcasting’s deference to congressional and agency findings.⁵⁰¹ Reliance on sociological and psychological studies although not a novel judicial practice,⁵⁰² is however questionable in constitutional adjudication.⁵⁰³

⁴⁹⁶ *Lamprecht*, 958 F.2d 382, 403 (D.C. Cir. 1992).

⁴⁹⁷ “That may well be the case, but it has not been documented in the record before us.” See, *Lamprecht*, 958 F.2d 382, 403 (D.C. Cir. 1992).

⁴⁹⁸ *Lamprecht*, 958 F.2d 382 (D.C. Cir. 1992).

⁴⁹⁹ The 2010 public hearings on media ownership issues are briefly discussed in the section on FCC.

⁵⁰⁰ The FCC commissioned studies to support its 2010 ownership review (yet to be published) - see the section on FCC.

⁵⁰¹ “Metro says repeatedly that courts should defer to Congress’s conclusions about the link between ownership and programming, as long as the conclusions reflect reasoned analysis rather than archaic stereotypes.” See, Dissenting Opinion of Mikva, Chief Judge, in 958 F.2d 382, 404 (D.C. Cir. 1992).

⁵⁰² See, for a discussion on *Branzburg v. Hayes* (1972) and the role that empirical research plays in this type of adjudication, Amy Reynolds, Brooke Barnett, “Communication and Law. Multidisciplinary Approaches to Research,” Lawrence Erlbaum Associates, Publishers, London, 2006. The author mentions that in *Branzburg v. Hayes* (1972) in the absence of showing of any compelling empirical evidence to indicate that forcing journalists to testify before grand juries would harm relationships between reporters and sources, the journalists’ qualified privilege was not upheld. The Court relied on a study of Professor Vincent Blasi, composed of interviews with journalists on whether their sources were afraid of potential subpoenas. *Ibidem*.

On the one hand, there are benefits to testing the rule of the law against the world's reality. One notices a switch from First Amendment formalism to First Amendment realism in the sense that long held beliefs about speech as a "near perfect instrument for testing ideas and promoting social progress" are being seriously undermined by feminist scholars, critical race theorists, and others⁵⁰⁴. These critical thinkers brought to the legal system a fresh air when they dismantled the abstract meaning of some notions and tried to see "how the First Amendment functions in the society in which we live."⁵⁰⁵

On the other hand however, the use of studies to support an argument might first seem beyond the scope of judicial authority and second it might weaken some constitutional guarantees, such as the free speech. Justice Stewart wrote in his *Brandenburg v. Hayes* dissent that "we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exists, we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from

⁵⁰³ As Justice Brennan once wrote for the Court, "[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Craig v. Boren*, 429 U.S., at 204, 97 S.Ct. at 460.

⁵⁰⁴ Anthony L. Fargo, "Social Science Research in Judges First Amendment Decisions," in Amy Reynolds and B. Barnett, *ibidem*, at p. 23. See, also, at p. 24, referring to Professor Zick Timothy who argues as well that "constitutional law is becoming an empirical enterprise and not so much a normative theory of constitutional interpretation." This argument is based on an analysis in this respect of the United States Supreme Court and other federal courts' jurisprudence. *Ibidem*.

⁵⁰⁵ See, Reynolds and Barnett, "Introduction: The Benefits of a Multidisciplinary Approach in Communication Law" in Reynolds and Barnett, *ibidem*, at p. xxv. See, further, Anthony L. Fargo, "Social Science Research in Judges' First Amendment Decisions" in Reynolds and Barnett, *ibidem*, at p. 23, referring to Fiss, "The Irony of Free Speech" (1996) and Mackinnon, "Only Words" (1993) who, as well pointed at the manner in which "traditional safeguards for freedom of speech contributed to silencing women, minorities and other 'outgroups' instead of broadening the marketplace of ideas." Justice Oliver Wendell Holmes was "one of the pioneers of the American legal realism." See, A.L. Fargo, *ibidem*, at p. 25. Holmes argues that "[t]he life of the law has not been logic; it has been experience." See, A.L. Fargo, *ibidem*, at p. 25.

engaging in First Amendment actions.⁵⁰⁶” Such alien borrowing might dilute the strength of the democratic, almost metaphysical values embodied in the First Amendment. Because of this high standard of protection demanded for certain constitutional guarantees, the risk of integrating statistical data in the courts’ decision making might be too great. However, “the problem with much of the empirical data on media effects is that there are conflicts and discrepancies, which are normal in research, but disturbing for courts⁵⁰⁷.”

The fact that the courts need to look at real life phenomena to evaluate the extent to which law efficiently regulates their many aspects and intricacies is not in conflict with the fact that the same courts might not be properly equipped to do so. These courts may rely on findings of better suited governmental actors, such as regulatory agencies.

As noted above, *Lamprecht* focused on the degree of causal link between media ownership and content diversity⁵⁰⁸. The dissent in *Lamprecht* based itself on this very essential dilemma. Is there a link or not, and if it is one, how strong should it be? This was even more important given the fact that *Metro Broadcasting* did not command the existence of a “necessary” link, but only a reliance on strong congressional and agency findings⁵⁰⁹.

Lamprecht is ultimately an indicator of the general trend towards less affirmative action⁵¹⁰. With Justice Thomas that wrote the DC Circuit’s decision in *Lamprecht* now on

⁵⁰⁶ *Branzburg v. Hayes*, 408 U.S. 665, 733, Stewart, J. Dissenting (1972).

⁵⁰⁷ See, *Fargo*, *ibidem*, in *Reynolds and Barnett*, *ibidem*, at p. 34.

⁵⁰⁸ *Lamprecht*, 958 F.2d 382, 403 (D.C. Cir. 1992).

⁵⁰⁹ “Although not necessary connection exists between ownership and diverse programming, congressional and FCC findings strongly suggested that diversity would be promoted by increasing the representation of groups currently underrepresented among owners.” See, Patricia J. Williams, “*Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*,” *Harvard Law Review*, Vol. 104, No. 2. (Dec., 1990), p. 525-546.

⁵¹⁰ See, Patricia Williams, *ibidem*, at p. 536. See, *ibidem* at p. 541: “devaluation of the interests at stake.” The author deploys great effort in showing how the noble intention to eradicate racism should go beyond

the Supreme Court one wonders what would be the stance that the highest Court would take on this issue. The future of this type of policies is, to say the least, doubtful⁵¹¹.

However, one should also think in terms of not only what things are, but what they should be⁵¹². The decision that the Supreme Court might take in such a future case may still be an unsettled prediction. Following the line of rationale seemingly developed by the Court in *Metro Broadcasting* and the DC Circuit in *Lamprecht*, the FCC's proposed policies have just one chance: to prove with enough sufficiency the ownership/content nexus. The DC Circuit's failure to credit the existence of a "female voice" doomed the women ownership policy in *Lamprecht* from the start. Proving up the ownership/content nexus, as was done in *Metro Broadcasting*, could give minority preference, or women preference, policies a fighting chance at surviving constitutional scrutiny. Besides convincingly proving the ownership/content nexus, one could put forward an even more optimistic scenario: the Court would go back to admitting that the ownership/content link is under FCC's ambit⁵¹³. As one recalls, the Court put more trust in FCC's reasoning and wisdom by admitting that even if the record was not conclusive on the point,⁵¹⁴ the Commission "acted rationally in finding that diversification of

sublime neutrality. In the context of media diversity the Court should recognize the necessity of an affirmative action: "the failure to take into account history and context can radically alter whether mere neutrality can be deemed just." The author refers explicitly to the dissent, perhaps realizing the dangers that the dissent in *Metro Broadcasting* carry for the future of minority media ownership.

⁵¹¹ Some, like Professor Geoffrey Stone would have accepted the minority media ownership only in the case of a strong empirical background research documenting the nexus ownership/content. See, Interview with Professor Geoffrey Stone at New York University, October 2007. Professor Monroe Price made the same contention. See, Interview with Professor Monroe Price at Cardozo Law School, October 2007.

⁵¹² Discussions with Professor C. Edwin Baker, New York, fall 2007.

⁵¹³ Proving the ownership/content link will be a strenuous business, considering that a recent study by Matthew Gentzkow and Jesse M. Shapiro, "What Drives Media Slant? Evidence from U.S. Daily Newspapers," found that the consumers' preferences determine the political leaning of a newspaper. "Ownership plays little or no role in determining slant." Available at: economics.uchicago.edu/pdf/gentzkow_102306.pdf.

⁵¹⁴ See, T. Barton Carter, Marc A. Franklin, Jay B. Wright, "The First Amendment and the Fourth Estate. The Law of Mass Media," Seventh Edition, 1997, p. 625.

ownership would enhance the possibility of achieving greater diversity of viewpoints.⁵¹⁵”

The key issue is however the clash between policies resembling affirmative action based on race preferences such as minority media ownership and equal protection – strict scrutiny would most likely render a new minority media ownership policy unconstitutional, in spite of the fact that in a country where minorities make up 33% of the population, only 3% of full power commercial stations are owned by them⁵¹⁶.

II. 3. 1. 5. Preliminary conclusion regarding minority and women ownership rules

Policies aimed at increasing media diversity by allowing for more diverse media ownership may still have a future in the United States,⁵¹⁷ but must overcome strict scrutiny if they allow for classifications based on race or minority status, and may have to meet a heightened standard of proof with respect to the ownership/content nexus if they are based on gender⁵¹⁸. While the minority media ownership may stand little chance to be constitutionally upheld even if re-worded⁵¹⁹ because it must survive strict scrutiny, the

⁵¹⁵ Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775, 796 (1978).

⁵¹⁶ See, also, p. 5 of the Commissioner Michael J. Copps’ Dissenting Opinion, Re. 2006 Quadrennial Media Ownership Review – MB Docket 06-121, et al. See, Arie Beresteanu, Paul B. Ellickson, “Minority Ownership in Media Enterprises,” Media Ownership Study 7, 2007. This Study argues that the reason for minority and women’ under-representation in media ownership is the lack of access to capital.

⁵¹⁷ The FCC included the policy and its constitutional implications in its 2006 invitation for comments. See, 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-136A1.doc. For a discussion on the 2010 quadrennial regulatory review and the FCC commissioned studies, see the chapter on FCC. See, further, for the FCC expressing its doubt that a distress sale policy similar to the one challenged in Metro Broadcasting, could pass constitutional muster, paragraph 38 of the Report and Order and Third Further Notice of Proposed Rule Making, December 18, 2007, available on the FCC website. See, also, Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding, MB Docket No. 09-182, June 16, 2010.

⁵¹⁸ See, also, para. 37 and para. 75, FCC, Notice of Inquiry, In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, May 25, 2010.

⁵¹⁹ In 2006 the FCC proposed to include minority media in a racially neutral category – the small business and new entrants category, although the Commission was again criticized for failing to prove how this

women ownership policy might however be able to withstand constitutional muster, considering the intermediate standard of scrutiny. Lamprecht would be no obstacle to the constitutionality of a women ownership measure if the FCC were able to prove the existence of an ownership/content nexus with greater sufficiency.

II. 3. 2. Other structural norms aimed to further media diversity

Aside from minority and women media ownership enhancing rules, media ownership restrictions and must carry provisions are part of the structural rules that promote media diversity by limiting the market shares that a company may hold and, respectively, by facilitating carriage for less attractive content. In regard to the ownership restrictions, the United States' courts adopted the same attitude as elsewhere when faced with regulatory measures to further media diversity: they paid lip service to the idea⁵²⁰ but did not pursue the path further and did not sustain the constitutionality of the media diversity enhancing measures. By analyzing some of the most important cases (Fox, Sinclair and Prometheus) that deal with ownership regulation I show how the fact that the Court did not take a clear stand on the issue of media concentration invited more deregulation. The cable related must carry provisions suffered an interesting, although almost reversed, trend and they are still in force.

II. 3. 2. 1. Ownership restrictions

Ownership restrictions refer to both horizontal and cross ownership restrictions. The first observation that I make in regard to these rules is that, throughout time, they

policy would increase minority and women media ownership. See, Statement of Commissioner Jonathan S. Adelstein, Concurring in Part, Dissenting in Part, at p. 65 in R&O of December 18, 2007. The Commissioner proposed a "socially and economically disadvantaged business" category with no reference to race that would pass more easily constitutional muster.

⁵²⁰ See, 418 U.S. 241, 250 (1974).

became more relaxed, a process in which the Congress, the FCC and the courts shared their role. In what looks like a vicious circle, deregulation leads to more deregulation. These rules' development also conducts to a second observation. These rules' original intent, the very reason why they were enacted, was so that they preserve media diversity. Aspects such as the scarcity rationale and the weak market competition soon started to be considered things of the past and contributed to these rules' relaxation. Perhaps most importantly however, as observed above in relationship with the minority and women media ownership as well, when offered the opportunity to defend them, the FCC failed to provide what the courts would have considered a proper assessment of the market and the improvement in diversity that these norms would bring about.

Deregulation spurs more deregulation. The congressional intent to deregulate was used as a justification for both the Commission and the courts to ease up the ownership restrictions. The passage of the Telecommunications Act of 1996 reflected the deregulatory agenda of the Republican Congress and the Clinton's Administration' support for a national platform and infrastructure for communications⁵²¹. The 1996 Telecommunications Act allowed telephone and cable broadcast cross-ownership⁵²². "In radio, it eliminated the national and relaxed the local restrictions upon ownership [] and

⁵²¹ See, James C. Goodale; updated by Rob Frieden, "All about cable and broadband," New York: Law Journal Press, 2008, at p. 1-37.

⁵²² Fox Television v. FCC, 280 F.3d 1027, 1033 D.C. Cir. (2002). See, for a history of the deregulatory trend in relation to the telco/cable cross-ownership rules, Michael J. Zarkin, "The Federal Communications Commission: Front Line in the Culture and Regulation Wars," Greenwood Publishing Group, 2006, at p. 72, speaking of the telco – cable cross-ownership ban of 1970. The Congress enacted rules to this effect in 1984. Following this however, the FCC started to deregulate, given the technological impetus present on the market. See, in this sense, FCC adopts proposal that it has legal authority to grant waivers of the cable-telco cross-ownership ban to telephone companies seeking to provide video programming in their telephone service areas, cc Docket No. 87-266, May 16, 1995, available online at: http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1995/nrcc5050.txt. The repeal of the telco-cable cross-ownership rule happened with the Telecommunications Act of 1996. See, also, the FCC Order of March 15 1996 following the Act, available online at: http://www.fcc.gov/Bureaus/Cable/Orders/1996_TXT/fcc96112.txt.

eased the ‘dual network’ rule []⁵²³.” The local television ownership rule was struck down.⁵²⁴ “In addition, the Act directed the Commission to eliminate the cap upon the number of television stations any one entity may own⁵²⁵ and to increase to 35 from 25 the maximum percentage of American households a single broadcaster may reach⁵²⁶.” Most importantly, in Section 202(h) of the Act, Congress instructed the Commission, in order to continue the process of deregulation, to review each of the Commission’s ownership rules every two years, a consideration that contributed to the striking down of the cable/broadcast cross-ownership rule⁵²⁷. Recently, the national cap on cable ownership set at 30% was found unconstitutional.⁵²⁸

Ownership limits were established to combat concentration, and thus, to help ensure diversity⁵²⁹. The Telecommunications Act of 1996 established a biennial review of broadcast ownership rules by the FCC⁵³⁰. Congress directed the FCC to review all

⁵²³ Fox Television v. FCC, 280 F.3d 1027, 1033 D.C. Cir. (2002).

⁵²⁴ The rule “allow[ed] common ownership of two television stations in the same local market [only] if one of the stations [wa]s not among the four highest ranked stations in the market and eight independently owned, full-power, operational television stations remain[ed] in that market after the merger.” Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 152 (2002). The Court of Appeals in Sinclair started from the premise that the Fox v. FCC case “construed section 202(h) of the Telecommunications Act of 1996 [the FCC]’s “further [] review” of the ownership rules] . . . to carry with it a presumption in favour of repealing or modifying the ownership rules.” Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 152 (2002), quoting Fox TV Stations v. FCC, 280 F.3d 1027, 1048 (D.C. Cir. 2002). The Court held that the FCC “failed to demonstrate that its exclusion of non-broadcast media in the eight voices exception is not arbitrary and capricious.” Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 152 (2002).

⁵²⁵ 1996 Act § 202(c)(1)(A).

⁵²⁶ Fox Television v. FCC, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

⁵²⁷ In Fox, “[t]he [cable/broadcast cross-ownership] [r]ule prohibit[ed] a cable television system from carrying the signal of any television broadcast station if the cable television system own[ed] a broadcast station in the same local market.” Fox Television v. FCC, 280 F.3d 1027, 1035 (D.C. Cir. 2002). The court noted that “[t]he retention decision was arbitrary and capricious as well as contrary to § 202(h) [of the 1996 Telecommunications Act], and that this requires us to vacate the Rule.” 280 F.3d 1027 (D.C. Cir. 2002). See, also, Roger L. Sadler, *ibidem*, at p. 105, 114. The text of the United States 1996 Telecommunications Act is available at: <http://www.fcc.gov/Reports/tcom1996.pdf>.

⁵²⁸ Time Warner Entertainment Co., L.P. v. FCC, 240 F.3d 1126 (2001) (Time Warner II). See, also, Comcast Corporation v. FCC, US Court of Appeals for the District of Columbia Circuit, August 28, 2009. No. 08-1114. Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293154A1.pdf.

⁵²⁹ Broadcasting regulation was meant to ensure that this media will serve the public interest. See, J. C. Goodale, *ibidem*, at p. 1-2.1.

⁵³⁰ Telecommunications Act of 1996, section 161(a)(1).

ownership rules to “determine whether any of such rules are necessary in the public interest as the result of competition” and “to repeal or modify any regulation it determines to be no longer in the public interest.”⁵³¹ The FCC recent ownership reviews refocused the public attention on the trend towards deregulation in the media industry⁵³² and rekindled the public opinion’s interest in media diversity.⁵³³ The 2003 review⁵³⁴ established new ownership rules at national and local level for both radio and television. The FCC’s action met opposition from both Congress and the public. The new rules were stayed by the US Court of Appeals for the Third Circuit⁵³⁵ and the US President called for their review⁵³⁶. The 2006 FCC review,⁵³⁷ although aiming to serve “two critical public interest goals – localism and diversity,⁵³⁸” was about, of course, further deregulation. I proceed to present the rules as they currently stand, mostly drawn from the 2003 review while pointing out how the 2006 review affected them. This year the FCC is expected to present its new ownership review⁵³⁹.

⁵³¹ Telecommunications Act of 1996, section 202(h).

⁵³² See, Kerri Smith, “The FCC Under Attack,” *Duke Law & Technology Review*, August 26, 2003, Media and Communications, 2003 *Duke L. & Tech. Rev.* 19. See, further, FCC Commissioner Adelstein Seeks Stay of Media Ownership Decision: “Today’s Congressional action is a dramatic rebuke of a bad decision. This is what happens when an agency ignores an outcry from Congress and the public to slow down and tread cautiously. The FCC ran right through the warning lights and into a guardrail.” At http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235641A1.pdf (June 19, 2003).

⁵³³ The FCC had received a massive amount of letter, 750,000 99.9 percent of which opposed deregulation. Andrew Ratner, Amid Protests, FCC votes 3-2 to Relax Media Ownership Rules, *The Baltimore Sun*, June 3, 2003.

⁵³⁴ See, the FCC 2003 Biennial Review, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf.

⁵³⁵ *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

⁵³⁶ On January 22, 2004, President Bush signed into law the Consolidated Appropriations Act, 2004, H.R. 2673.536. Section 629(1) of the Appropriations Act amends Section 202(c) of the Telecommunications Act of 1996 and directs the Commission to modify the national television ownership limit to 39 percent. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-320A1.doc

⁵³⁷ See, the FCC 2006 Quadrennial Review Order, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf. Hereinafter, FCC 2006 Review.

⁵³⁸ See, Statement of Chairman J. Martin, in FCC 2006 Review, at p. 99.

⁵³⁹ See, Notice of Inquiry, In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, May 25, 2010.

The national TV ownership rule prohibits an entity from owning television stations that would reach more than 35% of U.S. television households⁵⁴⁰. The national TV ownership rule was raised to 39% by congressional action and was thus not under review in 2006⁵⁴¹. The local TV ownership rule, which was retained by the 2006 Quadrennial Review, allows an entity to own two television stations in the same market only if at least eight independently-owned commercial or non-commercial broadcast television stations would remain⁵⁴². The local radio ownership rule, which is mainly a rule designed to limit horizontal concentration and to ensure that several radio stations exist in a community, is still in force after the Commission expressly denied its reconsideration.⁵⁴³

Part of the cross-ownership rules, “the radio/TV cross-ownership rule limits the number of radio and television stations one entity may own in a market. The rule allows common ownership of at least one television and one radio station in a market. In larger markets, a single entity may own additional radio stations depending on the number⁵⁴⁴,” of other independently owned media outlets in the market. Further, while the 2003

⁵⁴⁰ See, the FCC 2006 FCC Review.

⁵⁴¹ See, p. 97 of the 2006 Review, referring to the 2004 Consolidated Appropriations Act that “insulated” from review, as the Third Circuit Court in *Prometheus* pointed out, the national cap. See, further, the 2004 Consolidated Appropriations Act, section 629, that modifies the 1996 Telecommunications Act as amended by the 2003 FCC Review: to include a 39% national ownership cap, to limit the period allowed for companies in order to divest their businesses so as to comply with the cap and to remove from the scope of FCC review.

⁵⁴² The local TV ownership rule allows an “entity ... [to] own two television stations in the same DMA if: (1) the Grade B contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination.” See, para. 87 of the FCC 2006 Quadrennial Review. A grade B contour defines the area that a station’s frequencies may reach. See, for instance, William E. Kennard, FCC, 5 November 1998, <http://www.fcc.gov/Speeches/Kennard/Statements/stwek888.html>.

⁵⁴³ See, for a Summary for this rule, FCC, “Multiple Ownership of Radio Stations,” available at: http://www.fcc.gov/mb/audio/multiple_ownership.html. See, para. 110 of the 2006 Quadrennial Review.

⁵⁴⁴ Charles B. Goldfarb, “FCC Media Ownership Rules: Issues for Congress,” May 16, 2003, Report for Congress, Received through the CRS Web, At CRS-8.

maintained the newspaper/broadcast cross-ownership prohibition in the same market, the 2006 review took “a modest step in loosening the complete ban on cross-ownership⁵⁴⁵”. The “modest step” refers to a presumption in favour of granting of a waiver from this prohibition if certain conditions are met and only for the top 20 relevant markets⁵⁴⁶. The main explanation for this presumption that a waiver is not inconsistent with the public interest and thus can be granted is that in these markets because of the “vibrancy and number of voices⁵⁴⁷.” There is further a presumption against combinations in the lower relevant markets⁵⁴⁸. Being presumptions, these rules can be overturned by showing of specific factors, such as market concentration following a certain transaction even in the case of the first 20 DMAs⁵⁴⁹. One sure reason to overturn the negative presumption is in the context of failed/failing stations, considering the need to counter their possible disappearance⁵⁵⁰. The dual television network rule prohibits a merger between or among the following television networks: ABC, CBS, Fox and NBC⁵⁵¹.

Prometheus v. FCC⁵⁵² came about as a challenge to the 2003 FCC review of the ownership rules characterized by an intent to deregulate the media market⁵⁵³. Fox v. FCC⁵⁵⁴ and Sinclair⁵⁵⁵ arose in the same context.

⁵⁴⁵ See, para. 13 of the 2006 Review.

⁵⁴⁶ DMAs. See, para. 53 of the 2006 Review: “We adopt a presumption that it is not inconsistent with the public interest for an entity to own in the top 20 Designated Market Areas (“DMAs”) either (a) a newspaper and a television station if (1) the television station is not ranked among the top four stations in the DMA, and (2) at least eight independent “major media voices” remain in the DMA; or (b) a newspaper and a radio station. We expect that, as a result of this presumption, a waiver of the newspaper/broadcast cross-ownership ban generally would be granted in such cases.”

⁵⁴⁷ See, para. 63 of the 2006 Review.

⁵⁴⁸ DMAs.

⁵⁴⁹ See. Para. 64 of the 2006 Review, where the Commission refers to “factor particular to each market and proposed transaction.”

⁵⁵⁰ See, para. 65 of the 2006 Review.

⁵⁵¹ See, <http://www.fcc.gov/cgb/consumerfacts/reviewrules.html> (FCC’ s Review of the Broadcast Ownership Rules, FCC Consumer Facts). See, para 139 of the 2006 Review.

⁵⁵² Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004). The citations below come from United States Court of Appeals for the Third Circuit, Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-

Based on considerations of empirical evidence, the Third Circuit Court of Appeals in *Prometheus* upheld the restriction preventing a single entity from owning two top-four TV stations, but remanded the more generous local TV limits to the FCC, and directed the FCC to reconsider or better justify its waiver policy for the local TV rule⁵⁵⁶. The court directed the FCC to revise its failed station waiver provision because it adjusted this rule without acknowledging that the original purpose of the rule was to aid minority ownership. In this sense, there is a high potential that under *Lamprecht* this type of regulation would be unconstitutional⁵⁵⁷.

As mentioned above, ownership and cross-ownership restrictions limit the ownership of different types of media by one single entity. A desire to preserve media diversity and “the voices of independent broadcast stations, which provide local news and public affairs programming” and a fear of potential foreclosure of competing stations⁵⁵⁸ were two of the reasons that justified the enactment of these rules. It was not long however before issues such as the scarcity rationale and the lack of market competition became obsolete and allegedly no longer justified their preservation.

One of the most important causes however that persuaded the courts to adopt a deregulatory approach to the structural regulation of the media was the lack of evidence

3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951, 03-4072, 03-4073 & 04-1956, *Prometheus Radio Project vs. Federal Communications Commission; United States of America*, On Petition for Review of An Order of the Federal Communications Commission (FCC No. 03-127), Argued February 11, 2004, Filed June 24, 2004, Available on the FCC’s website at: <http://www.fcc.gov/ogc/documents/opinions/2004/03-3388-062404.pdf> (hereinafter *Prometheus v. FCC*, 2004).

⁵⁵³ Report and Order and Notice of Proposed Rulemaking, June 2003, FCC 03-127, available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf.

⁵⁵⁴ See *infra*.

⁵⁵⁵ See *infra*.

⁵⁵⁶ “[An unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in the local markets.” *Prometheus Radio Project v. FCC*, 2004, at 78. See, Don R. Pember, Clay Calvert, *ibidem*, at p. 674.

⁵⁵⁷ 373 F.3d 372 (3d Cir. 2004), at 95, note 59.

⁵⁵⁸ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

in their support. In *Fox v. FCC* the merely tangential nature and the inconsistency of the studies proposed by the FCC persuaded the Court of Appeals for the D.C. Circuit that the national television stations ownership and the cable cross ownership were arbitrary and capricious⁵⁵⁹. In *Sinclair* the local television ownership rule was remanded for consideration⁵⁶⁰. In order to promote media diversity, the national television station rule was thought to strengthen the network affiliates' bargaining power. However, the findings of the Commission's reports were contradictory⁵⁶¹.

The lack of evidence in support of the ownership restrictions led to either their invalidity or to their remand for consideration. Another aspect contributed to the courts' loosening their grip on these restrictions – interchangeability. A discussion on the horizontal and cross-ownership limits' role in protecting media diversity must include the issue of media substitutability. The interchangeability between various media is one of the most widely adopted pro-deregulation instruments. The fact that courts still do not treat the Internet and the traditional media as substitutes is important for media diversity's protection since it contributes to the argument that the existence of new technologies does not make regulation moot.

⁵⁵⁹ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

⁵⁶⁰ See, *Sinclair v. FCC*, 284 F.3d 148 (2002).

⁵⁶¹ The 1998 report contradicted its findings from the 1984 report in which it stated that it did not yet have any evidence to sustain the argument that non-affiliated stations better promote media diversity. "In the 1998 Report (p 30) the Commission asserted that independently-owned affiliates play a valuable role by "counterbalancing" the networks' strong economic incentive in clearing all network programming "because they have the right ... to air instead" programming more responsive to local concerns. In the 1984 Report, however, the Commission said it had "no evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming." 1984 Report p 53." 280 F.3d 1027 (D.C. Cir. 2002). In regard to the cable broadcast cross ownership rule (CBCO) this court observed the lack of showing of new evidence justifying the discrepancy in the 1992 report where the Commission argued that the CBCO was not necessary to prevent carriage discrimination. 280 F.3d 1027 (D.C. Cir. 2002). See, also, *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (2002).

The essential factors in assessing whether different types of media are interchangeable are the quality of substitutability from an audience's perspective and the intrinsic nature of the content offered by alternative sources such as the Internet⁵⁶². There is a distinction between merely reproducing broadcasting content on the Internet – such as in the case of television, radio and newspapers websites – and producing independent, solely Internet targeting local news and information.⁵⁶³ The search engines and other Internet sites “may be useful for finding restaurant reviews and concert schedules, but this is not the type of ‘news and public affairs programming’ that relates to the FCC’s mission to preserve viewpoint diversity.”⁵⁶⁴

Furthermore, different media have different power in terms of audience influence and impact⁵⁶⁵. In the court’s view, different weight in the process of identifying and measuring diversity is to be given to different types of speech. Note that this approach is inconsistent with the Supreme Court’s enhanced protection of political speech.⁵⁶⁶ The FCC’s tool for measuring diversity, the Diversity Index⁵⁶⁷ treats all media the same, irrespective of market power and audience impact. Considering that “the Commission gave too much weight to the Internet as a media outlet and it irrationally assigned outlets

⁵⁶² 373 F.3d 372 (3d Cir. 2004).

⁵⁶³ “[T]here is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast stations counterpart. The latter do not present an “independent” viewpoint and thus should not be considered as contributing diversity to local markets. *Prometheus v. FCC*, 2004, at 64.

⁵⁶⁴ *Prometheus v. FCC*, 2004, at 68.

⁵⁶⁵ 373 F.3d 372 (3d Cir. 2004).

⁵⁶⁶ See, Cass Sunstein, “Democracy and the Problem of Free Speech,” at p. 121 and seq., arguing “political speech lies at the heart of constitutional concern” and that interference with political speech is “subject to the strongest presumption of unconstitutionality.”

⁵⁶⁷ The diversity index introduced by the 2003 Report and Order provides that in markets of three stations there is a total ban on cross-ownership; in markets of four to eight tv stations there are allowed combinations of owning either a daily newspaper, one tv station, and up to half of the radio limit on that specific local market; either one daily newspaper and up to the radio limit on that market; either two tv stations and up to the radio limit on that market. In markets of more than nine tv stations, there is no ban on cross-ownership.

of the same media type equal market shares⁵⁶⁸,” the Court found that the FCC inconsistently derived the cross ownership from its Diversity Index results.⁵⁶⁹”

The conclusion of lack of substitutability is based on lack of empirical evidence that Internet may provide enough local news to satisfy a diversity requirement that was in the realm of television: “the Commission does not cite, nor does the record contain, persuasive evidence that there is a significant presence of independent local news sites on the Internet.⁵⁷⁰” The different media’s outreach power or impact should have led to a respectively different weighing process in the FCC’s analysis and adoption of the Diversity Index: “[a] Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality.⁵⁷¹” Thus, the Diversity Limits overlooked one of the most important aspects of media concentration: the cross ownership limits resulting from the diversity index do not take into account the market power of the media outlets it refers to.

II. 3. 2. 2. Must carry provisions

Diversity in the media is about diversity of programming and diversity of means of transmission, including cable⁵⁷². In the following lines I analyze how the courts treated

⁵⁶⁸ See, *Prometheus v. FCC*, 2004, at p. 58.

⁵⁶⁹ *Prometheus v. FCC*, 2004, at 58. Furthermore, “the Commission improperly relied on the Internet as a substantial source of local news, particularly when the FCC found that cable television is not a substantial source of local news. *Prometheus v. FCC*, 2004, at 62-64.

⁵⁷⁰ *Prometheus v. FCC*, 2004, at 65-66.

⁵⁷¹ *Prometheus v. FCC*, 2004, at 70.

⁵⁷² “Cable television systems distribute their signals to subscribers over a network of coaxial cable” and they are mainly supported through subscriptions. See, for a brief description of how cable appeared and developed, Michael G. Parkinson, L. Marie Parkinson, “Law for Advertising, Broadcasting, Journalism and Public Relations. A comprehensive Text for Students and Practitioners,” Lawrence Erlbaum Associates, Publishers, 2006, at p. 125 and 126. See, also, Robert A. Luff, *Cable Technology. Changing the Face of the Industry*, in *The Bright future of cable and pay television: economic, legal, regulatory strategies*. Co-sponsored by the New York Law Journal and the Amos Tuck School of Business Administration of

the FCC's policy to promote cable competition through structural regulation⁵⁷³. The regulatory framework developed around cable is important for the subject of my thesis because this means of transmission contributes to a high extent to the media diversity. Having a multitude of cable operators on the market ensures low prices and the possibility for content suppliers to approach various venues for their content, which ultimately leads to the audience being able to receive diverse content.

Since cable operators carry on their networks speech,⁵⁷⁴ cable regulation is not foreign to First Amendment implications⁵⁷⁵. Because cable operators choose which channel is carried on their networks, their editorial freedom may be curtailed by the must carry rules, requiring cable operators to carry local programming,⁵⁷⁶ which in turn allegedly contributes to local media diversity⁵⁷⁷. As any other means of transmission, cable is "an instrument of social power⁵⁷⁸." Concentration in the cable industry may threaten media diversity⁵⁷⁹. Again, one notices a tension between First Amendment

Dartmouth College. Chairmen: Richard S. Bower, Morton I. Hamburg, New York, New York Law Journal, (1977), at p. 262, on the function of a cable system, "to distribute television broadcast signals from an appropriate antenna site to home terminals (subscribers) throughout the cable service area."

⁵⁷³ See, Dwight L. Teeter, Jr., Bill Loving, "Law of Mass Communications. Freedom and Control of Print and Broadcast Media," Eleventh Edition, Foundation Press, 2004, at p. 726.

⁵⁷⁴ See, George H. Shapiro, Philip B. Kurland, James P. Mercurio, "'CableSpeech.' The Case for First Amendment Protection. A Time Incorporated Study," Law&Business Inc., Harcourt Brace Jovanovich Publishers, 1983.

⁵⁷⁵ "We recognize that there are profound first amendment implications inherent in the regulation of cable operators." *Central Telecommunications v. TCI Cablevision*, 800 F.2d 711 (8th Cir. 1986) (a case acknowledging that cable franchising had First Amendment implications).

⁵⁷⁶ See, Kenneth C. Creech, "Electronic Media Law and Regulation," Elsevier Inc., 2007, at p. 116.

⁵⁷⁷ See, also, Morton I. Hamburg, "All About Cable. Legal and Business Aspects of Cable and Pay Television," Law Journal Seminars – Press Inc., New York, 1979, at p. 521. Some authors believe though that the market alone without any access rules to cable networks will lead to media diversity. See, Shapiro, Kurland, Mercurio, *ibidem*, at p. 89.

⁵⁷⁸ See, Sloan Commission on Cable Communications, "On the cable: the television of abundance; report," McGraw-Hill Book Co. (1971) at p. 135.

⁵⁷⁹ See, *ibidem*, at p. 137. See, *ibidem*, at p. 148 and 149, on the importance of structural regulations in the cable industry to protect diversity of ownership.

claims made by media companies and the goal of promoting media diversity⁵⁸⁰. I make three observations in the following lines that exemplify the courts' approach on the role that cable's "must carry provisions" serves in improving media diversity and people's access to such diversity.

The first observation refers to the relationship between the development of cable networks in the US and the regulatory input that helped or stalled this development⁵⁸¹. This congruence helps to make the argument for a positive governmental action in the form of regulation for increasing the available cable operators on the market⁵⁸². The manner in which the courts go from not accepting the rules to embracing them outlines the shift from a pro-cable approach and from pushing for the cable industry's flourishing – realized mainly through the Cable Communications Policy Act of 1984⁵⁸³ - to acknowledging the threat posed by the same industry – the Cable Act of 1992⁵⁸⁴. I exemplify this development, and regulatory shift, through the must carry provisions.

The FCC enacted the first must carry rule in 1965⁵⁸⁵, requiring "cable systems to retransmit the signal of any requesting broadcast station that was "significantly viewed" in its local market.⁵⁸⁶" These rules were held unconstitutional mainly on grounds that they were not sustained by empirical research into the harmful effect of cable on local

⁵⁸⁰ See, also, Patrick Parsons, "Cable television and the First Amendment," Lexington Books, 1987, at p. 7, on the two goals of the First Amendment: "to benefit both the individual and the collective" and how while the courts generally seem to reconcile these two goals, in the case of cable there is tension between these two.

⁵⁸¹ See, also, in general on early cable regulation, Steven R. Rivkin, "A New Guide to Federal Cable Television Regulations," The Massachusetts Institute of Technology, 1978.

⁵⁸² See, also, Shapiro, Kurland, Mercurio, *ibidem*, at p. 78. See, Jerome Barron, "Freedom of the Press for Whom" (1973), J. Barron, "Access to the Press- A New First Amendment Right," *ibidem*, J. Barron, "An Emerging First Amendment Right of Access to the Media?" 37 Geo. Wash. L. Rev. 487 (1969), referenced in Shapiro, Kurland, Mercurio, *ibidem*, at p. 89.

⁵⁸³ The 1984 Cable Communications Policy Act of 1984 remains the basis of cable regulation. The 1992 Cable Act only modified the previous 1984 Act. See, Pember and Calvert, *ibidem*, at p. 717.

⁵⁸⁴ See, *infra*, at p. 135.

⁵⁸⁵ See, Michael G. Parkinson, L. Marie Parkinson, *ibidem*, at p. 126.

⁵⁸⁶ See, Michael G. Parkinson, L. Marie Parkinson, *ibidem*, at p. 126.

television and that they interfered with the cable operators' First Amendment rights⁵⁸⁷. The must carry rules of 1965 were followed by the channel dedication rules of 1972⁵⁸⁸. Under these rules "cable operators were required to dedicate four of their channels for public, governmental, educational, and leased access."⁵⁸⁹ They were struck down as unconstitutional shortly after because they intruded upon editorial freedom since they transformed the cable operators in common carriers⁵⁹⁰ or because they were overbroad⁵⁹¹. Encouraged by these decisions, cable operators started to enjoy a monopoly in the communities they served⁵⁹².

⁵⁸⁷ *Quincy Cable T.V. v. Federal Communications Commission*, 768 F.2d 1434 (D.C. Circuit, 1985) and *Century Communications Corporation v. Federal Communications Commission*, 835 F.2d 292, 304 (CA DC 1987). See, Robert B. Hobbs, Cable TV's "Must Carry" Rules: The Most Restrictive Alternative - *Quincy Cable TV, Inc. v. FCC*, 8 Campbell L. Rev. 339 (1986). Warner, R. Matthew, "Reassessing Turner and litigating the must-carry law beyond a facial challenge," *Federal Communications Law Journal*, March, 2008, available online at: http://www.entrepreneur.com/tradejournals/article/178895277_1.html.

⁵⁸⁸ These rule commanded cable television systems that have 3,500 or more subscribers and carry broadcast signals the following: to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by public, educational, local governmental, and leased-access users, and to furnish equipment and facilities for access purposes. See, *Cable Television Report and Order*, 36 FCC 2d 141, 241 (1972), *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

⁵⁸⁹ See, Michael G. Parkinson, L. Marie Parkinson, at p. 127.

⁵⁹⁰ The Supreme Court held that the FCC exceeded its authority because Congress had limited the authority's ability to provide "public access at the expense of the journalistic freedom of persons engaged in broadcasting." *Federal Communications Commission v. Midwest Video Corporation* 440 U.S. 689 (1979). The case involved the FCC rule requiring cable systems that have 3500 or more subscribers to develop at least a 20 channel capacity, to make available channels for access by public educational and local governmental users, and to furnish equipment and facilities for access purposes. Cable operators did not have a say in who could use access channels and in what could be transmitted over such channels.

⁵⁹¹ In one case the cable company challenged the FCC regulations requiring cable operators to transmit to their subscribers every television signal that was "significantly viewed in the community," irrespective of the number of must carry channels already being transmitted, the amount of programming duplicity, or the channel capacity of the cable system. The Court noted the overbreadth of the regulation in response to the asserted governmental goal of preserving a free local television and it required FCC to redraft the must carry rules in a manner more "sensitive" to the First Amendment. See, *Quincy Cable T.V. v. Federal Communications Commission*, 768 F.2d 1434 (D.C. Circuit, 1985).

⁵⁹² This argument appeared to justify regulation in the *Turner* case, as well as before, in the *Central Telecommunications v. TCI Cablevision*, 800 F.2d 711 (8th Cir. 1986): "The evidence reveals that the City's cable television market is currently a natural monopoly which, under present technology, offers room for only one operator at a time. Thus, we hold that the City could properly offer a de facto exclusive franchise in order to create competition for its cable television market." The Court rejected any First Amendment protection against monopolistic franchise in this situation. Several cases on cable franchise appeared in front of the courts, however it is not the purpose of this paper to deal with this subject.

Fearing the growing power of cable companies to the detriment of local media diversity⁵⁹³: “the ability of listeners to view channels far from their homes erodes the audience of the locally based channel and therefore shrinks its appeal to local advertisers,⁵⁹⁴” the courts upheld the FCC decisions that protected local television to the detriment of cable operators. Thus, the FCC’s denial of cable operator’s request to expend its transmission area was upheld as justified because of the demise of local television station and the loss of service to a substantial rural population not served by the cable system⁵⁹⁵. Along the same lines, the courts upheld a FCC policy committed to improving local participation in community affairs through cable television⁵⁹⁶. The courts seemed to be aware now that, after the FCC and the courts themselves helped cable to achieve market dominance, the industry might pose a danger to competition⁵⁹⁷.

The 1992 Cable Act was enacted in response to increased concern over concentration in the cable market.⁵⁹⁸ The Cable Act of 1992 required cable operators with more than 12 channels to set aside one third of their channel capacity for local

⁵⁹³ See, also, Michael S. Horne, “The Broadcaster’s View of the Competition and Fairness Issue,” in “The Bright Future [],” *ibidem*, at p. 279, on how cable regulation appeared out of fear that this new means of transmission would impair upon broadcasters’ development.

⁵⁹⁴ *United States v. Southwestern Cable Company*, 39x2 U.S. 157 (1968). The Supreme Court upheld a FCC policy that banned cable transmission of distant signals into the 100 largest television markets.

⁵⁹⁵ *Carter Mountain Transmission Corporation v. Federal Communications Commission* 321 F.2d 359, 84 S.Ct. 442 (1963).

⁵⁹⁶ This policy required CATV operators of a certain size (3,500 or more subscribers) that wanted to carry television signals to carry as well local programming and even have “facilities for local production.” *United States v. Midwest Video Corporation*, 406 US 649 (1972).

⁵⁹⁷ “Congress’ acknowledgement that broadcast television stations make a valuable contribution to the Nation’s communications structure does not indicate that Congress regarded broadcast programming to be more valuable than cable programming; rather, it reflects only the recognition that the services provided by broadcast television have some intrinsic value and are worth preserving against the threats posed by cable.” *Turner Broadcasting v. FCC II*, 520 U.S. 180 (1997).

⁵⁹⁸ Notice in this sense that 40 percent of U.S. households still relied on broadcast stations for their television programming. Justice Kennedy in *Turner II* relied on data in the *actes préparatoires* of the United States Congress when drafting the Cable Act. *Turner Broadcasting v. FCC II*, 520 U.S. 180 (1997). See, Pember and Calvert, *ibidem*, at p. 719.

broadcasters and the ones with fewer than 12 to carry the signals of at least three local commercial television stations⁵⁹⁹.

In addition to the first observation related to the parallel between cable's history and the regulatory/jurisprudential role in this history, a second observation that one may draw from the line of cases and regulatory instruments attached to cable throughout time refers to the fact that both the regulatory actors and the courts started to be aware of concentration in the cable industry. That is to say that this phenomenon that this thesis deals with it is not a new one⁶⁰⁰, and it is part of the regulatory agenda for a long time. Consequentially, trying to keep it on the regulatory agenda is not such a radical or exotic idea.

These rules survived constitutional scrutiny after being sent back to the FCC for proper evidentiary support. Use of evidentiary support to uphold the rules conducts us to the third observation in this subsection on cable's contribution to media diversity. Reliance on empirical evidence led to a series of variations of the must carry rules to be invalidated as "unjustified and unduly sweeping."⁶⁰¹ In the first Turner case⁶⁰², the must

⁵⁹⁹Further, a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station. In general, there was no compensation required for carriage. See, section 4 on "carriage of local commercial television signals" of Cable Television Consumer Protection and Competition Act of 1992. Public Law 102-385--Oct. 5, 1992, available online at: http://www.fcc.gov/Bureaus/OSCE/library/legislative_histories/1439.pdf. Section 4 inserted a new section, section 614, in the Telecommunications Act of 1934. The Act stemmed from concern over cable's natural monopoly and vertical integration, at the time, on the local market, which resulted in high monthly rates for subscribers. See, section 2 of this Act. See, Teeter, at p. 742.

⁶⁰⁰ See, also, Martin H. Seiden, "Cable television U.S.A.; an analysis of Government policy," Praeger Publishers (1972), at p. 24. At the time, cable ownership was concentrated and, among the first ten companies, we find Warner Communications (number 2 in number of subscribers) and Viacom (number 8). See, M.H. Seiden, *ibidem*, at p. 25.

⁶⁰¹ *Century Communications Corporation v. Federal Communications Commission*, 835 F.2d 292, 304 (DC Cir. 1987). "We do not suggest that must carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests. But when trenching on First Amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures." Further, "[The Commission] has failed to put itself in a position to know whether the problem that its regulations seek to solve is a real or fanciful threat." 835 F.2d 292, 304 (DC Cir. 1987).

carry rules that required cable operators to transmit local commercial and public broadcast channels⁶⁰³ were remanded to the lower courts for reconsideration due to lack of factual evidence⁶⁰⁴. In the second *Turner* case⁶⁰⁵ the rules were upheld, this time being backed up by sufficient evidence that the rules actually helped alleviate the dangers posed by cable's development to over-the-air broadcasting⁶⁰⁶. For the time being, the rules appear to stay put, considering that the Supreme Court recently refused to grant certiorari⁶⁰⁷ following an appeal by a cable company challenging their constitutionality⁶⁰⁸.

It is important to pinpoint that in the two above mentioned *Turner* cases, the Supreme Court considered that these rules did not attempt to regulate speech⁶⁰⁹, and thus, they were submitted to an intermediate standard of review⁶¹⁰. The role that the courts

⁶⁰² *Turner Broadcasting System v. Federal Communications Commission* (I)512 U.S. 622 (1994). *Turner* is the first time the Court "seriously grappled with the First Amendment issues that federal and state government regulation of cable television raised." The case was remanded for more evidence. See, Ashutosh Bhagwat, *ibidem* at p. 155.

⁶⁰³ See the Cable Television Consumer Protection and Competition Act of 1992, section 4 and 5. *Turner Broadcasting System v. Federal Communications Commission* (I)512 U.S. 622 (1994). Based on these rules the TV broadcasters could choose to negotiate for payment for the carriage of their signals on cable systems under the "retransmission consent" agreement or they could require cable operators to include them in their service under the "must carry" rules.

⁶⁰⁴ Under the intermediate standard of scrutiny applied to incidental burdens on speech, the courts considered that the burden of proof was on the government to show that the regulation did not place an unnecessary burden on free speech rights. *Turner Broadcasting System v. Federal Communications Commission* (I)512 U.S. 622 (1994).

⁶⁰⁵ *Turner Broadcasting v. FCC II*, 520 U.S. 180 (1997).

⁶⁰⁶ See, K.C.Creech, *ibidem*, ed. 2007, at p. 117.

⁶⁰⁷ See, John Poirier and James Vicini, "U.S. court won't hear Cablevision/FCC must-carry case," May 17, 2010, <http://www.reuters.com/article/idUSTRE64G4XF20100517>. See, also, John Eggerton, "Cablevision Asks Supreme Court To Review Constitutionality Of Must-Carry," 1/28/2010, http://www.multichannel.com/article/446478-Cablevision_Ask_Supreme_Court_To_Review_Constitutionality_Of_Must_Carry.php?rssid=20061.

⁶⁰⁸ See, *Cablevision Systems Corporation v. Federal Communications Commission*, United States Court of Appeals, Second Circuit, June 22, 2009, 570 F. 3d 83 (2009) upholding the must carry rules.

⁶⁰⁹ See, K.C.Creech, *ibidem*, ed. 2007, at p. 117.

⁶¹⁰ See, *United States v. O'Brien*, 391 U.S. 367 (1968), *supra* at FN 460.

attach to evidence that supports administrative decision making is an aspect emphasized in relation to other FCC policies, such as minority and women media ownership⁶¹¹.

In regard to the must carry provisions the FCC put forward a solid empirical background that convinced the courts that its policies were still needed on the market to protect media diversity. However, evaluating empirical research to decide upon the constitutionality of administrative measures still poses questions of separation of powers and courts' competence to assess the correctness and the importance of such studies. One should also consider that in general, reliance on research in decision making is a contentious business, with every side involved pushing their own agenda through separately funded studies⁶¹².

Furthermore, this trend obliges the FCC to carefully, thoroughly and comprehensively back up its policies. The evidence that the FCC will have to gather to support its policies may have little room however for non-economic, non-quantifiable elements. This may run counter to the protection of media diversity, if one understands this concept as encompassing more than a multitude of operators on the market. If a media diversity is understood as a multitude of both viewpoints and sources, a wide range of cultural, economic, political, social representations of the life around us, then the FCC's policies that protect this concept will be hard to sustain.

Moreover, other policy making related issues might escape the precise and quantifiable nature of the evidence required by the courts to back up FCC's policies. These issues refer to cautious decision making since any deregulatory measure should be

⁶¹¹ See, *supra*, section II.1.4.

⁶¹² See, Rolla Edward Park, Conclusion, in Rolla Edward Park, ed., "The Role of Analysis in Regulatory Decisionmaking. The Case of Cable Television," Lexington, Mass., Lexington Books, The Rand Corporation (1973), at p. 72.

undertaken as a matter of principle with extreme caution considering the importance of the media product for democracy and to the FCC's accountability to the people, encouraging the FCC to take into account these people's opinions on its policies. These issues that are hard to pinpoint in precise, mathematical formulas are still of paramount importance in supporting any policy directed at enhancing the amount of media diversity on the market. The value of the FCC's empirical research that supplements the missing link between owners and content, and that in turn documents the owners' influence over content or, as in the case with cable, the cable networks' lack of desire to carry unattractive (for advertisers at least) content is still much needed. However, the courts should look at the many aspects that make up for the entire justification to a media diversity enhancing policy and should defer to the regulatory agency for matters that the latter knows best.

II. 4. Preliminary remarks

This part of my paper pushed forward a progressive agenda of fostering media diversity because of its importance in a democratic society. The Supreme Court and the federal courts hinted at this agenda when they shaped the image of a free press. One of the nuances of this picture was media diversity. I am in perfect agreement with Professor Bollinger's theory of a more "sophisticated model of quality public debate, in which there is some room for public institutions to be used to help moderate tendencies within everyone that distort and bias the process of public discussion and decision making."⁶¹³

⁶¹³ See, Bollinger, *ibidem*, at p. 23. This theory stands on the basis of three arguments: the need for a system of partial regulation, "a system such as we have had with the newer media regulated and the print media preserved largely unregulated," a newer, proper assessment of the efficiency of the public regulation

A complex image of a free press must account for the power implications that touch upon the very essence of any institution. Because of the immense protection under the First Amendment umbrella, the media might be prone to abuse and corruption. The only manner in which this potential is to be tackled is by making room for many voices to be heard and for many companies to be able to air these voices⁶¹⁴.

The same complex image of a free press also encompasses a certain image of the man in society. Such an image describes a human being prone to natural personal biases and prejudices and to eventual simple – mindedness – and since media is the product of men, then the same attitude could stain the media as well. The path to follow in order to avoid the creation of this type of man is to make sure that many people will argue their own vision of reality in the marketplace of ideas – the media market.

The two above mentioned effects of empowering the media – the potential for power abuse and the potential for personally biased and simply minded press – can be corrected through a constant and coherent regulation to promote media diversity. Responding to commentators that might suggest that we should let the media reflect the audience's tastes, one should always consider the desirable social goals of social cohesion, education and cultural learning. These are goals that the ordinary citizen might not permanently internalize and be aware of and that today's media hardly promote and have little interest in promoting. As the media responds to people's demands the same is true – the media can and should influence the people in accepting and becoming more

of the electronic media and a reasonable and consistent doctrine of regulation of the electronic media. See, Bollinger, *ibidem*, at p. 22.

⁶¹⁴ This argument was supported by the courts, even though with different final outcomes, in all the cases discussed in this chapter that challenged either minority (Metro Broadcasting) or women (Lamprecht) ownership or cross-ownership limits or ownership caps (Fox v. Fcc, Sinclair and Prometheus). See, the discussion *supra*.

and more interested in issues that naturally do not appeal to them⁶¹⁵. Thus, media diversity rightly posits that the media should not just give the people what they want at any given moment.

It is difficult to see how the cases presented above might help or impede any future media diversity advocacy. Some aspects of these cases are worthy of the noble cause. The courts generally recognized the public interest in media diversity, but courts have also largely frustrated the FCC's attempts at promoting media diversity. Some authors, like the media advocate Mark Cooper, even suggest that the courts might have extended the scope of the First Amendment in the sense that "the First Amendment is not limited to preventing government from impeding the free flow of ideas."⁶¹⁶ "[T]he decisions in the cases spawned by the Telecommunications Act of 1996, *Fox v. FCC* and *Sinclair Broadcast Group v. FCC*⁶¹⁷, reiterate the principle that restraints on the economic interests of licensees are legitimate in the effort to promote the public's interest in diversity.⁶¹⁸" However, what started as a promising endeavour, stopped short before turning into an efficient regulatory framework to protect media diversity. The cross-ownership limits disappeared as the courts joined Congress in its general deregulatory trend⁶¹⁹ and, as shown in this chapter, the various policies designed to enhance media diversity are constitutionally weak. One may argue, based on the cases discussed above, that the United States courts "essentially privatized the injury of speech behaviour."⁶²⁰

⁶¹⁵ See, Bollinger, *ibidem*, at p. 27.

⁶¹⁶ Mark Cooper, "Public Opinion Supports the Bold Aspiration for the First Amendment," <http://www.consumerfed.org/elements/www.consumerfed.org/file/sinclairsurveystatement.pdf>.

⁶¹⁷ *Fox Television Stations, Inc., v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *Sinclair Broadcasting, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

⁶¹⁸ Mark Cooper, "Public Opinion Supports the Bold Aspiration for the First Amendment," *ibidem*.

⁶¹⁹ FCC Report and Order on Reconsideration, 2008, available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf.

⁶²⁰ See, Bollinger, at p. 35.

They missed therefore from their analysis the “quality” of public discussion⁶²¹. After all, the multiple ownership rules as well as other FCC measures were designed to promote viewpoint diversity in order to contribute to public welfare,⁶²² but these policies have been largely discarded.

II.5. Antitrust and regulation. How reliance on antitrust analysis affects media diversity under the public interest standard. The downside of too much antitrust in FCC’s review

II. 5. 1. Preliminary considerations

Media concentration is the result of mergers and acquisitions between media companies (“media mergers”). The FCC and the Antitrust Division of the Department of Justice (DOJ)⁶²³ review, from different angles, media mergers. Section 601 of the 1996 Telecommunications Act expressly allows the continuing application of antitrust in the communications industries⁶²⁴. Although the process they employ is in some respects similar, it nevertheless carries significant differences because of the distinct characteristics of the legal regimes they use.

⁶²¹ Dwight L. Teeter, Jr., Bill Loving, “Law of Mass Communications. Freedom and Control of Print and Broadcast Media,” Eleventh Edition, Foundation Press, 2004, at p. 724: “The Federal Communications Commission made it clear that the Miltonian principle of diversity – called the “marketplace of ideas” was subordinated by Republican “free market” ideology and by media conglomerates thirsting to get even bigger.” We assist to a progressive dilution of the traditional First Amendment understanding: The media is increasingly used simply to spread, rather than exchange, information about markets, rather than ideas. See, Patricia J. Williams, at p 534.

⁶²² As the Supreme Court reminded in *Associated Press v. U.S.* See the FCC official web page, from April 2002 Supplemental Filing Report by Professor Andrew Calabrese of University of Colorado analyzing industry studies. April 17, 2002, <http://mediaaccess.org/programs/diversity/calabreseFCCfiling.pdf>.

⁶²³ See, ABA Section of Antitrust Law, “Mergers and Acquisitions. Understanding the Antitrust Issues,” Robert S. Schlossberg, ed., 2d Edition (2004), at p. 228.

⁶²⁴ Section 601 (b) of the 1996 Telecommunications Act.

In the following lines, I analyze the legal provisions governing media mergers and acquisitions and I compare the review performed by the aforementioned agencies. This analysis leads to the following main arguments: i) there are inherent limits in relying only on one type of review, either antitrust or regulatory, ii) the regulatory review mixes in antitrust elements, iii) there is currently, in my opinion, no other better suited tool to define the media market than the antitrust tool and iv) using antitrust to define the media market is just one step, and an extremely helpful one⁶²⁵, to protect media diversity under the public interest standard within the FCC review. Thus, a combination of the two types of review/legal regimes might best protect media diversity.

The review performed by the DOJ and the FCC converges in many respects and differentiates in others. Since it is the FCC that scrutinizes media mergers for their impact on media diversity, I compare here the two types of review, with a heavy emphasis on the regulatory process. I mainly intend to show the extent to which the FCC public interest standard protects media diversity and the manner in which antitrust principles permeate regulatory review (for better or worse for media pluralism protection). I exemplify the FCC review by discussing several decisions in mergers cases. I chose not to dedicate much space to DOJ media mergers' decisions since they do not take into account media diversity⁶²⁶. I do however briefly analyze some of DOJ's decisions in order to pinpoint

⁶²⁵ A narrow definition of the media market may better suit media diversity protection purposes, since it forces the regulatory or antitrust agency to perform the review at microscale. By breaking down the market and ensuring competition at micro level, the media market comprises more media sources – media companies. This is the European Commission's approach to the media market definition. See, in this sense, the chapter on the European Union.

⁶²⁶ “[T]here has also been a fair amount of discussion of whether media deals should get a higher, or at least different, level of antitrust scrutiny. The Antitrust Division’s approach to merger analysis in the media and entertainment industries generally utilizes the same framework we use to review mergers and other forms of strategic alliances in other, non-media industries.” See, Remarks by Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 2003, “Antitrust Enforcement in the

the relationship created between this agency's review and FCC. I argue that there is much cooperation, with the FCC relying on and accepting the DOJ's decisions, adding though some analysis and conditions of its own⁶²⁷.

This analysis will show that except for very few mergers that involved the biggest players in the media market, the mergers were approved by the FCC (as well as by the DOJ). Both agencies choose to order a restructuring of the proposed joint venture resulting from the merger and rarely dissolve or not approve it⁶²⁸. I assert that the reason for FCC's approvals (which are arguably to the detriment of media diversity) is the heavy reliance on antitrust analysis. A slight turn towards the democratic and constitutional principles behind the First Amendment that could factor more heavily into the FCC's review, under the public interest that the agency needs to employ based on the 1996 Telecommunications Act, might better differentiate the analysis performed by this agency from the one performed by the DOJ and in the same time might deter future mergers and thus better enhance media diversity⁶²⁹.

II. 5. 2. Antitrust⁶³⁰ and regulation⁶³¹ in agencies' review

The antitrust review is performed by two agencies: the DOJ⁶³² and the Federal Trade Commission, in cooperation, although the agencies developed over time a certain

Entertainment and Media Industries," available online at: <http://www.usdoj.gov/atr/public/speeches/204474.htm>.

⁶²⁷ FCC's review "largely duplicates the review undertaken by the DOJ or FCC." See, ABA Section of Antitrust Law, *Telecom Antitrust Handbook* (2005) (hereinafter *ABA Handbook*), at p. 197.

⁶²⁸ See, *ABA Handbook*, at p. 197.

⁶²⁹ See, for entirely flawed, partially flawed or entirely non-objectionable from a constitutional point of view, policy solutions and proposals to media concentration, Baker, "Media Concentration and Democracy," at p. 163 et seq.

⁶³⁰ Antitrust law is "designed to preserve competition by prohibiting monopolistic practices and agreements that unreasonably restrict competition." See, ABA SECTION OF ANTITRUST LAW, *ANTITRUST AND ASSOCIATIONS HANDBOOK*, (2009), American Bar Association, at p. 1.

⁶³¹ Broadly, regulation refers to "policy choices made by governments that limit the private behavior of citizens or businesses." Paul Teske, "Regulation in the states," Brookings Institution Press, Washington D.C., 2004, at p. 5. They intervene to alleviate "market failures." See, P. Teske, *ibidem*, at p. 5.

division of their competences⁶³³. From an antitrust⁶³⁴ law perspective, the mergers and acquisitions are reviewed to determine whether they lead to a “substantial lessening of the competition” or to the “tendency to create a monopoly.”⁶³⁵ The formation of new media joint ventures is scrutinized for its potential impact on market competition as well as for its potential to engage in anticompetitive behavior or practices⁶³⁶.

The DOJ reviews the media mergers based on economic analysis. In conducting its review, the Department of Justice⁶³⁷ focuses on the market for advertising as the relevant product market. The analysis centers on the prospect of increased prices for advertising time that may result from a single owner dominating that segment of the advertising market⁶³⁸. It is especially the case that the media mergers resulting from cross-ownership and including other type of businesses – the so-called conglomerate

⁶³² See, for a brief description of both DOJ and FTC competences in the enforcement of the antitrust law, ABA Section of Antitrust Law, “The Merger Review Process. A Step-by-Step Guide to Federal Merger Review,” ed., Ilene K. Gotts, 2001, p. 17 an 18. For a brief description of their investigatory powers, *ibidem*, at p. 7 et seq.

⁶³³ See, <http://www.ftc.gov/bc/antitrust/enforcers.shtm>. See, also, <http://www.ftc.gov/opa/2002/04/clearanceoverview.shtm>.

⁶³⁴ I use here the term antitrust, which is more common among United States lawyers than competition law and which I use as encompassing in general both mergers and acquisitions and anticompetitive practices (although from an European perspective, antitrust is about anticompetitive practices only).

⁶³⁵ See, Section 7 of the Clayton Act. The Clayton Act was amended in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, which required companies to pre-notify the DOJ of their intended mergers.

⁶³⁶ Section 2 of the Sherman Act prohibits the willful acquisition, maintenance, or extension of monopoly power; by the use of exclusionary or predatory conduct, “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.”

⁶³⁷ Aside from the Department of Justice – Antitrust Division – the antitrust review may be conducted by the Federal Trade Commission, created by the Federal Trade Commission Act. The Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” The division of attributions between the two agencies – DOJ and FTC – is not extremely clear and the danger of overlapping in their investigations is avoided by cooperating. See, FTC Guide to the Antitrust Laws, at: http://www.ftc.gov/bc/antitrust/antitrust_laws.shtm

⁶³⁸ DOJ will also consider the formats of the stations to be acquired, the number of stations involved, and the demographics of the listening audience. While there is no concrete rule governing when the Department will object to an acquisition, mergers that will result in a single entity garnering more than 40% of market revenue share tend to be viewed as problematic. See, “19th Annual Institute on Telecommunications. Policy & Regulation,” Co-Chairs Richard E. Wiley, Henry M. Rivera, R. Clark Wadlow, Practicing Law Institute, 2001, at p. 35.

mergers or networks – pose potentially grave antitrust concerns⁶³⁹. Precisely because of the ramifications of their business, the new media company may discriminate against its competitors and leverage its power in different markets. The “conglomerate power⁶⁴⁰” benefits from the possibility to cross-subsidize⁶⁴¹ its activities in order to either compensate an eventual loss on one of the market where it operates⁶⁴² or to push out of the market some of its rivals, employing the “price squeeze” strategy⁶⁴³. While antitrust law protects, to a certain extent and as in any other industry, media market competition, however, nowhere does the DOJ take into account the mergers’ effect on media diversity⁶⁴⁴. This is in turn done by the FCC, under the public interest standard. Because antitrust review is not equipped with proper tools to evaluate a merger’s non-economic effects on the market, an agency like the DOJ can only achieve media diversity as an unintended byproduct.

In turn, the FCC is the specialized agency that reviews media mergers, (also) for their non-economic impact on the market. Broadcasting was first regulated at federal level by the Radio Act of 1912, which introduced the license requirement⁶⁴⁵. Concerns

⁶³⁹ “When the large company spreads across many products throughout a wide geographical area and covers a series of stages in production and distribution, its opportunities for multiple contacts with other large concerns are at their greatest, and the advantage to be derived from an effort to get the best of another large company at a particular point is least evident. Similarly, such a company has the maximum chance to discipline or destroy any particular small company by a localized attack without serious inconvenience to itself, and has the minimum vulnerability to attack from a single small company.” See, Corwin Edwards, “Conglomerate Bigness as a Source of Power,” in *Business Concentration and Price Policy*, quoted by Eugene M. Singer, “Antitrust Economics. Selected Legal Cases and Economic Models,” Prentice-Hall, Inc., 1968, at p. 260.

⁶⁴⁰ See, Eugene M. Singer, *ibidem*, at p. 260.

⁶⁴¹ See, also, George L. Priest, “Networks and Antitrust Analysis,” in *ABA Section of Antitrust Law, Issues in Competition Law and Policy* (2008) at p. 665.

⁶⁴² See, Eugene M. Singer, *ibidem*, at p. 262.

⁶⁴³ See, Eugene M. Singer, *ibidem*, at p. 262.

⁶⁴⁴ Professor Barry Hawk, personal interview, New York, 2007. Professor Hawk mentioned that he was not aware in his years of antitrust experience of any US antitrust review that considered the mergers’ effect on media diversity.

⁶⁴⁵ See, at Harry Warner, Part III, Chapter VIII, *ibidem*, at p. 757 et seq. See, also, Ithiel de Sola Pool, “Technologies of Freedom,” The Belknap Press of Harvard University Press, 1983, at p. 3.

over private monopoly over the radio communications market started to appear prior to the enactment of the 1927 Radio Act⁶⁴⁶.

The Communications Act of 1934⁶⁴⁷ requires the FCC to determine whether a proposed merger involving the transfer of control of FCC common carrier⁶⁴⁸ or wireless⁶⁴⁹ licenses would serve the “public interest”⁶⁵⁰. The “public interest”⁶⁵¹ is itself a broad and amorphous concept, and in need of further definition. The meaning of “the public interest” in the context of broadcast licensing was first clarified in the 1943 case, *NBC v. United States*⁶⁵². The case was brought in relation to the chain broadcasting rule that the FCC implanted in 1941⁶⁵³. The national radio networks’ influence over the

⁶⁴⁶ See, the summary of the discussions at the various radio conferences, in which members of the Congress had the opportunity to express their opinions on diverse issues, as well as of the legislative proposals preceding the 1927 Radio Act, Harry Warner, part III, chapter VIII, at p. 766-775. For a description of this Act’s provisions, see, *ibidem*, at p. 776-778. Please note that the 1927 Act failed to be implemented because of lack of budget and personnel. See, *ibidem*, at p. 778.

⁶⁴⁷ For a history of the legislative process preceding the 1934 Communications Act, see Harry Warner, Part III, chapter VIII, *ibidem*, at p. 783-790. For the proposed amendments to the same Act, see, *ibidem*, at p. 791 et seq.

⁶⁴⁸ “The term ‘common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.” See, section 3 (10) of the 1934 Telecommunications Act, 47 U.S.C. 153.

⁶⁴⁹ Section 310 (d) of the 1934 Communications Act states: “no construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or licenses, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”

⁶⁵⁰ “The FCC reviews media mergers by the authority granted to oversee broadcast licenses in the Communications Act of 1934. [] When applying for a license, a broadcaster must meet ‘citizenship, character, and financial, technical and other qualifications . . . to operate the station’ [quoting] 47 U.S.C. § 308(b) (2004). [Furthermore], license transfers are permissible only when the Commission finds that the ‘public interest, convenience, and necessity will be served’ by this action [quoting] 47 U.S.C. § 310(d) (2004).” See, Serratore, *ibidem*, at p. 207.

⁶⁵¹ Section 214 (a) of the 1934 Communications Act states: “no carrier shall acquire any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the operation of such additional or extended line.”

⁶⁵² *NBC v. U.S.*, 319 U.S. 190 (1943).

⁶⁵³ See, for a description of this Report and its rules, Frank J. Kahn, “Documents of American Broadcasting,” Prentice-Hall, 1978, at p. 104 et seq.

broadcasting industry and over the local programming⁶⁵⁴ led the FCC to enact the chain broadcasting rules⁶⁵⁵ (based on these rules, the stations' affiliates could choose their own content without the networks' interference)⁶⁵⁶. The rules survived until 1977 when competition in the radio industry made their existence obsolete⁶⁵⁷. "NBC argued that the FCC's regulatory authority was limited only to 'technical and engineering' matters and that the FCC did not have the authority to implement competition-based, broadcasting regulations over the national radio networks⁶⁵⁸." However, the Supreme Court embraced a broader view of the public interest standard and noted that the FCC was more than "a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other⁶⁵⁹." Rather, "in the Court's view, the Commission 'was given a comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.'⁶⁶⁰" That instance "confirmed that the Commission had broad, congressionally authorized power to regulate the broadcast spectrum⁶⁶¹."

⁶⁵⁴ A 1938 study by FCC revealed that more than half the radio stations then in operation were affiliated with one of the two networks, and they were the powerful stations. Of these stations, the most powerful were the eighteen owned by CBS and NBC. See, Donald M. Gillmor, Jerome A. Barron, Todd f. Simon, Harbert A. Terry, "Fundamentals of Mass Communication Law," West Publishing Company, 1996, at p. 259.

⁶⁵⁵ See, Nicole Serratore, "How Do You Say 'Big Media' in Spanish? Spanish-Language Media Regulation and the Implications of the Univision-Hispanic Broadcasting Merger on the Public Interest," *Fordham Intellectual Property, Media and Entertainment Law Journal*, Autumn 2004, Note, 15 *Fordham Intell. Prop. Media & Ent. L.J.* 203, at p. 208, FN 12.

⁶⁵⁶ See, Nicole Serratore, "How Do You Say 'Big Media' in Spanish?["]. See, also, FCC, Notice of Proposed Rule Making, Review of the Commission's Regulations Governing Broadcast Television Advertising, June 14, 1995, at para. 5.

⁶⁵⁷ See, Nicole Serratore, "How Do You Say 'Big Media' in Spanish?["], at FN. 12. See, also, National Association of Broadcasters Legal Guide for FCC Broadcast Regulations, [NAB Legal Guide] Second Edition, Update – August 1984, NAB Legal Guide, at p. V-15.

⁶⁵⁸ See, Nicole Serratore, *ibidem*, at p. 208. See, also, Thomas G. Krattenmaker, Lucas A. Powe, "Regulating Broadcast Programming," AEI Press 1994, at p. 182; NAB Legal Guide, at p. V-14 to V-16. See, further, Frank J. Kahn, ed., "Documents of American Broadcasting," *ibidem*, at p. 99-102, and at p. 104 et seq. See, also, Barton Carter, Marc A. Franklin, Jay B. Wright, *ibidem*, at p. 679.

⁶⁵⁹ See, Nicole Serratore, *ibidem*, at p. 208.

⁶⁶⁰ See, Nicole Serratore, *ibidem*, at p. 208, quoting *NBC v. U.S.*, 319 U.S. 190, 219 (1943).

⁶⁶¹ See, Nicole Serratore, *ibidem*, at p. 208, referring to *NBC v. U.S.*, 319 U.S. 190, 219 (1943).

The FCC's "public interest" standard of review is however not identical to the "substantially lessening of competition" test of the DOJ⁶⁶². The FCC standard is broader because it includes the goals of the 1996 Communications Act, such as deregulation, designed to open all telecommunications markets to competition, the universal service, the deployment of new advanced services, the preservation of quality services, and the diversity of broadcast programming⁶⁶³. Mainly, the FCC reviews the effects of the proposed transaction on the diversity of voices and economic competition in a given market so as to serve "the public interest, convenience and necessity".⁶⁶⁴ This standard of review encompasses thus non-economic factors, such as media diversity. Nonetheless, it is inevitable that this standard relies on antitrust tools in order to evaluate non-economic factors that are essential to the initial phase of the proper assessment of the media diversity on the market.

Thus, despite the broad public interest standard, antitrust influences the FCC's review. One may easily notice that even the language of the Telecommunications Act cannot avoid becoming about antitrust. The Preamble of the Telecommunications Act of 1996 states that it was designed "to promote competition and to reduce regulation in

⁶⁶² Calvin S. Goldman, Ilene Knable Gotts, Michael E. Piaskoski, "The Role of Efficiencies in Telecommunications Merger Review," *Federal Communications Law Journal*, Vol. 56, 2003. See, "20th Annual Institute on Telecommunications. Policy & Regulation," Co-Chairs Richard E. Wiley, Henry M. Rivera, R. Clark Wadlow, Practising Law Institute, 2002, at p. 235.

⁶⁶³ For instance, it must "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." Section 521 (4) of the Communications Act. See, Gilles Le Blanc & Howard Shelanski, "Merger Control and Remedies Policy in Telecommunications Mergers in the E.U. and U.S.," 2002, available at: <http://www.sceco.univ-montp1.fr/laser/Conferences/TPRCTelecomMergers.pdf>. See, also, FCC 2002 Biennial Regulatory Review, Report, released on March 14, 2003, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-342A1.pdf.

⁶⁶⁴ See, for instance, among others that will be discussed here, Memorandum Opinion and Order, 2001, In the Matter of the Applications of UTV of San Francisco, Inc., KCOP Television, Inc. UTV of San Antonio, Inc., Oregon Television, Inc., UTV of Baltimore, Inc., WWOR-TV, Inc., and UTV of Orlando, Inc. and United Television, Inc. (Assignors) and Fox Television Stations, Inc. (Assignee) For Consent to the Assignment of Licenses for Stations (hereinafter "Subsidiaries of Chris-Craft Industries/Fox Television"). Following the transaction, ten television broadcast licenses were assigned to Fox Television.

order to secure lower prices and higher quality services for the American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.⁶⁶⁵ The House Conference Report explained that the purpose of the Act was “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services ... by opening all telecommunications markets to competition.”⁶⁶⁶ Thus, the FCC’s review encompasses considerations normally relegated to antitrust law, such as promoting competition, securing lower prices and higher quality services.

In addition to the overlap with antitrust law, a specific commandment of the Telecommunications Act is the guarantee of diversity and competition among media voices. The Supreme Court accentuated the FCC’s mission in accordance with the 1996 Telecommunications Act to promote diversity and competition among media companies and has concluded that the FCC’s interest in “promoting widespread dissemination of information from a multiplicity of sources is an important governmental interest.”⁶⁶⁷ The FCC’s regulatory supervision of the media industry seeks to promote the First Amendment interests of the consumers⁶⁶⁸. Since the First Amendment “rests on the

⁶⁶⁵ Interestingly enough, the Communications Act of 1934 says nothing about competition. “Congress, rightly or wrongly (probably wrongly), believed that competition in radio was impossible because it was impossible to have competitive markets in spectrum and that competition in telephony was impossible because there was only one phone company.” See, Thomas G. Krattenmaker, “The True Believers: Some Thoughts on Competition, Regulation, the FTC and the FCC,” Prepared for Symposium on the FTC’s 90th Anniversary, available online at: <http://www.ftc.gov/ftc/history/docs/040916krattenmaker.pdf>.

⁶⁶⁶ See Peter W. Huber, Michael K. Kellogg and John Thorne, “Federal Telecommunication Law,” 1999, Aspen Law & Business, at p. 16.

⁶⁶⁷ See, *Turner Broadcasting System, Inc. v. Federal Communications Commission* 512 U.S. 622 (1994).

⁶⁶⁸ This was stated in various FCC regulatory instruments, such as FCC 2002 Biennial Regulatory Review (“2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996”), Report released on March 14, 2003, para. 13, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-342A1.pdf.

assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,”⁶⁶⁹ diversity can be achieved through rules that “encourage diversity in the ownership of broadcast stations, so as to foster a diversity of viewpoints in the material presented over the airwaves.”⁶⁷⁰

We have seen thus how the Telecommunications Act commissioned the FCC with protecting media diversity under the public interest standard. We turn now to the concrete means that the Commission employs in order to achieve this goal. Procedurally, the FCC traditionally requires the applicants to bear the burden of proving that the proposed transfer will advance the public interest. After a merger application has been filed with the FCC, it is placed on public notice so that the interested parties may comment on the merits of the proposed merger. After receiving comments and reply comments, the FCC will issue an order explaining its reasons for either approving or denying the application⁶⁷¹.

A very important democratic consequence follows from the procedural aspects involved in the FCC review: the process of review involves a great deal of public participation and is very transparent⁶⁷². The FCC must thoroughly reason its decision and it must respond to petitions to deny filed by members of the public that raise “specific

⁶⁶⁹ See, FCC 2002 Biennial Review, para. 19.

⁶⁷⁰ Review of the Commission’s Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, August 1999, para. 17, available online at: http://www.fcc.gov/Bureaus/Mass_Media/Orders/1999/fcc99209.pdf.

⁶⁷¹ See, “20th Annual Institute on Telecommunications. Policy & Regulation,” *ibidem*, at p. 230.

⁶⁷² The merger review goes through the same process as the other FCC decision-making processes. See, “About the FCC: A Consumer Guide to Our Organization, Functions and Procedures,” a FCC Consumer & Governmental Affairs Bureau Publication.

allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest.⁶⁷³”

In conducting its public interest inquiry, the FCC traditionally examines two main questions: (1) whether the proposed transaction would violate the Communications Act or any other statutory or regulatory rules and their implementation, including the FCC rules, and (2) whether the proposed transaction would lead to affirmative public interest benefits⁶⁷⁴. It is important to note here, before going into more in depth analysis, that precisely because the FCC’s review is based on broader considerations than the DOJ’s, one of the differences among the manner of review performed by these agencies is that while the DOJ reviews only the large mergers⁶⁷⁵, the FCC reviews all media mergers regardless of their size. This aspect recognizes that even a merger of media companies holding a small market share might have an impact on media diversity.

The FCC’s merger analysis involves a series of steps similar to antitrust review: the definition of relevant product markets, the definition of relevant geographic markets, identification of the most significant market participants, evaluation of the potential effect on competition, including an assessment of how the proposed merger or acquisition will affect the two distinct customer groups recognized by the agency – residential and small

⁶⁷³ Memorandum Opinion and Order, April 9, 2002. In the Matter of Telemundo Communications Group, Inc. (Transferor) and TN Acquisition Corp. (Transferee) For Consent to the Transfer of Control of... (hereinafter “Telemundo/ TN”).

⁶⁷⁴ The FCC’s landmark 1997 order approving the merger of Bell Atlantic and NYNEX set the analytical framework through which the agency has judged proposed mergers. Under this standard, parties seeking Commission approval of a transaction must demonstrate that, on balance, all harms to competition that the merged entity poses are outweighed by the transaction’s pro-competitive effects. In addition, applicants are required to show that a proposed merger or acquisition will not eliminate the potentially significant sources of competition that the 1996 Act sought to create. See, Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, MO&O approving the merger, FCC 97-286 (1997).

⁶⁷⁵ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 414 (3d Cir. 2004) (noting that the DOJ and FTC require notice of a merger only if “the transaction exceeds \$200 million or if the assets of one party exceed \$10 million and the assets of the other party exceed \$100 million”).

business (“mass market”) and medium-sized and large business customers (“larger business market”) and identification of any public interest benefits/efficiencies that enhance competition and therefore outweigh any anticompetitive effects⁶⁷⁶. I concentrate in the following lines on the unfolding of these theoretical steps in the FCC’s practice.

II. 5. 3. Antitrust and regulation as applied

II. 5. 3. 1. Preliminary observations

I analyze here some of the mergers’ notifications that have come in front of the Commission. I find that the Commission generally approved the mergers based on antitrust principles and methods. While the FCC is concerned with media diversity and this concern appears as a factor when deciding whether to approve or not a merger, there is little in the cases that I analysed that show that media diversity substantially makes any difference. This is evidenced by the fact that the mergers were generally approved in spite of growing consolidation on the market.

Thus, the FCC performs an antitrust review before going into the public interest standard. This sets the stage for the analysis under the public interest test. When reviewing a merger proposal, however, the FCC conducts its own market analysis and it does not necessarily follow the market analysis performed by the DOJ. Further, as mentioned above, the FCC review, although it does take into consideration antitrust law principles, it is not governed by the scope of the antitrust laws⁶⁷⁷.

⁶⁷⁶ See, “19th Annual Institute on Telecommunications. Policy & Regulation,” *Ibidem*, at p. 137. See, Calvin S. Goldman, Q.C., Ilene Knable Gotts, and Michael E. Piaskoski, “The Role of Efficiencies in Telecommunications Merger Review,” *Federal Communications Law Journal*, vol. 56, 2003, available at: <http://www.law.indiana.edu/fclj/pubs/v56/no1/gotts.pdf>.

⁶⁷⁷ See, Peter W. Huber et al., *Federal Telecommunications Law*, second edition, 1999 and the 2003 Supplement, p. 624, citing *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) – where one radio

I proceed now to show how the FCC decided on several issues that might impact media diversity. First, I analyze the market definition in Commission's case law. I second show how FCC treated vertical integration in media markets. It is clear in this sense that what appears true for the other industries – that vertical integration is less harmful for market competition and more beneficial for consumer welfare – is true for the media industry as well. However, from a media diversity point of view, the fact remains that even in vertical integration cases, the synergy of content production and distribution facilities leads to less media diversity. I further look into other possible threats to media diversity, such as the potential threat of exceeding the statutory ownership limits.

My conclusion is that the FCC does not really consider media diversity when allowing a merger to proceed. In its review of media mergers, the FCC behaves more like an antitrust agency than a media regulator. This is mostly supported by the finding that in most cases the attachment of conditions to the merger agreement solves all the potential anticompetitive concerns. Thus, from the one side, the FCC does not seriously consider in its media mergers' reviews the concept of media diversity and from the other side, even the possible threats to media diversity are dismissed or alleviated by commitments or conditions that the parties agree to attach to their agreement to form the joint venture. I argue that this situation is the result of precisely too much antitrust in the FCC's review. If the Commission gets concerned only with the economics, it may forget about the profound democratic implications of media diversity. By relying so heavily on antitrust, the FCC is failing to live up to its public interest mandate.

company challenged the granting of broadcasting authorizations that would have duplicated its own transmissions on reasons of decrease in competition on the radio and cable market. The Supreme Court decided that it is at the FCC's discretion to conclude, within the confines of the Communications Act's commandments, what competition really means within the broadcasting industry.

II. 5. 3. 2. Market definition

Although the FCC's review is wider than pure antitrust evaluations,⁶⁷⁸ it borrows heavily from antitrust. The most important part of the FCC review that borrows from antitrust is the market definition. This can hardly be different considering that the relevant market may be defined only in relation to the interchangeability/substitutability factor, a basic antitrust tool⁶⁷⁹. The relevant media market is defined, according to traditional antitrust theory, as including the product in question and all the other products that based on their use and price may be considered by consumers as interchangeable with the product in question.⁶⁸⁰

Although the first step in FCC review, media market definition has profound implications for media diversity since it allows the Commission not only to perform its analysis on a narrowly circumscribed market, but also to positively distinguish between

⁶⁷⁸ The antitrust law is not enough to deal with anti-competitive effects: "our determination of the competitive effects of the proposed transaction under the public interest standard is not limited by traditional antitrust principles." Memorandum Opinion and Order, December 19, 2003, In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control, MB Docket No. 03-124 (hereinafter "GM").

⁶⁷⁹ The relevant product market is defined by the DOJ Horizontal Merger Guidelines by applying the "small but significant and nontransitory" increase in price by a hypothetical monopolist test. Thus, the product market is comprised by the products that consumers see as substitutable to the product in question, whose price may be increased by the producer. If they are enough products on the market with similar and substitutable characteristics so that the consumers could shift to them in case one producer or distributor increases the price, then that product market is considered not to be concentrated. Interestingly and judiciously in the same time, when it comes to the products' substitutability, several factors are taken into account, such as even the manner in which a certain brand was established as extremely credible in consumers' view (and then only that brand or brands that achieved the same level of credibility and exposure will make up a relevant product market). The relevant geographical market is defined again from the perspective of the consumers' possibility to shift to other products in case one product becomes more expensive, however this time taking into account the availability of that product on a certain territory. Thus, if the consumers have to travel a long way to get a substitutable product, then that product will not be part of the relevant geographic market. See, the DOJ Horizontal Guidelines, adopted in 1992 and revised in 1997.

⁶⁸⁰ The relevant product market may also have sub-markets, which for antitrust analysis, serve as relevant product markets on their own. See, in this sense, *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962).

content and means of transmission⁶⁸¹, which in turn offers a more pluralistic picture of the media markets as a whole. I briefly point to the manner in which FCC defines the relevant media market – and its implications for a certain understanding of media diversity both as diversity of means of transmission and diversity of content - and second I discuss one of the most important relevant media market definitions (or “non-definitions”) – the minority language media market.

Diverse media is a media diverse in both content and means of transmission. Content and transmission means are thus the two main factors that differentiate markets. The content based market definition focuses on the content that the subscribers might consider so attractive or important to their needs that they are willing to change distributors in order to get access to this content.⁶⁸² There is therefore a special market for premium programming, a market for the national and non-sports regional cable programming networks, the regional sports cable networks, and the local broadcast television programming.

Defining the market for attractive programming as a separate product market is an important distinction that permits the FCC to evaluate the concentration on the markets that are especially attractive for both advertisers and the audience⁶⁸³. In turn, from a means of transmission perspective, broadcasting, cable and satellite represent specific and distinct markets, although this distinction is criticized⁶⁸⁴.

⁶⁸¹ See, Bruce Owen, “Economics and Freedom of Expression: Media Structure and the First Amendment” (1975), quoted in Baker, “Media Concentration and Democracy,” at p. 61.

⁶⁸² See, the GM case.

⁶⁸³ A media market defined on types of content (and not content in general, i.e., newspapers/radio/television/internet), i.e. content targeting specific consumers’ interests helps better protect media diversity. See, C.E. Baker, “Media Concentration and Democracy,” *ibidem*, at p. 64.

⁶⁸⁴ Commissioner Copps in the GM case criticizes the manner of distinguishing between markets, so as the broadcast television outlets are considered as not competing in the same market as cable and DBS. This in turn allowed the majority in the GM case to avoid tackling the issue of horizontal media concentration that

The FCC's markets' division is similar to the DOJ's that "traditionally defined the market for mass media transactions by type of media."⁶⁸⁵ These markets may be further distinguished in sub-markets.⁶⁸⁶ This narrow definition of the product markets contributes to the protection of media diversity in two ways. Various means of transmission are taken into account when assessing whether there is enough media diversity, giving thus life to the concept of media diversity as diversity of means of transmission (in addition to diversity of content)⁶⁸⁷. Also, this narrow definition allows the FCC to evaluate the media concentration on smaller markets, which may lead to an easier finding of anti-competitive effects.

Until now, we have looked into two important elements in the FCC's review that may contribute to the protection of media diversity. Distinguishing between the market for content and the market for means of transmission recognizes the importance of ensuring that enough competitors are on both of these markets. Further, differentiating within these two broad markets – content and distribution – other smaller sub-markets

would arise out of the merger between broadcasting outlets, cable and DBS (which serve in Commissioner Copps' view the same market). See, Commissioner Copps' dissent in the GM case. The majority in the GM case treated this issue not as a horizontal integration, but as a vertical integration, which it addressed via its conditions attached to the transaction. See, para. 75 of the GM case.

⁶⁸⁵ Catherine J.K. Sandoval, "Antitrust language barriers: First Amendment constraints on defining an antitrust market by a broadcast's language, and its implications for audiences, competition, and democracy," *Federal Communications Law Journal*, June 2008, available online at: http://www.entrepreneur.com/tradejournals/article/182405956_1.html. Sandoval, at p. 408.

⁶⁸⁶ The cable geographic markets are: "1) markets not served by any cable system, 2) markets served by low capacity cable systems; and 3) markets served by high capacity cable systems." See at para. 22 of Memorandum Opinion and Order, October 11, 2005, In the Matter of Rainbow DBS Company LLC, Assignor and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and related Special Temporary Authorization, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-177A1.pdf ("Rainbow/Echostar"). The Commission found that the purchasing of the station by EchoStar would increase the competition on the second and the third markets, and it would "provide a higher quality product" in the third market. See, Rainbow/Echostar, at para. 26.

⁶⁸⁷ See, Baker, "Media Concentration and Democracy. Why Ownership Matters," *ibidem*, at p. 60 et seq. on how in order to assess the media concentration's effects on media diversity, one should not consider its effects on the media market as a whole, however on the distinct markets of "content delivery" on the one hand and "content creation" on the other. See, *ibidem*, at p. 61.

conducts to an easier finding of anti-competitive effects. We turn now to one of the most important facets of media market definition, the aspect of the market for minorities' language media. The approval of the merger⁶⁸⁸ of the Spanish language television Univision with the radio assets of the Hispanic Broadcasting Corporation was taken in disregard of the FCC's commitment to diversity and protection from market monopoly. As the FCC did not use language as a criterion for the relevant market definition in that case, I believe that the decision is flawed⁶⁸⁹.

In the above mentioned decision, the FCC argued that Spanish language programming does not constitute a separate media market⁶⁹⁰. The product markets are not defined based on programming format or language. This conclusion raised concerns for diversity in the foreign language media market – it basically disregarded the existence of the need for minorities' media. If one would acknowledge the existence of a Spanish media market, then the mergers on that market would be evaluated based on their impact on that specific market, and thus it would be less likely for concentration to occur. In contrast, when one analyzes the merger's impact on a broader market which does not differentiate itself based on language, then the impact on diversity of opinions is smaller – since the market is bigger. The narrower one defines the market, the less potential for harm on media diversity. This is, I believe, one of the most efficient tools FCC may borrow from pure antitrust review, but in this case the FCC missed the opportunity to narrowly define the market.

⁶⁸⁸ Hispanic Broadcasting Corporation / Univision Communication, FCC 03-218 (2003). <http://www.fcc.gov/transaction/univision-hbc.html> (hereinafter "Hispanic Broadcasting"). The merger was the result of assets transfer (generally the mergers may be the result of either assets or shares transfer).

⁶⁸⁹ "Had the FCC acknowledged that language plays a part in the diversification of voices in media ownership, the merger decision would have been different. The adverse consequences of the FCC's failure will only become more apparent as America's Hispanic population grows. The FCC cannot ignore that this population will be severely impacted by the merger." See, N. Serratore, *ibidem*.

⁶⁹⁰ See, Hispanic Broadcasting.

The relevant product market definition was essential in this case. By defining the relevant market as being broader than the Spanish language programming market, the FCC ignored competition concerns that a narrower market definition would have entailed. For instance, both Hispanic Broadcasting and Univision were the largest Spanish language programming stations – cable and radio, respectively - and thus the creation of a new company through their merger consolidated the market⁶⁹¹. The main threat of such merger is also denying access to competitors or increasing advertising prices. “When a company is trying to reach and inform the Spanish speaking community in the U.S. about its product, even a media product, if it is denied access to dominant media outlets it may be placed at a significant competitive disadvantage⁶⁹².” This merger had the potential to lead to this type of competitive disadvantage, but the definition of the product market allowed the FCC to avoid dealing with such concerns.

A narrower definition of the product market would have allowed the Commission to address these anti-competitive effects. It would not have been far-fetched for the FCC to consider the Spanish language market to be a separate market. Foreign language media regulation is a distinct aspect of the FCC’s general regulation policy,⁶⁹³ and the FCC considers language as a determining aspect in defining the relevant market⁶⁹⁴. For

⁶⁹¹ “The newly created entity has upwards of 80% of the audience and 70% of the advertising revenue of Spanish language media in the U.S.” See, Charles B. Goldfarb, “Spanish Language Media After the Univision-Hispanic Broadcasting Merger: Brief Overview,” CRS Report for Congress, available online at: https://www.policyarchive.org/bitstream/handle/10207/3807/RS21645_20031020.pdf?sequence=1.

⁶⁹² See, Charles B. Goldfarb, “Spanish Language Media[.],” at p. 6.

⁶⁹³ See, Nicole Serratore, *ibidem*. The Latino population is one third of California’s population, while “the number of radio outlets, commercial and noncommercial that are owned or controlled by Mexican-Americans in California is less than 0.10%.” See, Comments of Ms. Delia Saldivar, FCC Broadcast Localism Hearing, Monterey, California, July 21, 2004, available online at: http://www.fcc.gov/localism/072104_docs/saldivar_statement.pdf. The Comments make reference to the existence of ethnic community specific social and cultural concerns that would be better promoted by minority owned media.

⁶⁹⁴ See, for instance, N. Serratore, *ibidem*, at p. 215.

instance, language significantly affects market advertising and competition⁶⁹⁵. Further, precisely because the Spanish language media faces different marketplace challenges and conditions than English language media⁶⁹⁶ it benefited from waivers under the network representation rule.⁶⁹⁷

Although the Commission had recognized language as a determinative factor for the community's needs and interests⁶⁹⁸, the FCC has consistently denied the language factor when it considers mergers decisions. As it did in the Univision decision discussed above, the Commission did not define the distinct markets based on language in the Spanish Radio Network decision⁶⁹⁹. Nevertheless, the FCC did not bluntly reject language as a factor of consideration. Rather, it stated that in order to make this move the

⁶⁹⁵ Telemundo Commun. Group, Inc., 17 F.C.C.R. 6958 (2002). In this case the Commission found that the Spanish language stations did not compete directly with the English language station NBC since it had distinct programming and a different audience.

⁶⁹⁶ See, Nicole Serratore, *ibidem*.

⁶⁹⁷ The network representation rule bars affiliates "from being represented by their network in the non-network (spot) advertising sales market." See, Section 73.658(i) of the Commission's Rules, 47 C.F.R. § 73.658(i), quoted in Serratore, at p. 223. The justification for this measure resided in the desire to protect the network affiliates from the networks' involvement in the advertising representation firms who were setting the advertising rates in the spot sales market. See, for instance, in *In the matter of Azteca International Corporation (Azteca America) Petition for Waiver of Section 73.658(i) of the Commission's Rules*, DA 03 -1783, available online at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-03-1783A1.pdf. (Azteca)

⁶⁹⁸ "The record evidence in this proceeding shows that the waivers [from the network representation rule, see *infra*] granted to both Univision and Telemundo continue to provide additional benefits in that they further several of the Commission's longstanding goals: encouraging the growth and development of new networks; fostering foreign-language programming; increasing programming diversity; strengthening competition among stations." Univision and Telemundo were granted temporary waivers of the rule in 1978 and 1987, respectively. See, Waiver Order, 5 FCC Rcd, quoted in Azteca, DA 03 -1783, at FN 10. See, also, for local market agreements in which the "brokered station" sells broadcasting time to the "brokering station" for foreign language programming, Michael E. Lewyn, "When is Time Brokerage a Transfer of Control? The FCC's Regulation of Local Marketing Agreements and the Need for Rulemaking," 1995, 6 Fordham Intell. Prop. Media & Ent. L.J. 1.

⁶⁹⁹ See, Spanish Radio Network, Memorandum Opinion and Order, Report No. MM 95-80 (1995), Spanish Radio Network available online at: http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/nrmm5092.txt. ("Spanish Radio Network") The FCC approved the transfer of control of six radio stations to Heftel Broadcasting Corporation and stated that: "evaluation of the stations' combined audience share for local ownership rule compliance purposes based on the language spoken on the stations was inconsistent with the language and intent of the local ownership rule [the petitioners contended that the combined audience share of the Spanish language stations superseded the 25% limit]." *Ibidem*.

rules should first be changed: “Although Spanish speakers may be perceived by those seeking to reach them as a distinct market, the multiple ownership rules are not geared toward such a market definition.”⁷⁰⁰

Concern over concentration in the Spanish language media market stems from the existence of a difference between Spanish language programming and English language programming,⁷⁰¹ an important difference that the Commission recognized. For example, the petitioners in Telemundo/TN⁷⁰² feared that the endeavor to make Telemundo a more effective competitor to its chief Spanish language programming rival, Univision, would be at the expense of programming dilution by limiting programming sources. The Commission, however, accepted the parties’ argument that the merger will enhance programming diversity by meeting the needs of the Spanish – speaking population, NBC having pledged to continue the Spanish-language programming at the Telemundo Stations⁷⁰³.

The foregoing cases have shown how the FCC’s market definition may have drastic effects on media concentration. The purpose of discussing them was mainly to show the differentiation between the market for content and the market for means of transmission. By differentiating between the two, the FCC has more, and narrower, markets in which to analyze the mergers, and thus, is more likely to halt mergers which have anticompetitive effects and/or effects on media diversity. However, even with a review performed on narrow markets, the FCC still cleared these mergers. Even when not

⁷⁰⁰ See, Spanish Radio Network, *ibidem*.

⁷⁰¹ “For example, Spanish-language news emphasizes issues of importance to the Latino community and contains far more information about Latin America than is found on English-language newscasts”. See, Catherine J.K. Sandoval, *ibidem*.

⁷⁰² Telemundo/ TN.

⁷⁰³ Telemundo/ TN.

narrowing down markets, the result was the same since the FCC failed to differentiate the markets based on language and allowed concentration on the Spanish media market.

Although paradoxical, these results are the consequences of two factors: heavy reliance on economic analysis in disregard of other, non-economic concerns and the solution to counteract any anti-competitive concerns with the help of a list of commitments that the parties to a merger agree to in order to have their merger cleared by the agency. These results may also offer a lot to the advocates for the FCC's disappearance⁷⁰⁴ since it appears that the FCC does not act any differently than an antitrust agency. However, I argue that the FCC may instead focus its review on the public interest standard and stop mergers that affect the level of media diversity on the market.

II. 5. 3. 3. Vertical integration

Mergers may occur either between media companies involved in the same type of media business (horizontal integration leading to horizontal mergers⁷⁰⁵), between media companies involved in different types of media business (vertical integration leading to vertical mergers), or between media companies and other non-media business types (very similar to vertical mergers). All these mergers may pose a potential threat to media diversity. I chose here to use an economics/antitrust concept – the concept of media

⁷⁰⁴ See, Jack Shafer, "New Wave. The case for killing the FCC and selling off spectrum," Jan. 17, 2007, <http://www.slate.com/id/2157734>. Shafer refers to Peter Huber, "Law and disorder in cyberspace : abolish the FCC and let common law rule the telecosm," Oxford University Press, 1997. Huber in turn argues that many regulatory policies are unjustified. For example, referring to cable's must carry provisions, Huber affirms that they in fact perpetuated scarcity because they forced cable networks to carry programming that was already carried over the air. See, P. Huber, *ibidem*, at p. 149. See, also, *ibidem*, at p. 58 on how cable made the scarcity rationale obsolete.

⁷⁰⁵ See, the creation of AT&T Comcast, merging two of the largest cable operators in the United States. In the matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No. 02-70. November 13, 2002.

market competition - as a proxy to media diversity. Thus, for ease of analysis here, I use media diversity interchangeably with media market competition since it better fits within the larger FCC treatment of the media mergers, although I do not accept that the antitrust concept is equal to the democratic concept of the media diversity.

Vertical integration is, generally, in comparison to horizontal integration, less harmful to the public interest because of the efficiencies that it brings. However, in the media market it may still endanger media diversity. I discuss in the following how the Commission dealt with vertical integration and the extent to which it touched on marginal, regulatory concerns⁷⁰⁶, independent of pure antitrust issues. I find that here, as elsewhere, the FCC did little more than pure antitrust analysis without considering media diversity. However, the application of pure antitrust principles managed to reach some of the desirable consequences for media diversity protection.

Vertical concentration's⁷⁰⁷ potential harms to competition in general are foreclosure, discriminatory access⁷⁰⁸ to distribution networks,⁷⁰⁹ leveraging⁷¹⁰ and

⁷⁰⁶ Throughout this paper, regulation refers to regulatory instruments that would be found in statutes or regulations and that would deal specifically with the media market (including with the protection of media diversity) while antitrust refers to the general antitrust norms applicable to all markets and industries.

⁷⁰⁷ Or integration.

⁷⁰⁸ See, Memorandum Opinion and Order, January 11, 2001, In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, CS Docket No. 00-30 (hereinafter "Time Warner").

⁷⁰⁹ See, for instance, Time Warner.

⁷¹⁰ The combined company would have the potential to leverage power in broadband distribution and Internet access to increase its power over broadband content and vice versa. See, Time Warner. See, AOL/Time Warner Order, Comments of SBC Communications. The commenting parties argued that the merger reminds of the past cable companies that combined distribution and content to maintain control over both of these markets. The problem was even more complicated due to the existing links between the group of AT&T, TCI and MediaOne and the team of Time Warner/AOL as well as due to their common interests in Excite@Home and Road Runner. These connections would, according to the commenting parties, increase the risk of collaborative and exclusionary conduct.

strengthening of dominant position⁷¹¹ especially when prior to the transaction the parties already held a strong market position.⁷¹²

Many transactions notified to the Commission would have resulted in vertically integrated content/distribution platforms. These transactions could harm media diversity by foreclosing access to competitors that produce content. Content producing company acquires a national distribution platform, for which it provides content. As a result, the content supplier would become a competitor in the distribution market and this in turn might lead to an increase in its incentive to use anticompetitive practices in the form of foreclosure bargaining strategies with certain content producers⁷¹³. Such was the case for instance with the AOL/Time Warner merger⁷¹⁴ combining Time Warner' ownership⁷¹⁵ in content and cable with AOL's Internet network⁷¹⁶.

The vertical mergers create an opportunity to save costs and to efficiently promote advertising across multiple media formats. There are however many downsides of this type of combination for a media diversity. As to the impact on the other competitors on the markets, it may push out smaller, independent media that lack the advantages of

⁷¹¹ Furthermore, AOL Time Warner and AT&T could coordinate their market behavior. See, Time Warner.

⁷¹² See paragraph 13 of the Time Warner case.

⁷¹³ News Corp was to acquire a de facto controlling interest over Hughes, which includes DirecTV - the second largest multi video programming distributor in the market after Comcast Corp, and holder of a national distribution platform. News Corp was also the content supplier to DirecTV. See, GM case. However, see for instance that the FCC "declined to approve the transfer of licenses from EchoStar Communications Corporation and Hughes Electronics Corporation, a subsidiary of General Motors Corporation, to a new entity. EchoStar and Hughes both provide direct broadcast satellite (DBS) service via their Dish Network and DirecTV." The Commission "feared" the concentration in the industry. See, "FCC Declines to Approve EchoStar DirectTV Merger" <http://www.techlawjournal.com/topstories/2002/20021010.asp>.

⁷¹⁴ Time Warner. The main license to be transferred to the newly formed AOL Time Warner company was the cable television relay service (CARS). Proved unsuccessful, the merger failed and the two companies split in December 9, 2009. See, <http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-aolseparation>.

⁷¹⁵ See, Online News Hour, FTC Approves AOL / Time Warner Merger, 2000, http://www.pbs.org/newshour/media/media_watch/aoltime_12-14.html. See, also, Time Warner.

⁷¹⁶ Online News Hour, FTC Approves AOL / Time Warner Merger, 2000, http://www.pbs.org/newshour/media/media_watch/aoltime_12-14.html. See, also, Time Warner. At the time of this merger, AOL, the United State's largest Web provider, served 26 million customers. See, para. 75 of the AOL/Time Warner case.

economies of scale. From the point of view of content, it may promote homogenization of programming across disparate media outlets⁷¹⁷. As Lili Levi points out, “[t]he transaction may lead not so much toward investment in new, high quality programming as to the development of a series of captive outlets for the entities’ existing content.”⁷¹⁸ Further, “[t]he consolidated entity’s ability to prefer its own content may discourage independent investment in content production.”⁷¹⁹ Moreover, there is a link between media concentration and power inequality in society and economy that may ultimately silence weaker voices.⁷²⁰ Another link may exist between business interests of media owners and content.⁷²¹

A consequence of vertical mergers, both horizontal and vertical, is that they increase the market share of one of the participants to the merger. From this point of view, the influence or flat out control of one media company over the other or over the newly formed entity shades concern over their editorial independence and over the effect of that merger on media market competition and, ultimately, on media diversity.

From a corporate and antitrust perspective, the manner to deal with this type of situation is through shares attribution. Program supply relationships, such as network

⁷¹⁷ Memorandum Opinion and Order, May 3, 2000, In the Matter of the Applications of Shareholders of CBS Corporation, (Transferor) and Viacom, Inc., (Transferee) For Transfer of Control of CBS Corporation and Certain Subsidiaries, Licensees Of KCBS-TV, Los Angeles, CA, et al., File Nos. BTCCT-19991116ABA, et al.. (hereinafter “CBS/Viacom”). The case involves the granting consent to transfer of control of 20 broadcast television station, 162 broadcast radio stations, and other licenses and granting temporary waivers to permit parties come into compliance with multiple ownership, cross-ownership, and dual network rules after consummation of transaction. Ibidem.

⁷¹⁸ See, Levi, *ibidem*, at p. 597.

⁷¹⁹ See, Levi, *ibidem*, at p. 598.

⁷²⁰ See, Levi, *ibidem*, at 599. Levi cites Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain,” 74 N.Y.U. L. Rev. 354, 377-82 (1999). Ibidem.

⁷²¹ See, Levi, at p. 599. Levi cites C. Edwin Baker, “The Media That Citizens Need,” 147 U. Pa. L. Rev. 317, 362 (1998). Ibidem.

affiliation agreements lead to attribution only after they comply with the EDP standard⁷²². Due to its obvious influence on major decision-making over programming⁷²³ the manner of nomination of the members of the Board of Directors is an important factor in determining which company controls the other. For instance, in Telemundo/TN the directors' behaviour shows beyond doubt that NBC has the means to exercise influence over Paxson, and the latter company's shares were attributed to the former.⁷²⁴

Acknowledging this attribution serves a dual purpose for protecting media diversity: one, the real market shares of the company are calculated, which may lead to the company's overstepping the ownership restrictions imposed by the FCC, and two, the proposed merger's impact on media diversity is clearer. The new entity following the merger may be under the joint control of the two merging companies. However, if only one holds control, then the impact of the merger on media diversity needs to be more carefully scrutinized, since what the merger does is increasing the power on the market of one company, potentially diminishing content diversity and discriminating against competitors.

II. 5. 3. 4. Ways to circumvent ownership restrictions and media diversity concerns

This section discusses several methods through which the media mergers are concluded in spite of their potential anticompetitive and media diversity threatening

⁷²² Equity Debt Plus, see *infra*, FN 768.

⁷²³ In Telemundo/TN, according to an Investment Agreement between Paxson and NBC, NBC has an attributable interest in Paxson. The Commission did not accept that the right of approval for the annual operating budget of the Paxson corporation might lead to attributable interest. This is a "permissible method of affording a minority shareholder like NBC the means by which to protect its investment and does not create a problem under our attribution rules." See, Telemundo/TN. These control related aspects are essentially corporate law themes. Although corporate legal rules are of extreme importance to establish the level of control over media companies and to assess the possible interests involved, this is a topic in itself that deserves the attention of a full thesis.

⁷²⁴ Telemundo/TN.

effects. These methods are: commitments of the parties to the merger to divest some of their holdings, including temporary waivers in which this divestiture should take place and conditions not to employ anticompetitive practices, consumers' benefits or merger's efficiencies that outweigh the negative consequences of allowing the merger to go through and a finding of sufficient market competition. The purpose of the section is to show that by using (or overusing) antitrust instruments the FCC glosses over a real discussion of the implications that some of these mergers have on media diversity.

Ownership restrictions are a creation of administrative interpretation under the "public interest, convenience and necessity" standard⁷²⁵. The 1934 Communications Act did not contain such limits⁷²⁶. For instance, in a 1935 case, the FCC denied a license application "on the ground that the proposed service would add nothing new, different, or anything that would reflect a different point of view in the community."⁷²⁷ In the same case as well as in others⁷²⁸, the FCC observed that the corporative structure of the applicant would be the same as the station existing already on the relevant market and that "the two stations would not be engaged in actual or substantial competition with each other in the rendering of service"⁷²⁹. As Warner notices, "this policy was applied in a case where the stockholders of an applicant corporation were members of the same family who controlled a station in the same community"⁷³⁰. These rules did not automatically preclude the existence of more than one station in the same community,

⁷²⁵ See, Harry Warner, *ibidem*, part I, at p. 213.

⁷²⁶ See, Harry Warner, *ibidem*, part I, at p. 212.

⁷²⁷ See, Harry Warner, part I, at p. 213, referring to case *Re The Journal Co.*, 2 CC 180, 182 (1935). The author also quotes other cases, such as *Re East Texas Broadcasting Co. (KGKB) et al.*, 2 F.C.C. 40, 408 (1936).

⁷²⁸ See, Harry Warner, *ibidem*, part I, at p. 213, FN. 2 and p. 214, FN 4.

⁷²⁹ See, *Re Genesee Radio Corp.*, 5 F.C.C., 183, 186-187 (1938) cited in Harry Warner, *ibidem*, part I, at p. 214 (and FN. 4 and the cases cited therein).

⁷³⁰ See, *Re The Colonial Network Inc.*, 5 F.C.C. 654, 662 (1938), referenced in See, Harry Warner, *ibidem*, part I, at p. 214, FN. 5.

however the applicant needed to show that the new station would go beyond the “business interests of the applicant⁷³¹” and would be “for the benefit of the community, fulfilling a need which cannot otherwise be fulfilled⁷³².” This policy was later confirmed and incorporated in the “multiple ownership rule pertaining to television,⁷³³” spurred by the desire “to end [] concentration of ownership⁷³⁴” and re-affirmed in subsequent FCC decisions⁷³⁵. It is not the proper time and space here to look more into the history of the ownership rules⁷³⁶, however one may find that the FCC put a heavy emphasis on the media diversity as a focus in its licensing procedures, at least at the beginning of the Commission’s functioning⁷³⁷.

Media mergers may lead to firms exceeding ownership limits. If this happens, the FCC generally will grant the parties enough time to divest some of their business in order to comply with the aforementioned rules. Sometimes, the Commission is satisfied with these divestitures. For instance, following the merger of Subsidiaries of Chris-Craft Industries with Fox Television⁷³⁸, the aggregate national audience reach of Fox

⁷³¹ See, *Re Genesee Radio Corp.*, 5 F.C.C., 183, 186-187 (1938) cited in Harry Warner, *ibidem*, part I, at p. 214 (and FN. 4 and the cases cited therein).

⁷³² See, *Re Genesee Radio Corp.*, 5 F.C.C., 183, 186-187 (1938) cited in Harry Warner, *ibidem*, part I, at p. 214 (and FN. 4 and the cases cited therein).

⁷³³ The rule states: “no license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another station broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation.” See, section 3.35 of the FCC Rule and Regulations, in Harry Warner, *ibidem*, Part. I, at p. 215 (and FN. 9).

⁷³⁴ See, *Re Sioux Falls Broadcast Association, Inc. (KSOO)* (B-218, November 9, 1945), - FCC -, in Harry Warner, *ibidem*, Part. I, at p. 216 (and the cases quoted at FN 11).

⁷³⁵ Where the FCC affirms its belief in serving the public interest by “diversifying ownership and control.” *Re Finger Lakes Broadcasting System et al.* (B-253, September 18, 1946) – FCC – in Harry Warner, *ibidem*, Part I, at p. 217, FN 13 and the other cases therein.

⁷³⁶ See, also, the “equitable distribution of broadcasting facilities” – section 9 (b) of the Radio Act of 1927, in Harry Warner, *ibidem*, Part I, at p. 292 et seq.

⁷³⁷ It may be that this is what Professor Baker urged me to look for in our last conversation on the subject, although I would unfortunately never have the chance for follow up with him on this issue. I remain grateful however for the inspiration provided and for pointing me in the right direction.

⁷³⁸ Subsidiaries of Chris-Craft Industries/Fox Television.

Television Stations (FTS) would have been 40,91%⁷³⁹. The Commission granted the FTS a temporary waiver to reduce its national audience reach to its permissible 35.352%⁷⁴⁰ so as to comply with the national ownership cap⁷⁴¹. As to the local television ownership rule, this transaction⁷⁴² would have resulted in FTS owning two television stations in four designated market areas (DMAs) and thus in violation of another FCC ownership rule. In its 1999 Television Ownership Order⁷⁴³ the Commission allowed common ownership of two television stations in the same DMA⁷⁴⁴, if “eight independently owned and operating full-power commercial and noncommercial television stations would remain in the DMA post-merger and at least one of the two stations to be commonly owned was not ranked among the top four in the DMA”⁷⁴⁵.

Another case where divestiture saved the deal involved two giants in the cable industry: AT&T Corp., United States’ largest cable operator, with Multi Video Programming Distribution Services, Video Programming Networks, Internet Services,

⁷³⁹ Subsidiaries of Chris-Craft Industries/Fox Television.

⁷⁴⁰ Subsidiaries of Chris-Craft Industries/Fox Television.

⁷⁴¹ “Section 202 [of the Telecommunications Act] also directed the Commission to eliminate the numerical cap on the number of television stations a single entity can own or control nationally, and revised upward (from 25 percent to 35 percent) the national audience reach limitation for television stations. See, Section 202(c)(1) of the Telecommunications Act. See, the 1999 Television Report.

⁷⁴² Subsidiaries of Chris-Craft Industries/Fox Television.

⁷⁴³ Report and Order, 1999, In the Matter of Review of the Commission’s Regulations Governing Television Broadcasting, MM Docket No. 91-221, Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8, available online at: http://www.fcc.gov/Bureaus/Mass_Media/Orders/1999/fcc99209.pdf.

⁷⁴⁴ DMA (Designated Market Area) “is a television media market as designated by Nielsen Media Research. Each DMA typically is centered on a metropolitan area but includes surrounding counties. In a few cases, such as Salt Lake City, the DMA covers an entire state. There are 210 Nielsen TV DMAs in the U.S. covering the entire contiguous 48 states, Hawaii and portions of Alaska.” Kiran Duwadi, Scott Roberts, and Andrew Wise, Media Ownership Study Two. Ownership Structure and Robustness of Media, available online at: http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A3.pdf.

⁷⁴⁵ See, para. 59 of the 1999 Television Report. Further, according to the radio/television cross-ownership rule rule, a party may own 1 television station and up to 6 radio stations in any market where at least 20 independently owned media voices remain in the market after the proposed transaction. See, para. 92 of the 1999 Television Report. See, the Hispanic Broadcasting order.

and Comcast Corporation, the nation's third largest cable operator⁷⁴⁶. The new entity, AT&T Comcast, would have had (considering that AT&T held an important interest in the nation's second largest cable operator, TWE) an attributable ownership interest in cable systems serving approximately 38.34 million subscribers, or 41% of all nationwide cable subscribers⁷⁴⁷. As of the merger's closing, applicants committed themselves not to have any attributable interest in TWE⁷⁴⁸. The period of time for compliance with the ownership restrictions was extended afterwards indefinitely, due to a District Court's remand of the Commission's horizontal ownership rule⁷⁴⁹. In this period of time the Commission also imposed interim conditions⁷⁵⁰ in order to "mitigate the potential harm to the diversity of programming and competition during the compliance period."⁷⁵¹ One of the most important of these conditions "limits AT&T[s] involvement in the video programming activities of TWE and the programming networks in which the merged firm has ownership interests, including Liberty Media Group and Rainbow"⁷⁵².

⁷⁴⁶ Memorandum Opinion and Order, November 13, 2002, In the matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, Comcast Corporation/AT&T Corp.

⁷⁴⁷ See, AT&T/Comcast.

⁷⁴⁸ They would place TWE and any successor interests in a trust upon the merger's closing and they would fully divest themselves of any interest in TWE within five and a half years after the merger's closing. The company will in this manner fall within the Commission insulated limited partnership exemption according to which its interest in TWE's cable properties are nonattributable. Under this exemption, a limited partnership interest is not attributed to a partner that "is not materially involved, directly or indirectly, in the management or operation of the video-programming related activities of the partnership." See, Attribution Order, cited in Peter W. Huber, Michael K. Kellogg and John Thorne, "Federal Telecommunication Law," 2003 Cumulative Supplement, Aspen Law & Business, at p. 137. See, AT&T/Comcast.

⁷⁴⁹ See, *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (2001) (Time Warner II).

⁷⁵⁰ Peter W. Huber, Michael K. Kellogg and John Thorne, "Federal Telecommunication Law," 2003 Cumulative Supplement, Aspen Law & Business, at p. 138.

⁷⁵¹ See, AT&T/MediaOne Order.

⁷⁵² "FCC Grants Conditioned Approval of AT&T and MediaOne Merger; Divestitures Ordered for Compliance with FCC 30% Subscriber Cap." FCC Release, 5 June 2000, at: http://www.fcc.gov/Bureaus/Cable/News_Releases/2000/nrcb0015.html. For instance, no officer or director of AT&T is permitted to be an officer or director of TWE nor is an officer, director or employee of AT&T allowed to directly or indirectly influence or attempt to influence the management or operation of the video programming activities of TWE. See, AT&T/MediaOne Order, Appendix B.

This condition tackles the potential threat to media diversity resulting from vertical integration. The Commission concluded that, with these conditions, the merger was in the public interest because the potential public benefits outweighed the potential harms⁷⁵³.

Not all the time however are the companies willing to divest their businesses according to Commission's regulatory commandments. The AT&T/MediaOne merger failed because the market share of the new entity combining the two cable operators' market share would have violated the 30% national ownership restriction⁷⁵⁴ and the Commission was not satisfied with the divestitures made by AT&T, required to comply with the ownership restriction.

The FCC also granted a permanent waiver of the television/newspaper cross ownership rule to Rupert Murdoch in the New York market. In Subsidiaries of Chris-Craft Industries/Fox Television the Commission granted a 24 month waiver due to News Corp "commitment to preserving the Post as a media voice" considering the disadvantaged position that the Post has on the competitive market⁷⁵⁵. The Commission granted yet another waiver to National Broadcasting Company, which owns TN Acquisition Corporation and would have owned three stations in the Los Angeles television market, in order to comply with the duopoly rule⁷⁵⁶.

⁷⁵³ See, AT&T/MediaOne Order.

⁷⁵⁴ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, Memorandum Opinion and Order ("AT&T/MediaOne" Order), 2000. See, also, the Order for Reconsideration denying the approval of the merger, CS Docket No. 99-251, February 8, 2001. See, for a short description of "concentration of cable ownership," Debra J. Pearlstein et al, ed., *Antitrust Law Developments*, Fifth Ed., Chicago, Ill.: ABA Section of Antitrust Law, American Bar Association, 2002, at p. 1273.

⁷⁵⁵ Subsidiaries of Chris-Craft Industries/Fox Television.

⁷⁵⁶ See, Telemundo/ TN. The object of this transaction was eleven full power television stations and seventeen low power and television translator stations. The waiver is granted, for NBC to comply in 12 months with the duopoly rule.

Several aspects may lead the FCC to approve a merger that would otherwise pose threats to media diversity. Divestitures are one form of escape that the companies may rely on when they want their merger to pass through the regulatory gates of the FCC. Others are benefits to consumers resulting from the merger that outweigh the anticompetitive effects of the merger and if anything else fails, commitments attached to the transaction that the parties undertake in the merger agreement in order to tackle anticompetitive issues. The main point of this discussion is that the FCC tries its best to avoid the question of whether media diversity by itself may make or break a merger. Rather, the Commission instead resorts to technical argumentation and antitrust tools to uphold media mergers.

A merger is more likely to be approved if there is “robust competition” on the relevant media market. The market’s competitiveness is assessed by looking into the existence of multiple sources of news and information programming from broadcasters⁷⁵⁷ and from the print press,⁷⁵⁸ the presence and the competitive nature (expressed mainly in their number of subscribers) of the different means of transmission, as well as the market power of the companies and the concentration in the specific market.⁷⁵⁹ Under these circumstances, the FCC is more likely to approve a merger because the competition will alleviate potential effects on media diversity.

Benefits resulting from the transaction are another reason why certain media mergers are allowed to proceed. As in antitrust proceedings, benefits may play a role in the FCC review only when they are “transaction-specific,” that is only if they could not

⁷⁵⁷ In this respect, one notices that the DBS is not currently a source of local news or other local content. See, in GM case.

⁷⁵⁸ See, GM case.

⁷⁵⁹ See, GM case.

have been achieved without the transaction⁷⁶⁰. For instance, in the GM case, the benefit of increased diversity in both programming and employment was not considered a transaction-specific benefit, as DirecTV already had a commitment to diversity⁷⁶¹. Thus, the FCC avoided the question of the transaction's impact on diversity. Finally, the benefits that saved the transaction were the ones dealing with innovation and technological progress, ultimately ending in consumers' increased satisfaction⁷⁶². As such, the FCC yet again relied on antitrust benefits to allow the transaction and circumvented any real discussion of media diversity.

Most of the times however, the Commission is concerned with the lack of market competition, with the strong market power of the companies involved in a transaction and with the possibility that the consumers do not receive any of the transaction's benefits. This is when the parties' agreement, including conditions or commitments in order to comply with the public interest standard comes into play.

When reviewing a merger, the FCC can "attach conditions . . . in order to ensure that the public interest is served by the transaction"⁷⁶³. In theory at least, "unlike . . . the antitrust enforcement agencies, the [FCC]'s public interest authority enables it to impose and enforce" more stringent conditions⁷⁶⁴. This is because the DOJ's analysis "focuses solely on whether the effect of the proposed merger may substantially lessen competition, [whereas] the Communications Act requires the Commission to make an independent

⁷⁶⁰ The benefits must be merger specific: "It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction — i.e., harms and benefits that are "merger-specific." Time Warner, para. 6.

⁷⁶¹ See, the GM case.

⁷⁶² See, the GM case.

⁷⁶³ See, Time Warner, para. 25. Pursuant to sections 214(c) and 303(r) of the 1996 Telecommunications Act.

⁷⁶⁴ See, Time Warner, at para. 25. See, 20th Annual Institute on Telecommunications. Policy & Regulation, *ibidem*, at p. 237.

public interest determination”,⁷⁶⁵ part of which should be an evaluation of the impact on media diversity.⁷⁶⁶

In practice however, the FCC’s analysis sometimes becomes so inundated with antitrust principles that it either relies entirely on the documents agreed on by the parties with the antitrust agency, or parallels the latter’s reviewing process, or ultimately, reaches the same conclusion. No matter how much broader the public interest standard seems to be in theory, it is much narrower when applied (and almost a copy of the antitrust standard of review).

Thus, the FCC sometimes relies on the antitrust agencies’ input in a specific case that came previously in front of them and it considers that the FTC agreement mitigates most of the competition harms⁷⁶⁷. For instance, in the Hispanic Broadcasting case, the FCC was satisfied that the applicants already accepted in the DOJ’s Consent Decree to transform their shares and interests in two other companies so as they were not attributable for purposes of market share calculation⁷⁶⁸. The same happened with the

⁷⁶⁵ See, Time Warner, para. 21, citations omitted. See, Peter W. Huber, Michael K. Kellogg and John Thorne, “Federal Telecommunication Law,” 2003 Cumulative Supplement, Aspen Law & Business, at p. 126, citing SBC/Ameritech Order.

⁷⁶⁶ “Unlike the role of antitrust enforcement agencies, the Commission’s public interest authority enables it to rely upon its extensive telecommunications regulatory and enforcement experience to impose and enforce certain types of conditions that tip the balance and result in a merger yielding overall public interest benefits.” See, Peter W. Huber, Michael K. Kellogg and John Thorne, “Federal Telecommunication Law,” 2003 Cumulative Supplement, Aspen Law & Business, at p. 126, citing SBC/Ameritech Order. See the Order at: http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99279.html.

⁷⁶⁷ While relying on the agreement concluded by the parties as commanded by the FTC, the FCC added “conditions related to AOL Time Warner’s contracts and negotiations with unaffiliated ISPs” and in particular “a condition forbidding the merged firm from entering into contracts with AT&T that would give AOL exclusive carriage or preferential terms, conditions and prices.” See, Time Warner, at para. 18.

⁷⁶⁸ Hispanic Broadcasting. In Hispanic Broadcasting, the Clear Channel’s interest in HBC was not attributable to Clear Channel’s market share, either on basis of de jure or de facto control. “De jure control is to be assessed through the Equity/Debt Plus ([EDP]) attribution standard: when an investor either 1) supplies over 15% of a station’s weekly broadcast programming hours, or 2) if is a same-market media entity subject to the broadcast multiple ownership rule, its interest in the licensee or other media entity in that market will be attributable if that interest, aggregating both debt and equity, exceeds 33% of the total asset value of the licensee or media entity. Clear Channel did not exceed the thresholds. As to de facto control, Clear Channel’s rights to approve some fundamental actions were considered “permissible investor

carriage obligations in Time Warner.⁷⁶⁹ In AT&T, however, both the FCC and the DOJ imposed conditions before approving the deal in order to counteract the potential anticompetitive effects of the merger⁷⁷⁰.

A most natural consequence of too much reliance on antitrust is that most of the time, the FCC's reviews and conclusions are the same as the DOJ's. For instance in EchoStar Communications' application to merge with Hughes and DirecTV⁷⁷¹ the DOJ maintained that the merger would lead to a monopoly or duopoly (depending on the relevant market affected) by decreasing the number of multichannel video programming distributors (MVPDs)⁷⁷² from three to two. The FCC similarly concluded that the merger, if allowed, would lead to further concentration in the already highly concentrated MVPD market, and mirrored the DOJ's analysis that the transaction would lead to monopolies or duopolies in the many geographic markets⁷⁷³. The merger was conditionally approved despite these harmful effects on competition⁷⁷⁴.

protections that neither restrict a corporation's discretion nor rise to the level of attributable influence." See, in Hispanic Broadcasting. See, Hispanic Broadcasting. In 2007 Hispanic Broadcasting was transferred to Broadcasting Media Partners, Inc. See, MO&O, FCC 07-24 (2007), available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-24A1.pdf.

⁷⁶⁹ See, for the conditions accepted by the parties to comply with the FTC's requirements, Online News Hour, FTC Approves AOL / Time Warner Merger, 2000, http://www.pbs.org/newshour/media/media_watch/aoltime_12-14.html. See, also, Time Warner.

⁷⁷⁰ See, Time Warner, for instance at paras. 258, 261, 262, 263, 267, 268. "AT&T [wa]s required to divest its interest in Road Runner. AT&T was also required to obtain prior approval from the Department of Justice before entering into certain types of agreements with Time Warner or with AOL regarding cable modem or residential broadband service." See, Department of Justice Press Release, Justice Department Requires AT&T to Divest MediaOne's Interest in Road Runner Broadband Internet Access Service (2000).

⁷⁷¹ In the Matter of Application of Echostar Communications Corp., 17 F.C.C.R. 20559 (Oct. 18, 2002).

⁷⁷² Multichannel video programming distributors (MVPD) include programmes distributors, such as cable operators, satellite distributors. See, section 602 (13) of the 1996 Telecommunications Act.

⁷⁷³ See, Kenneth R. Logan, Arman Oruc and Chris Evans, Simpson Thacher & Bartlett LLP, "Antitrust Developments in the Media and Entertainment Industries," January 2004.

⁷⁷⁴ The Justice Department concluded that the FCC action "addresse[d] the Department's most significant concerns with the proposed transaction[]" and the FCC's action justified its decision to close its investigation. See, Press Release, US Dep't of Justice, Justice Department Will Not Challenge News Corp.'s Acquisition of Hughes Electronics Corp. (Dec. 19, 2003) (available at http://www.usdoj.gov/opa/pr/2003/December/03_at_714.htm), quoted in Philip J. Weiser, "FCC Reform

The attachment of conditions, or commitments, was the most common practice in the FCC decisions that I analysed. However, these commitments do not expressly speak of media diversity, they only tackle competition law concerns. Thus, in one instance⁷⁷⁵, while the anticompetitive concerns on the content market⁷⁷⁶ were addressed by specific legal provisions⁷⁷⁷, the other anticompetitive practices on the distribution market⁷⁷⁸ were tackled by the FCC with the help of “commitments” attached to the transaction’s agreement, which did not contain, as underlined above, any media diversity reference⁷⁷⁹. Rarely one may find specific means to save a merger, such as requiring the parties to wait to enter a new market until the market starts developing⁷⁸⁰. The commitments that condition a merger’s approval address and try to alleviate anticompetitive concerns that a merger may trigger. By doing so, they contribute to the protection of media diversity. Thus, ensuring competitors’ access⁷⁸¹, avoiding discriminatory treatment, foreclosure or abuse may keep many competitors on the market, one aspect of media diversity.

Although using antitrust is an easy way out, there is another way to look at the public interest standard, beyond pure economic analysis. The damage that the overuse of

and the Future of Telecommunications Policy,” available at: <http://fcc-reform.org/sites/fcc-reform.org/files/weiser-20090105.pdf>.

⁷⁷⁵ See, the GM case.

⁷⁷⁶ See, the Satellite Home Viewer Extension and Reauthorization Act of 2004, available at: <http://www.cbo.gov/showdoc.cfm?index=5686&sequence=0>. The potential public harm resulting from the possible discrimination against unaffiliated programming producers (the ones who sell programming to networks) is countered by the programming carriage rules imposed by the FCC. See, the GM case.

⁷⁷⁷ See, section 628 of the 1934 Communications Act and section 616 of the 1992 Cable Act. See, GM case, para. 47.

⁷⁷⁸ “NewsCorp’s [] (and its majority held subsidiary Fox Entertainment Group) incentive and ability to persuade MVPD competitors to carry its affiliated programming however pose the real harm to the public interest.” See, GM case.

⁷⁷⁹ The conditions attached to the agreement refer to “non-discriminatory access to DirecTV platform for unaffiliated programming providers and [to] non-discriminatory access to national and non-sports regional programming for rival MVPDs.” See, GM case.

⁷⁸⁰ See, AOL/Time Warner Order. The company was required to submit, and it submitted, a report on achieving an interoperability agreement.

⁷⁸¹ For instance, in Time Warner, one of the most important conditions refers to the new entity’s obligation to open cable systems to competing ISPs and to ensure that its customers be given the option to choose and ISP not affiliated with AOL/Time Warner. Time Warner.

these antitrust tools may do to media diversity becomes apparent when one thinks that a simple waiver that saves a merger will not acknowledge the importance of many and diverse sources of information and viewpoints on the market. For instance, in one of the approved mergers following a waiver, while recognizing that “the [ownership] cap is designed to ensure that no one company can control the flow of video programming to consumers,”⁷⁸² the Commission did not consider however “the significant impact that an AT&T/MediaOne combination could have on the diversity of media voices.”⁷⁸³ If the FCC would first do an antitrust analysis and then it would address specific issues related to media diversity, the outcome of these cases might have been that many media mergers would have been denied.

II. 5. 4. Preliminary conclusions on the role that antitrust plays in regulatory review

The FCC employs a great deal of antitrust in its scrutiny of media mergers. Considering that the ownership rules and other rules developed throughout time by the FCC and Congress have been slowly reduced or eliminated, perhaps antitrust is the only tool left. However, this would in turn question the very existence of the FCC.

I do not argue here that there should not be an FCC. Rather, I argue that even if some might incorporate some social-political factors in antitrust analysis⁷⁸⁴, such addition to antitrust would not make antitrust the best legal regime to deal with media

⁷⁸² See, Peter W. Huber, Michael K. Kellogg and John Thorne, “Federal Telecommunication Law,” 2003 Cumulative Supplement, Aspen Law & Business, at p. 136.

⁷⁸³ Commissioner Gloria Tristani argued that “by focusing primarily on technical compliance with our rules, the Commission has not sufficiently analyzed whether the proposed transaction will undercut a fundamental purpose of the Communications Act – maintaining independent sources of news and information.” See, AT&T/MediaOne Order, Concurring Statement of Commissioner Gloria Tristani.

⁷⁸⁴ Benjamin M. Compaine and Douglas Gomery, “Who Owns the Media?: Competition and Concentration in the Mass Media Industry,” 3rd ed., quoted in Baker, Media Concentration and Democracy, at p. 56.

concentration and its effects on diversity of opinions⁷⁸⁵. Antitrust concerns itself with avoiding formation or abuse of dominant positions that would result in inefficient prices increase and lower consumer welfare⁷⁸⁶. These antitrust goals could work, to a certain extent, to protect media diversity as part of the “desirable surrogate for any important social and political standards.”⁷⁸⁷ Further, narrowing down the market is a simple yet efficient way to contribute to the protection of media diversity.

Thus, one of the potential solutions which would help increase media diversity would be to insert socio-political criteria in antitrust review, a hardly imaginable solution considering the lack of quantifiability and preciseness that the media diversity criteria would imply for antitrust review. Another solution would be to acknowledge and review media mergers accordingly, the difference between “power over price” and “power over public opinion.”⁷⁸⁸ Starting with this premise, the FCC might put the antitrust tools to a better use and view it still as a preliminary step to media mergers’ review so as to protect media diversity. While the ownership caps and limitations should be stricter than the antitrust constraints,⁷⁸⁹ however, considering the constant deregulatory trend, one may

⁷⁸⁵ “Political concerns ought to be treated as limited factors that influence the way in which prospective rules are designed to accomplish antitrust objectives.” See, Robert Pitofski, “The Political Content of Antitrust,” *University of Pennsylvania Law Review* 127 (1979) in Richard A. Posner, Frank H. Easterbrook, *Antitrust. Cases, Economic Notes and Other Materials*, West Publishing Company, 2nd ed., at p. 163.

⁷⁸⁶ “The result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.” See, United States Department of Justice, “Horizontal Merger Guidelines,” adopted in 1992 and revised in 1997, available online at: <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>. See, further, Makan Delrahim, *ibidem*.

⁷⁸⁷ See, C. Edwin Baker, “Media Concentration and Democracy,” referring to Benjamin Compaine and Douglas Gomery, “Who Owns the Media?: Competition and Concentration in the Mass Media Industry,” 2000.

⁷⁸⁸ See, C.E. Baker, “Media Concentration and Democracy,” p. 56-57.

⁷⁸⁹ “The public interest standard applied by the FCC is a more restrictive standard than the antitrust rules.” See, Edward D. Cavanagh, Symposium: “Are New Media Really Replacing Old Media? Broadcast Media Deregulation and the Internet: Deregulation of the Air Waves: Is Antitrust Enough?,” 17 *St. John's J. Legal Comment.* 67, 72 (2003).

wonder if an antitrust review of stations' acquisitions could result in more restrictions than the regulatory review.

The FCC may very well borrow from antitrust in order to define the relevant media market. After all, there is yet to be found a new tool that would better serve this purpose. However, antitrust has its own limitations. The antitrust agencies may not assess the impact that a merger and its potential anti-competitive consequences may have on issues such as the diversity of sources of information, the diversity of viewpoints and the diversity of opinions. The media diversity eludes to a certain extent economic evaluations. The public interest standard that the FCC applies should in theory make up for these limitations.

This section showed how strong reliance on antitrust principles and tools in the review that the FCC performs under the public interest standard undermined the goals of media diversity. Tools such as relevant market definition and economic assessment of market competition and the effect of a merger on such market competition are necessary steps. However, overuse of antitrust instruments such as divestitures within temporary waivers, commitments and economic interpretation of consumers' benefits, without the careful consideration that a comprehensive public interest standard of review should give to the concept of media diversity, questions the very essence of the FCC's role in protecting media diversity. I argue here that this democratic aspect inherent in media concentration related concerns, requires us to properly harmonize and treat the issue from different legal norms' perspective. I claim that each tool – constitutional, regulatory and antitrust, and not necessarily in this order – can contribute to the achievement of a diverse media.

Chapter III. Europe

III. 1. Preliminary considerations

The chapter on the United States approach to media diversity protection was divided into two main aspects: the general theoretical perspective derived from the case law and the more specific legal treatment of several structural rules designed to further media diversity as discussed by the courts, the FCC and the antitrust agencies. The European chapter is set to analyze similar aspects, in a similar fundamental division.

The most important elements for the discussion on media diversity protection are present in the European courts and legislation. Thus, the question of the scarcity rationale appeared in the European Court of Human Rights and took the same turn as in the United States: first as justification for regulation that ensures, *inter alia*, media diversity and second as a justification not to regulate the market. Courts and legislators assessed the importance of the media diversity aspect in broader contexts, such as licensing and access – where media diversity is a conditioning factor. Aside from making part of the scope of article 10 of the European Convention on Human Rights, the media diversity principle is also a constitutional value in all the countries discussed here. Norms that enhance internal pluralism are content related and they are discussed in relation with the agencies that enforce them and with their efficiency on the market. Structural pluralism is promoted through ownership restrictions and through other structural rules, such as licensing and access. Competition law, although it cannot tackle alone the various democratic consequences of media concentration, does make an important contribution to the protection of media diversity.

Several conclusions ensue. Structural regulation in the form of ownership restrictions and mandatory access needs to be preserved, if not tightened. Like in the United States, the review process needs to take into consideration the media diversity as an important factor, beyond antitrust analysis and economic considerations. The regulatory agencies need to enforce the norms designed to enhance content diversity. This thesis argues that media deregulation if not reversed, needs to at least be stopped. As observed at various points throughout this paper, constitutional law, regulation and antitrust are all branches of the law that cooperate to the existence of a diverse media and they all offer very strong justifications and instruments for continuing to make of the diversity principle an important part of their commitment.

III. 2. Media diversity principle

III. 2. 1. Fundamental right

The European Convention on Human Rights⁷⁹⁰ has, in the countries that ratified it⁷⁹¹, superior normative power than the national legal instruments. Under this Convention, freedom of expression includes freedom to hold opinions, freedom to receive information and ideas, freedom to impart information and ideas, all these

⁷⁹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Council of Europe, Rome, 4th of November, 1950. Available online at: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>. (hereinafter the European Convention on Human Rights)

⁷⁹¹ France ratified the Convention in May 1974; Germany in September 1953; Italy in October 1955, and Romania in June 1994. See, <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>. See, for instance, art. 55 of the 1958 French Constitution (available online at: <http://www.assemblee-nationale.fr/english/8ab.asp>); art. 10 para.1 of the Italian Constitution: “The legal system of Italy conforms to the generally recognized principles of international law” and art. 80 of the Italian Constitution on the ratification of treaties; art. 25 of the German Basic Law; art. 11 of the Romanian Constitution as modified in 2003 (available online in Romanian at <http://www.e-juridic.ro/Constitutia-Romaniei.html>).

“without interference by public authority and regardless of frontiers⁷⁹².” This part of my paper analyzes the European Court of Human Rights (“ECHR”)’ jurisprudence on broadcasting and the extent to which the Court took into account media pluralism in its decisions⁷⁹³. It is important to start by stating that the Court acknowledges the paramount significance of the media pluralism principle for the realization of the freedom of expression ideal in a democratic society⁷⁹⁴.

As one of the permissible restrictions of the right to freedom of expression, the Convention expressly allows Member States to regulate broadcasting via licensing⁷⁹⁵. Licensing is admittedly necessary to keep a minimum control over an activity with huge social implications, such as broadcasting⁷⁹⁶. However, by systematically interpreting the provisions of the article 10, the Court noted that given that art. 10 sets forth the permitted restrictions already in paragraph 1, its third sentence is an exception to the principle established in the first and second and it is thus of “limited scope⁷⁹⁷” and one may add, as any exception, of limited interpretation.

⁷⁹² Article 10, first paragraph of the European Convention on Human Rights. Article 10 second paragraph enumerates the motives on the basis of which the Member States are permitted to restrict the freedom of expression: “national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary.”

⁷⁹³ See, also, for a brief presentation of the case law, Wolfgang Strasser and Mona Al-Sharmani, “Freedom of expression. Report on the Recent Case-Law of the European Commission and Court of Human Rights,” in *Bulletin des Droits de l’Homme*, No. 7, July 1997, L’Institut Luxembourgeois des Droits de l’Homme, at p. 58. See, further, See, R. St. J. Macdonald, F. Matscher, H. Petzold, “The European System for the Protection of Human Rights,” Martinus Nijhoff Publishers, p. 466.

⁷⁹⁴ See, European Court of Human Rights, *Case of Informationsverein Lentia and Others v. Austria*, Application no. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, 24 November 1993, hereinafter *Lentia*, para.38.

⁷⁹⁵ See, art. 10 para. 1 of the European Convention on Human Rights.

⁷⁹⁶ Because media has such a powerful influence on society and culture, “some social control of the content of the material broadcast is appropriate.” See, Mark W. Janis, Richard S. Kay, Anthony W. Bradley, “European Human Rights Law, Text and Materials,” Oxford University Press, Second Ed., at p. 208. See, also, Clare Ovey and Robin White, “The European Convention on Human Rights,” Third Edition, Oxford, at p. 284.

⁷⁹⁷ European Court of Human Rights, *Case of Groppera Radio AG and Others v. Switzerland*, Application no. 10890/84, 28 March 1990, hereinafter *Groppera Radio*, para. 61.

The European Court of Human Rights follows an almost constant framework when it decides whether a certain governmental interference with an individual right guaranteed by the Convention violates the Convention. Thus, the Court will first inquire whether the interference is prescribed by law, whether it furthers a legitimate aim and whether it is “necessary in a democratic society”⁷⁹⁸. Generally, the Court finds as legitimate the Member States’ aim pursued when interfering with article 10. Media pluralism falls under “protection of the ... rights of others” heading.⁷⁹⁹ This means that the member states to the Convention could enact policies that although may be considered an interference with art. 10, they are permissible if they aim at furthering media diversity to the benefit of others. The main issue remains whether the interference/restriction is justified. Although the Member States have a margin of appreciation⁸⁰⁰ in relation to the implementation of certain aspects of the Convention, they still have to abide by European Court of Human Rights’ decisions. Given however the importance of the rights in article 10 paragraph 1, the supervision must be strict⁸⁰¹ and “the necessity for any restriction must be convincingly established.”⁸⁰²

The Court considered media pluralism in different analytical contexts such as licensing, public monopoly, defining the scope of art.10, as well as general access to broadcasting issues including whether the state may take affirmative action in the guise

⁷⁹⁸ See, *Lentia*, para. 34.

⁷⁹⁹ Paragraph 2 of Article 10 of the European Convention on Human Rights allows restrictions of the right to freedom of expression in certain circumstances. See, *supra*. See, *Groppera Radio*, para. 69.

⁸⁰⁰ Margin of appreciation refers to “[t]he latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention’s substantive guarantees”. See, Howard Charles Yourow, “The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence,” Kluwer Law International, 1996, at p. 13.

⁸⁰¹ See, also, European Court of Human Rights, *Case of Autronic AG v. Switzerland*, Application no. 12726/87, 22 May 1990, hereinafter *Autronic*.

⁸⁰² See, European Court of Human Rights, *Case of Radio ABC v. Austria*, 109/1996/728/925, 20 October 1997, hereinafter *Radio ABC*, para. 30.

of denying access to some to protect others. I discuss the manner in which the Court treated the media diversity aspect in these analytical contexts.

The first case to be discussed is Informationsverein Lentia and Others, which:

“made it clear that the Member States are permitted to regulate by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. Technical aspects are undeniably important, but the grant or refusal of a license may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.”⁸⁰³

In this context, it seems that the media diversity aspect came into play albeit indirectly as one of the conditions that the broadcaster needs to fulfill to receive a license⁸⁰⁴.

Media pluralism served as the justification for public monopoly in broadcasting. In early broadcasting regulation, monopoly was intended to ensure “objectivity and diversity of opinions.”⁸⁰⁵ Thus, in cases such as Tele 1, the grounds for the state’s refusal to grant a license lay in the fact that the legislation allowed the set up of only federal broadcasting stations (the Austrian Broadcasting Corporation had monopoly over terrestrial radio and television at the federal level) and not regional (regional terrestrial

⁸⁰³ Lentia, para. 14 and 32. See, also, European Court of Human Rights, Case of Tele 1 Privatfernsehgesellschaft mbH v. Austria, Application no. 32240/96, 21 September 2000, final 17/01/2001, hereinafter Tele 1, para. 25; see, further, Meltex Ltd and Mesrop Movsesyan v. Armenia, Application no. 32283/04, 17 June 2008, hereinafter Meltex, para. 76.

⁸⁰⁴ See, Lentia, *ibidem*.

⁸⁰⁵ See, Radio ABC. Radio ABC’s application for a license to set up a broadcasting station was denied. The basis of this denial rested in the permission under the Constitution and Constitutional Court’s precedent that only the Austrian Broadcasting Corporation is to operate in the broadcasting field – accepting monopoly – and authorization is to be granted only by the federal authorities. The ECHR ruled in relation to three periods: when the Regional Broadcasting Law was not in force – clear violation since there was no legal basis for any other station except for Austrian Broadcasting Corporation to apply for license; second period, from the entry into force of the Regional Broadcasting Law to the Constitutional Court declaring certain of its provisions unconstitutional – violation; third period – up to the entry into force of the amendments to the Law following the unconstitutionality declaration – violation. The Court did not rule over the fourth period following the entry into force of the amendments to the Law, since it cannot rule “*in abstracto*”. See, Radio ABC, paragraphs 13, 31, 35, 37.

broadcasting of radio programs was regulated though)⁸⁰⁶. Basically, no law regulated the set up of private terrestrial television stations except for ORF (*Oesterreichischer Rundfunk*). Cable broadcasting of radio and television programs' legislation was to enter into force only in 1996. However, while monopoly was a necessary evil, the public broadcasting carried greater responsibility to ensure that all layers of the society were properly reflected in its programmes. For instance, the Austrian Broadcasting Corporation must broadcast, "in compliance with the requirements of objectivity and diversity of views, in particular current affairs, news reports, commentaries and critical opinions, [] via at least two television channels and three radio stations, one of which must be a regional station⁸⁰⁷." Further, "broadcasting time must be allocated to the political parties represented in the national parliament⁸⁰⁸" and to representative associations⁸⁰⁹. The justification for ORF's monopoly lay in the necessity to preserve the very diversity of opinions.⁸¹⁰

Initially, the frequencies' scarcity – that is the fact that the transmission medium was physically limited and could not accommodate all the "voices" that wanted to "speak" – justified the monopoly's existence. After *Lentia* however, the scarcity rationale was no longer valid⁸¹¹. In that case, although the Austrian state argued that the monopoly

⁸⁰⁶ See, *Tele 1*, dealing with the refusal to grant license to set up and operate a television transmitter in the area of Vienna. The case is similar in many respects to European Court of Human Rights, *Case of Telesystem Tirol Kabeltelevision v. Austria*, Application no. 19182/91, 09/06/1997 (21/1996/640/824, 29 May 1997), hereinafter *Telesystem*, which was stricken out of the Court's list of cases following the friendly settlement between the parties in consideration of the new Austrian legislation allowing for private active cable broadcasting and for dissemination of commercial advertising. See, *Telesystem*, paras. 27, 29.

⁸⁰⁷ See, *Tele 1*, para. 17.

⁸⁰⁸ *Tele 1*, para. 17 referring to the Law of 10 July 1974 on the Austrian Broadcasting Corporation.

⁸⁰⁹ *Telesystem*, para. 21.

⁸¹⁰ *Tele 1*, para. 40. The legitimate aim for restricting freedom to broadcast (i.e., to retain the possibility of broadcasting terrestrially only for ORF and not for other private broadcasters) was that of "guaranteeing the impartiality and objectivity of reporting and diversity of opinions through a national station." *Ibidem*.

⁸¹¹ The small size of a country may not justify monopoly. See, *Lentia*, para. 41-42. The scarcity rationale proved of little validity in *Tele 1* as well. However, while in the first case the Austrian state was found in

of public broadcasting was a means to ensure media pluralism and to contribute to “the quality and balance of programmes, through the supervisory powers over the media thereby conferred on the authorities,”⁸¹² the Court held that it was no longer justified in light of technological progress that allegedly expanded the technical capacities of the broadcasting medium.⁸¹³ There were however, as the Court noted, equivalent “less restrictive solutions”⁸¹⁴ such as a licensing system⁸¹⁵ to achieve the same goal. However, as it pointed out in a different case, technical progress may not make licensing obsolete, since it ensures “the orderly regulation of communication.”⁸¹⁶

The Court considers media pluralism in the context of defining the scope of art. 10. First, it argues that art. 10 protects both the content and the means through which the content is distributed (including adopting a view on the substitutability of different means of transmission). Second, there are different types of broadcast programming entitled to more or less protection (since they allegedly contribute to a different extent to democratic debate).⁸¹⁷

Article 10 protects both broadcasting of programmes over the air and cable retransmission of such programmes.⁸¹⁸ In *Autronic AG* the Court noted that art. 10

violation of article 10 of the Convention (see, para 43 of *Lentia*), in the second the Court differentiated between two periods, finding out that only in the first period there was a breach of article 10 but not in the second period under review (in the second period under review the applicant had the alternative to apply for a cable television license even if the terrestrial television was still under the ORF monopoly). See, para. 41 and 43 of *Tele 1*.

⁸¹² *Lentia*, para. 33 (see also, European Court of Human Rights, *Informationsverein Lentia and Others v. Austria* of 28 November 2002, Application no. 37093/97 – in which a friendly settlement was reached following Austrian legislation allowing private active cable broadcasting).

⁸¹³ *Lentia*, para. 39. The monopoly’s justification was further weakened by the availability of foreign programmes. The Court noted that the retransmission by cable of foreign programmes was permitted in Austria. *Lentia*, para. 39.

⁸¹⁴ *Lentia*, para. 39.

⁸¹⁵ *Lentia*, para. 39.

⁸¹⁶ *Groppera Radio*, Dissenting Opinion of Judge Bernhardt. See, also, para. 60 of *Groppera Radio*.

⁸¹⁷ See, *Demuth v. Switzerland*, Application no. 38743/97, 5 November 2002, hereinafter *Demuth*.

⁸¹⁸ *Groppera Radio AG*, para. 55.

protects both the “content of information” and the “means of transmission.”⁸¹⁹ The aspect of cable/terrestrial broadcasting substitutability is important from the point of view of access to media as well as for structural media pluralism – pluralism of means of transmission⁸²⁰. In *Tele 1* the Court pointed out that although viewers had access in higher proportion to terrestrial television, they had the possibility to relatively easily install the available cable. The Court did not look into the costs of installation – whether they were or not prohibitive⁸²¹. Cable represented thus a “viable alternative”⁸²². It is interesting to note that the substitutability factor was evaluated from an accessibility perspective and not based on a perspective of would the consumer switch from one means of transmission to another?

Further, in relation to various types of content some allegedly entitled to stronger art. 10 protection than the others, the Court has an ambivalent approach⁸²³. Thus, although the concurring judges in *Groppera* would have differentiated and created a hierarchy of content types distinctly worthy of art. 10 protection, the majority reached a

⁸¹⁹ See, *Autronic*, para. 47. The Swiss authorities did not allow retransmission of Soviet programming via satellite since such was not permitted without the broadcasting state’s permission.

⁸²⁰ The Court took into account that while there was no legislation enacted for the terrestrial private television, the private broadcasters had the possibility to broadcast via cable, for which legislation was set in place in 1997 (the Cable and Satellite Broadcasting Act) but which was permitted since 1996 following a Constitutional Court’s judgment in this respect. See, *Tele 1*, para. 22.

⁸²¹ The Concurring Opinion of Judge Bonello brings more light into this issue by pointing out that there was little proof brought to the Court to the extent that the costs on the broadcaster and viewer were more onerous. The Concurring Opinion also links the “free circulation of ideas and information” to the financial implications of access to the broadcasting medium. See, *Tele 1*, Concurring Opinion of Judge Bonello.

⁸²² *Tele 1*, para. 40.

⁸²³ *Groppera Radio*, para. 55. However, in the same case, other judges would have distinguished between different types of content deserving protection. Thus, only “communication of information and ideas” or “the kind of discussion or mere airing of views and expression of ideas or cultural or artistic events” qualify for protection under art. 10. Entertainment or commercial expression are not within the ambit of art. 10’s protection. See, Judge Matscher and Judge Valticos Concurring Opinions in *Groppera Radio*. Hence, content of the programme was viewed as a core matter when deciding whether art. 10 protects or not a certain broadcast. The Dissenting Opinion of Judge De Meyer in *Groppera Radio* astutely differentiated between means and content of communication. The Dissenting Opinion of Judge Pettiti in *Groppera Radio* noted that differentiating among different types of content amounts to content based restrictions tantamount to freedom of expression protections around the world (the Judge referred to the First Amendment of the United States Constitution).

rather neutral conclusion on this subject⁸²⁴. However, in *Demuth v. Switzerland*, the applicant's denial of a license to set up a specialized television programme on all aspects of car mobility and private road traffic was upheld by the ECHR⁸²⁵. In that case Switzerland argued that specialized programmes did not contribute to "the cultural development, free expression of opinion and entertainment of the public."⁸²⁶ The Swiss Government contended that specialized programmes did not enhance public democratic debate, which was instead fostered by comprehensive programming⁸²⁷. One may however in turn argue that the specialized programmes do actually contribute to the formation of a public opinion even though geared towards debate on certain specific topics. Such opinions are further to be seen in light of the ECHR's jurisprudence on commercial speech protection – considering especially that an informational advertising⁸²⁸ would be protected.

In *Demuth*, the media pluralism principle was turned on its head and used to restrict freedom of expression. The Swiss Constitution made express reference to the "variety of opinions" that the radio and television should convey through their programs⁸²⁹. Again, like in *Lentia*,⁸³⁰ the Government's argument for not granting a

⁸²⁴ In the Court's words: "without there being any need to make distinctions according to the content of the programmes." See, *Groppera Radio*, para.55.

⁸²⁵ See, *Demuth*.

⁸²⁶ See, art. 55 bis §§ 2 and 3 (now art. 93 §§ 2 and 3) of the Swiss Federal Constitution, in *Demuth*, para. 13.

⁸²⁷ See, *Demuth*, para. 12 (5) referring to the Swiss Federal Council's decision.

⁸²⁸ See, J. Steven Rich, "Commercial Speech in the Law of the European Union: Lessons for the United States?," *Federal Communications Law Journal*, vol 51, p. 263, 1999, available online at: www.law.indiana.edu/fclj/pubs/v51/nol/rich.PDF, at p. 270. See, para. 53 and 58 of European Court of Human Rights' case of *Barthold v. Germany* of 25th of March 1985, Application no. 8734/79. See, however, case *Coca v. Spain* of 24 of February 2004, Application no. 15450/89, where advertising was not protected. See, these cases, in J.S. Rich, *ibidem*, at p. 269.

⁸²⁹ See, art. 55 bis §§ 2 and 3 (now art. 93 §§ 2 and 3) of the Swiss Federal Constitution, in *Demuth* para. 13. The provisions of the Constitution were transposed into the Swiss Federal Radio and Television Act. See, *ibidem*, para. 15.

⁸³⁰ See, *Lentia*, *supra*.

license was media pluralism. In the Government's contention, media pluralism qualified under "the protection of the ... rights of others" of art. 10 para. 2 and further served the purpose of maintaining the "quality and balance of programmes"⁸³¹. For serving this purpose, it was important that the broadcast program would not be "limited to a particular group of viewers," such purpose⁸³² being of outmost consideration in a country "marked by cultural and linguistic pluralism"⁸³³. The Swiss Government put forward a clear picture of what a pluralistic media would mean: since the automobile related information was already covered in the programming broadcast by another television station, the public was already provided with this type of information. What was needed, in order to ensure the proper balance and diversity was for the station in issue to include in its programming cultural arguments that would apparently appeal to a wider group of people⁸³⁴.

Three interrelated arguments convinced the Court that the Swiss Government's interference with art. 10 was "necessary in a democratic society:" i) the programming that the television station intended to broadcast was of mere commercial nature and thus entitled to less art. 10 protection; ii) the Swiss federal state needed pluralistic broadcasting in light of its diverse linguistic and cultural background and iii) the television channel could have reapplied for a license, with better chances of succeeding if it included cultural elements in its programming. These arguments have their weak points: i) the commercial nature of this broadcasting endeavor is debatable since the television station intended to tackle environmental and traffic related issues, which are of

⁸³¹ See, para. 27 of Demuth.

⁸³² The Court considered this purpose legitimate. See, para. 34 and 37 of Demuth.

⁸³³ See, para. 28 of Demuth.

⁸³⁴ See, Demuth, para. 29.

public interest⁸³⁵ and more than purely “commercial;” ii) distinguishing between entertainment and cultural information is suspicious in itself; iii) it is further difficult to scientifically prove a relationship between specialized programmes and societal “segmentation and atomisation”⁸³⁶ and iv) the cable operators should be free to carry on their frequencies any type of programmes they choose to transmit⁸³⁷.

It is interesting to look at *Demuth* in light of *Lentia*. In *Lentia* the scarcity rationale led the Court to believe that monopoly was no longer justified. The Court did not however say that because the monopoly was not justified, there was no more need for regulation in broadcasting. It appears like several factors could influence a state’s decision to grant broadcasting license, among which serving media diversity is a legitimate one. The more problematic outcome of the *Demuth* case is embracing the concept that certain content adds more or less to the democratic debate and hence is more or less worthy of being on air. That could lead to a slippery slope to censor many content types, as well as to an elitist choice of such content.

Access to media is strictly connected with media pluralism issues. While, “there is no unfettered right to access to broadcasting by way of participation in programmes,” in certain circumstances, denial of access to broadcasting for certain groups or persons may raise article 10 issues⁸³⁸. As in the United States, the ECHR approached the media pluralism issue from an equal protection angle. The public’s general right of access to a wide range of media stems as well from the link between article 10 and article 14 of the

⁸³⁵ See, *Demuth*, Dissenting Opinion of Judge Gaukur Jorundsson.

⁸³⁶ See, the Swiss Government’s argument, *Demuth*, para. 21.

⁸³⁷ In this respect the television station already secured an agreement with a cable operator. See, *Demuth*, para. 23.

⁸³⁸ See, J.E.S Fawcett, “The Application of the European Convention on Human Rights,” Clarendon Press, Oxford, 1987, at p. 259.

Convention: “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... political or other opinion.”⁸³⁹

A recent case,⁸⁴⁰ in which the Swiss government was found as violating art. 10, sheds more light on the recognition of media pluralism in the ECHR jurisprudence. Thus, in *Verein 2* the Court had to decide whether a broadcaster’s continuing refusal to air a political advertisement violated art. 10. *Verein 2* followed *Verein 1*⁸⁴¹, in which the Court held that a violation of art. 10 took place. In *Verein 1* the Court had to assess whether the state’s argument that granting space to political groups to air their message would have meant creating a more privileged position for these groups that afford themselves to pay for such broadcasting and thus would have created an unequal expression of opinions qualified the restriction on free speech as necessary in a democratic society⁸⁴². It would have further decreased the possibilities of the printed press to survive⁸⁴³. The Court was satisfied that such aims were “legitimate” under the Convention in order to protect the rights of others⁸⁴⁴. However, even though the influence that some potent groups could exercise over the media was a legitimate concern⁸⁴⁵, the Government did not show that

⁸³⁹ *Meltex*, para. 94. The Court dismissed application on this ground since the applicant did not raise this issue in front of the domestic courts.

⁸⁴⁰ Case of *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), Application no. 32772/02, 30 June 2009 (hereinafter *Verein 2*).

⁸⁴¹ See, also, Case of *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland*, Application no. 24699/94, 28/09/2001, hereinafter *Verein 1*. In that case *Publisuisse SA* refused to air a commercial defending animals’ rights. The national courts considered that statutory provisions against political advertising served the goal of protecting public opinion from influence from powerful financial groups. See, para. 21 of *Verein 1*.

⁸⁴² See, *Verein 1*, para. 21.

⁸⁴³ See, *Verein 1*, para. 21.

⁸⁴⁴ See, *Verein 1*, para. 61.

⁸⁴⁵ See, *Verein 1*, para. 73.

the group in question was, concretely in the case at hand, capable of or did in fact exercise such influence⁸⁴⁶.

The Court did note in Verein 1 that the state is a “guarantor” of “the principle of pluralism⁸⁴⁷” and in Verein 2 that it may take positive steps to protect freedom of expression⁸⁴⁸. However, it avoided making a clear statement on the extent of the state’s positive obligations to guarantee the exercise of the fundamental rights in the Convention⁸⁴⁹. As observed by Judge Sajo in dissent, the imposition of forced acceptance of commercials by broadcast stations might interfere with editorial freedom⁸⁵⁰. This argument is fully acceptable and fully supportable in light of the desire to protect the freedom of speech at its maximum. However, if one interprets this Dissenting Opinion⁸⁵¹ as potentially implying (“the broadcasting market may have become more or less diverse, with more or fewer opportunities to communicate ideas⁸⁵²”) that there were more, alternative means of transmission available for the broadcast of that commercial, one should consider that although different means to broadcast the commercial existed, they may have been of lesser importance in terms of audience reach and impact, which should be both wide enough to fulfill the demands of a strong public debate. This aspect is in a sense reminiscent of the German regulatory agency that notices how certain programmes

⁸⁴⁶ See, Verein 1, para. 75. The Court also noted that the political advertising prohibition applied only to broadcast media and not to printed press, making such prohibition of not “a particularly pressing nature.” See, Verein 1, para. 74.

⁸⁴⁷ See, Verein 1, para. 73.

⁸⁴⁸ See, Verein 2, para. 80.

⁸⁴⁹ See, Verein 2, para. 81, 82. Verein 2 found a violation of art. 10 of the Convention based on the state’s obligation to take positive measures to ensure compliance with its judgment in Verein 1. See, Verein 2, para. 98. See, however, for a different opinion, on how Verein 1 did not impose any positive obligation on the state to comply with the Court’s judgment and on how Verein 2 dealt with a different in nature commercial, dissenting opinion of Judge Andras Sajo in Verein 2.

⁸⁵⁰ See, dissenting opinion of Judge Andras Sajo in Verein 2.

⁸⁵¹ See, dissenting opinion of Judge Andras Sajo in Verein 2.

⁸⁵² See, dissenting opinion of Judge Andras Sajo in Verein 2.

are relegated to the broadcasting time that attracts the least number of people and thus have little impact and ultimately contribute less to media diversity⁸⁵³.

The ECHR approaches the media diversity principle from the perspective of the permitted restrictions under paragraph 2 of article 10. It is a principle discussed not by itself but in the context of analyzing and justifying the existence of other broadcasting related issues, such as licensing and access. Two important lessons reveal themselves: first, content is more or less worthy of article 10 protection depending on the degree of contribution to the democratic debate (Groppera compared to Demuth) and second, access to broadcasting may not be denied in order to level the playing field, in the name of (among others) media diversity (Verein cases). As previously mentioned, granting more or less protection to different type of content is not a sage endeavor because it may lead to censorship. Denying access to privileged groups in order to level the playing field for less powerful interests is also an action that should be carefully scrutinized.

III. 2. 2. Constitutional recognition

III. 2. 2. 1. France. Objectif de valeur constitutionnelle

Before analyzing the legal measures that protect media diversity, one should consider the larger societal and historical context⁸⁵⁴ in which these measures were born. One does not have to look far to see the main difference between the historical development of broadcasting in Europe and the United States: in the former it appeared

⁸⁵³ See, *infra*, at p. 293.

⁸⁵⁴ See, for instance, John Kenneth Galbraith, “The Affluent Society,” A Mariner Book, New York, 1998, at p. 178, on “the advantage[s] of seeing things in full societal context.”

as state monopoly⁸⁵⁵. It is important to also note that broadcasting developed at a time where the Great Depression did not install in people much faith in the laissez faire policy of the market⁸⁵⁶. However, broadcasting development in Europe followed different courses in different countries.

Though little is written or known about this, France had a private radio sector and some advertising before the Second World War.⁸⁵⁷ Hence, although in 1923 the French state telecommunications monopoly⁸⁵⁸ was extended to the wireless telegraph, several private radio stations were created by 1928⁸⁵⁹. The public radio developed in the form of associations created by the Postal, Telephone and Telegraph Office, which was subordinated to the government⁸⁶⁰. The ordinance of 23 March 1945 reinstituted the public monopoly over radio and all the private authorizations were revoked⁸⁶¹. In France, concern for media pluralism increased over time, though changed in approach, following technological and market dynamics. One may assume that it was in fact this concern for

⁸⁵⁵ See, Rachael Craufurd Smith, "Broadcasting Law and Fundamental Rights," Clarendon Press, Oxford, 1997, at p. 11.

⁸⁵⁶ See, R. Smith, *ibidem*, at p. 28.

⁸⁵⁷ See, Thierry Vedel and Jerome Bourdon, "French Public Service Broadcasting: From Monopoly to Marginalization," in Robert K. Avery, "Public Service Broadcasting in a Multichannel Environment, Longman," 1993, at p. 30. In France, the first French private radio station started to operate in 1922 and by 1928 they were thirteen radio stations broadcasting. Although they were meant to disappear in favor of public broadcasting, they survived until 1945. See, R. Smith, *ibidem*, at p. 14.

⁸⁵⁸ The state monopoly is to be traced back in 1837, when the Law no. 6801 of 2nd of May instituted it over telegraphic lines. See, Philie Marcangelo-Leos, "Pluralisme et audiovisuel," ("Pluralism and audiovisual"), Paris: LGDJ, 2004, at p. 19.

⁸⁵⁹ A decree of 28 December 1926 prescribed the possibility for private radio stations to request authorizations from the Ministry of Post and Telecommunications. See, "La politique de l'audiovisuel (1980-2004) - Chronologie," <http://www.vie-publique.fr/politiques-publiques/politique-audiovisuel/chronologie/>. The private radio stations were allowed under the legal form of public concessions and they emerged out of the financial difficulties of the public radio.

⁸⁶⁰ The head of the government (president du Conseil) had authority over this Office. The government created also the Ministry of Information that controlled the broadcasting until 1964. See, T. Vedel and J. Bourdon, *ibidem*, at p. 30.

⁸⁶¹ See, Patrick Wachsmann, "Libertés publiques," Dalloz, 2000, at p. 447. See, also, Conseil d'Etat, 6 February, 1948, Rec. 65, R.D.P. 1948, p. 244, in Charles Debbasch, "Les grands arrêts du droit de l'audiovisuel," ("The Great Decisions of the Audiovisual Law"), Paris: Sirey, 1991, at p. 44. The ordinance assigned public monopoly of broadcasting to Radiodiffusion de France, which later became Radiodiffusion-Télévision de France (RTF). See, "The Media in Western Europe," *ibidem*, at p. 60.

media pluralism that triggered the preference for privatization, and further on the shaping of various audiovisual policies⁸⁶². Private media enterprise increased however as a result of political impetus. Thus, during the socialist government of 1986-1984, private TV channels La Cinq and TV 6 emerged and during the Chirac government TF1 was privatized.⁸⁶³

The legal preoccupation to deter concentration dates since the ordinance from 26 August 1944⁸⁶⁴ related to the organization of the French press, which contained measures on transparency of the capital of the publishing houses to publish the composition of their capital as well as the names and the qualities of the people directly or indirectly owning it. The same ordinance prohibited in article 9 that one person owned more than one magazine, including owning it indirectly⁸⁶⁵.

The poor technological development and the war delayed any meaningful improvement until mid-1950s⁸⁶⁶. After the war the three dominant parties, Communists, Socialists and Christian Democrats supported the development of the media⁸⁶⁷. Before 1958 broadcasting developed slowly, mainly because of France' political and legal instability⁸⁶⁸. The political propaganda through television continued to be a reality throughout the laws of 3 of July 1972 and of 7 of August 1974 that attempted to

⁸⁶² Although this might seem a bold statement, media pluralism is an essential point of reference and a constant push forward of the various statutes and regulation adopted over time. See, Philie Marcangelo-Leos, *ibidem*, at p. 53 and 78. The author claims that financial and technological matters determined the privatization on the one hand, and reaction to state monopoly and fear of consequential monopoly on opinions, on the other. See, also, Biolay Jean-Jacques, "Droit de la Communication Audiovisuelle," ("Law of the Audiovisual Communication"), J.Delmas et Cie, Paris, 1989, at p. 15.

⁸⁶³ See, "The Media in Western Europe," *ibidem*, at p. 58.

⁸⁶⁴ Ordinance of 26 August 1944 on the organization of the French press, Official Journal of 30 August 1944, at p. 779. See, "L'anniversaire de l'ordonnance du 26 août 1944," ("The anniversary of the ordinance of 26 August 1944"), <http://www.humanite.presse.fr/journal/1994-08-27/1994-08-27-706787>.

⁸⁶⁵ *Par prête-nom*, in French (through "name renting").

⁸⁶⁶ See, Patrick Wachsmann, *ibidem*, at p. 448.

⁸⁶⁷ See, Patrick Wachsmann, *ibidem*, at p. 448.

⁸⁶⁸ See, Patrick Wachsmann, *ibidem*, at p. 448.

progressively institute an independent control over audiovisual⁸⁶⁹. At the end of 1970, the printed press was numerous on the market, whereas the private broadcasting was just appearing⁸⁷⁰.

In August 1979 the *Conseil économique et social*⁸⁷¹ published a recommendation based on an report commissioned by the government and aimed at giving to the later the possibility to “appreciate the diverse measures that would be capable of maintaining and accentuating the pluralism in this domain.”⁸⁷² Media concentration made the subject in the 1981 of the report of Moinot Pierre, France Prime Minister of that time⁸⁷³. The report observes the technological development, while stressing the importance of the diversity of means of transmission and of content⁸⁷⁴. In order to protect the cultural identity of the nation and the pluralistic expression⁸⁷⁵ of all the social groups, even the more

⁸⁶⁹ See, Patrick Wachsmann, *ibidem*, at p. 448.

⁸⁷⁰ See, Patrick Wachsmann, *ibidem*, at p. 448.

⁸⁷¹ The Economic and Social Council.

⁸⁷² Journal officiel, Avis et rapports du Conseil Economique et social, 7 aout 1979, no. 21. La gestion des entreprises de presse, (The Management of Press Enterprise), no. of reference 1979-21. http://www.conseil-economique-et-social.fr/fr/plan_site.htm. See, also, Emmanuel Derieux, “La concentration de la propriété des médias en France,” (“The concentration in the media ownership in France”), <http://www.cem.ulaval.ca/CONCFrance.pdf>.

⁸⁷³ “Pour une réforme de l’audiovisuel,” (“For an audiovisual reform”), Rapport au Premier ministre de la Commission de réflexion et d’orientation, présidée par Pierre Moinot (“Report to the Prime Minister of the Commission on the reflection and orientation by Pierre Moinot”), 30 septembre 1981, available at: <http://lesrapports.ladocumentationfrancaise.fr/BRP/814054301/0000.pdf>. (hereinafter, Moinot Report).

⁸⁷⁴ In the words of the Report, “these [technological] progress places our society in front an alternative and challenge: either they will serve the diversification and the enrichment of the human exchanges, or they will make out of the people passive consumers of images and sounds produced in a centralized and more and more uniform manner and they will make them indifferent to the quality of their content.”. Broadcasting was to respond to the following missions: “to cultivate, to entertain, to inform and to educate.” Translations by the author. It was furthermore to respond to these goals in a coherent manner, which, the Report emphasized meant on the one hand that one single audiovisual creation should meet more than one of these needs and on the other that the whole sector should work together towards the fulfillment of these goals. See, p. 13, of the Moinot Report.

⁸⁷⁴ See, at p. 11 of the Moinot Report.

⁸⁷⁴ See, p. 13, of the Moinot Report.

⁸⁷⁵ The Report expressly employs this term: “*exigence de pluralisme*”. “This pluralism exigency implies that the freedom of communication must rest upon rules defines by a chart, guaranteeing in particular the facts’ exactness, the independence of informers, the most possibly fair expression of the assembly of the ideological, political and doctrinal tendencies.” See, at p. 11 of the Moinot Report.

marginalized ones, the state monopoly⁸⁷⁶, coupled with specific programming standards seemed to be the best alternative⁸⁷⁷. The Report warned about the dangers of a market driven policy in the audiovisual sector⁸⁷⁸. The market success is measured in audience shares and might lead to uniform and impoverished content⁸⁷⁹. The Report explored in depth the necessity for audiovisual creation, especially the need for each means of transmission to create its own programming⁸⁸⁰. The law of 9 November 1981 and sequentially the law of 29 of July 1982 allowed again authorizations for the private radios and abolished the state monopoly⁸⁸¹. Interestingly, these major changes in the French broadcasting law were influenced by prior changes in its Italian counterpart⁸⁸².

The statute of 29 July 1982 was the starting point of modern broadcasting law in France⁸⁸³. Article 1 of the *Loi* provided that “*la communication audiovisuelle est libre*.”⁸⁸⁴ Article 2 added that citizens have a right to a free and pluralist broadcasting system⁸⁸⁵. The Law of 23 October 1984 related to the printed press tried to put a stop to the Hersant monopoly⁸⁸⁶. It however achieved the contrary result as it also prescribed for

⁸⁷⁶ For instance the author of the Report calls for a permanent maintenance of the Société française de production, as an “irreplaceable tool for creating quality audiovisual works.” See, p. 34 of the Moinot Report.

⁸⁷⁷ See, at p. 11 of the Moinot Report.

⁸⁷⁸ See, generally, the Moinot Report.

⁸⁷⁹ See, p. 13, of the Moinot Report.

⁸⁸⁰ See, p. 64 and 71, of the Moinot Report.

⁸⁸¹ See, “The Media in Western Europe,” *ibidem*, at p. 61.

⁸⁸² The Constitutional Court in Italy in its decision of 10 of July 1974 imposed a real pluralism inside RAI and allowed right of broadcast for the local stations. Following this decision Italy benefited from an increasing number of free radio stations. See, P. Wachsmann, *ibidem*, at p. 448.

⁸⁸³ E. Barendt, “Broadcasting Law,” *ibidem*, at p. 16.

⁸⁸⁴ “The audiovisual communication is free.” Art 1 of “Loi n°82-652 du 29 juillet 1982 sur la communication audiovisuelle” (Law no. 82-652 of 29 July 1982 on the audiovisual communication).

⁸⁸⁵ Article 5 furthermore referred to “the honesty, the independence and the pluralism of information,” and, more generally, to “the principles of pluralism and equality among cultures, the beliefs, the currents of thought and opinions,” which are guaranteed both in the public and the private broadcasting. See, art. 5 of Law no. 82-652 on the audiovisual communication.

⁸⁸⁶ See, Vincent Wright, “The fifth republic: From the droit de l’tat to the tat de droit?,” *West European Politics*, Volume 22, Issue 4 October 1999, pages 92 – 119. Robert Hersant owned many holdings in the

a non-retroactive application of its provisions⁸⁸⁷. The Conseil Constitutionnel accepted the constitutionality of this non-retroactivity and thus “sanctified” the monopoly⁸⁸⁸.

The Loi of 30 September 1986 enlarged the definition of audiovisual communication to keep pace with the potential technological developments and made reference therefore to “transmission through any means of telecommunications⁸⁸⁹.” Article 41-4 of Loi of 1986, as modified by Loi of 17 January 1989 establishes specific anti-concentration measures for the audiovisual sector⁸⁹⁰. The Law of 1986, under the “right-wing Parliamentary majority⁸⁹¹” opened the deregulatory gate⁸⁹². Because this Law establishes loose ownership limits – up to 30% of the circulation of the daily press or, if combined with broadcasting, up to 10%, and this excluding weekly or other non-daily titles,⁸⁹³ it favored the media entrepreneur Hersant, who formed La Cinq channel in 1987⁸⁹⁴. The discussion on the current French broadcasting system sheds more light into

French newspapers industry, among which Le Figaro. <http://www.nytimes.com/1996/04/23/world/robert-hersant-76-the-owner-of-france-s-leading-press-group.html?pagewanted=1?pagewanted=1>.

⁸⁸⁷ See, Wolfgang Hoffmann – Riem, “Regulating Media. The Licensing and Supervision of Broadcasting in Six Countries,” the Guilford Press, New York, London, 1996, at p. 159 and the following on the historical background. At p. 168 he notes that the networks of content became a reality in 1984. They did not worry so much the Haute Autorité, which described them in its annual report merely as “the development of close relations between several radio stations.” The same indulgence was shown towards cross-ownership. In 1985 the Loi permitted natural and juridical persons to obtain up to three licenses for the same sector. Financial participation or other forms of influence were likewise permitted in up to three stations. The author notes that “in this manner, the trend towards concentration was legalized in part, without, however, curtailing that trend.” Riem points to a study at that time that warns about the domination of large music chains and networks, which were mostly in the hands of press publishers, advertising agencies and the cinema industry. Ibidem.

⁸⁸⁸ See, the decision Radio Libres, *infra* at FN 907.

⁸⁸⁹ Article 2-2, Loi of 30 September 1986 (Loi Leotard).

⁸⁹⁰ France had at that time a general law dealing with anticompetitive practices and abuse of dominant position. See, Loi no. 77-806 of 19 July 1977, as modified by the ordinance of 1st of December 1986. The Loi of 1986 did not exclude the application of the general law together with the specifically designed measures for audiovisual. See, articles 39- 41 of Loi of 30 September 1986.

⁸⁹¹ See, “The Media in Western Europe,” *ibidem*, at p. 62.

⁸⁹² See, “The Media in Western Europe,” *ibidem*, at p. 62.

⁸⁹³ See, “The Media in Western Europe,” *ibidem*, at p. 64.

⁸⁹⁴ See, “The Media in Western Europe,” *ibidem*, at p. 64.

the approach taken by the French legislator on the media concentration. I first analyse the role played by the French Constitutional Court in the protection of media pluralism.

The French Conseil Constitutionnel played a major role⁸⁹⁵ in shaping the French legislation that protects media pluralism⁸⁹⁶. The following lines will show how the Conseil Constitutionnel marked its contribution to the development of media pluralism as constitutional objective and furthermore how it influenced the statutory instruments on broadcasting⁸⁹⁷. In order to make easier a laborious attempt to analyze them, I decided to separate them chronologically. This will provide the reader with a certain understanding of the constantly progressive path that made out of media pluralism an objective of constitutional value, while nevertheless permitting the legislator to constantly deregulate the media ownership limits.

Among the judicial institutions that play in France a decisive role in protecting media pluralism, the Conseil Constitutionnel, after it declared and reaffirmed media pluralism as an objective of constitutional value⁸⁹⁸, set a trend of permanent concern for this value from the part of the legislator and the regulatory authorities. This part of my

⁸⁹⁵ Though, some of the authors are of the opinion that the courts and the legislator played little part in the development of private broadcasting. See, Eric Barendt, "Broadcasting Law," *ibidem*, at p. 15. The author points to a Conseil Constitutionnel decision from 1978 when it upheld the constitutionality of a Loi making it a criminal offence to broadcast from an unlicensed radio or television station. One cannot however disregard the 1981 decision of Conseil Constitutionnel that marked the beginning of private broadcasting, as well as the following decisions that shaped broadcasting policy.

⁸⁹⁶ In decision 84-181 of 1989 the Conseil explicitly refused any regression of the legal protection of media pluralism, by permitting modification or abrogation of existing laws only to make the exercise of the right more effective. It sat the trend for a continuous and progressive protection. See, Dominique Rousseau, "Droit du contentieux constitutionnel," ("Law of constitutional adjudication") Montchrestien, Paris, 2001, at p. 394. See, also, Claude Albert Colliard, Roseline Letteron, "Libertés publiques," ("Public Liberties"), Paris: Dalloz-Sirey, 2005, at p. 466, on the "more complex" system developed by the legislator in order to "satisfy the Conseil [Constitutionnel]' exigences" in the audiovisual sector (as compared to the printed press sector).

⁸⁹⁷ See, also, R. Smith, *ibidem*, at p. 88.

⁸⁹⁸ See, also, Francois Luchaire, "Le Conseil Constitutionnel. Tome II – Jurisprudence. Première parties: L'Individu," ("The Constitutional Council. Tome II – Jurisprudence. First Part. The individual"), Economica, 1998, p. 73.

paper will analyze the Conseil Constitutionnel decisions on media pluralism and I will assess their impact upon the legislation and judicial practice. It is to be observed first that the Conseil Constitutionnel made of media pluralism a leitmotif of its media related decisions. Secondly, the Conseil Constitutionnel's emphasis on media pluralism influenced the legislator to take actions to protect this principle.

In the following lines the Conseil Constitutionnel's competence will be briefly discussed, especially in order to present the effect that its decisions has on the reviewed legislation and on future developments. The 1958 Constitution established the Conseil Constitutionnel⁸⁹⁹. Among its competences, the Conseil Constitutionnel contributes to the guarantee of the fundamental rights through the *contrôle de constitutionnalité* of *lois*⁹⁰⁰. The Conseil Constitutionnel assesses the constitutionality of the laws against *le bloc de constitutionnalité*, which is composed by the 1958 Constitution and its Preamble that makes at its turn reference to the *Déclaration des droits de l'homme et du citoyen* of 1789 and to the Preamble of the 1946 Constitution⁹⁰¹. The Preamble to the 1946 Constitution refers to *les principes fondamentaux reconnus par les lois de la République*.

Once the Conseil Constitutionnel declares a principle or an objective as having constitutional value, then all the public authorities, legislative, administrative and judicial must respect it⁹⁰². Furthermore, laws that are declared unconstitutional cannot be

⁸⁹⁹ French Constitution of 4 October 1958, available in English at: <http://www.assemblee-nationale.fr/english/8ab.asp>.

⁹⁰⁰ This control is either obligatory or facultative, depending on the category of the law. See, article 61, para. 1 and 2 of the French Constitution.

⁹⁰¹ See, Claire M. Germain, "French Law Guide," available at: <http://library.lawschool.cornell.edu/WhatWeDo/ResearchGuides/French.cfm>.

⁹⁰² The *res judicata* is attached not only to the holding of the decision, *le dispositif*, however also to the reasoning, *les motifs*. See, article 62 of the French Constitution. For an opinion over the efficiency of this type of control in France, see, Olivier Dutheil de Lamothe, "L'effectivité et l'efficacité du contrôle de constitutionnalité en," ("The Efficiency of the Efficacy of the Constitutional Control in France"), December 2006, <http://www.conseil-constitutionnel.fr/divers/documents/controloi.pdf>.

promulgated⁹⁰³. While not going into the depths of constitutional review, it is nevertheless worth mentioning that the control performed by the Conseil Constitutionnel is based on a test of proportionality, which permits the Council to evaluate the non-disproportionate, non-excessive, opportune, reasonable character of the legislator's choices⁹⁰⁴.

Among *les objectifs de valeur constitutionnelle* is the principle of preserving the pluralistic character of the socio-cultural opinions expressed in the media.⁹⁰⁵ The Conseil Constitutionnel's first decision⁹⁰⁶ related to the audiovisual sector legally justified the

⁹⁰³ See, article 62 of the French Constitution.

⁹⁰⁴ See, D. Rousseau, *ibidem*, at p.152. The author refers expressly to Conseil Constitutionnel's Décision n° 84-181 DC of 10 and 11 October 1984 - Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse, (Law on limiting the concentration and ensuring the press' financial transparency and pluralism) <http://www.conseil-constitutionnel.fr/decision/1984/84181dc.htm> (hereinafter, Decision 84-181).

⁹⁰⁵ The following Conseil Constitutionnel's decisions : Décision n° 81-129 DC of 30 October 1981. Loi portant dérogation au monopole d'Etat de la radiodiffusion (Law on abrogation of the state's monopole on radio) <http://www.conseil-constitutionnel.fr/decision/1981/81129dc.htm> (hereinafter Decision 81-129); Décision n° 82-141 of 27 July 1982, Loi sur la communication audiovisuelle (Law on audiovisual communication) <http://www.conseil-constitutionnel.fr/decision/1982/82141dc.htm> (hereinafter Decision 82-141); Decision 84-181, *supra*; Décision n° 86-217 DC of 18 September 1986 - Loi relative à la liberté de communication (Law on the freedom of communication) <http://www.conseil-constitutionnel.fr/decision/1986/86217dc.htm> (hereinafter Decision 86-217); Décision n° 88-248 DC of 17 January 1989, Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Law modifying law no. 86 –1067 of 30th of September 1986 related to the freedom of communication), <http://www.conseil-constitutionnel.fr/decision/1988/88248dc.htm> (hereinafter, Decision 88-248); Décision n° 93-333 DC of 21 January 1994, Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Law modifying law no. 86 –1067 of 30th of September 1986 related to the freedom of communication), <http://www.conseil-constitutionnel.fr/decision/1993/93333dc.htm> (hereinafter, Decision 93-333); Décision n° 2000-433 DC of 27 July 2000 - Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Law modifying law no. 86 –1067 of 30th of September 1986 related to the freedom of communication), <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2000/2000-433-dc/decision-n-2000-433-dc-du-27-juillet-2000.452.html> (hereinafter, Decision 2000-433); Décision n° 2001-450 DC of 11 July 2001, Loi portant diverses dispositions d'ordre social, éducatif et culturel (Law on diverse social, educational and cultural provisions) – para. 12-26, <http://www.conseil-constitutionnel.fr/decision/2001/2001450/2001450dc.htm> (hereinafter, Decision 2001-450); Décision n° 2004-497 DC of 1 July 2004, Loi relative aux communications électroniques et aux services de communication audiovisuelle (Law related to the electronic communications and to services of audiovisual communication) – see especially article 35 and 69 to 73, <http://www.conseil-constitutionnel.fr/decision/2004/2004497/2004497dc.htm> (hereinafter, Decision 2004-497).

⁹⁰⁶ Decision 81-129.

existence of the private broadcasting⁹⁰⁷, however within the limits prescribed by law and the procedural and technical requirements imposed by the regulatory agency. This decision is analysed both for its historical relevance as the very beginning of constitutional preoccupation with private broadcasting, as well as for its rationale for maintaining certain limits to total privatization of broadcasting – the frequency scarcity rationale.

In the first decision related to the private⁹⁰⁸ audiovisual sector, the Conseil Constitutionnel reviewed the *Loi* establishing the private radio⁹⁰⁹. The new system replaced the public monopoly. An administrative authority was to handle the licensing process and the private radio was to conform to legislative conditions “*dans le respect des principes et des règles de valeur constitutionnelle*.”⁹¹⁰ In this sense the Conseil observed that this *Loi* does not confer discretionary powers to the regulatory agency, and in fact obliges it “*d’assurer l’expression libre et pluraliste des idées et des courants*

⁹⁰⁷ See, also, Radio libres (Free radios) in Louis Favoreu, coordinator, “Recueil de jurisprudence constitutionnelle,” (“Collection of constitutional jurisprudence”), 1959-1993, 1994, Paris: Litec, 1994, at p. 100.

⁹⁰⁸ As to the public monopoly, see the decision on the constitutionality of the *Loi* establishing it, Décision n° 64-27 L, 17 mars 1964, Nature juridique de certaines dispositions des articles 1er, 5, 6, 7 bis et 11 de l’ordonnance n° 59-273 du 4 février 1959 relative à la Radiodiffusion-Télévision française, ainsi que de celles de l’article 70 de la loi n° 61-1396 du 21 décembre 1961 portant loi de finances pour 1962, Recueil, p. 33 ; RJC, p. II-15 - Journal officiel du 4 avril 1964. (Legal nature of certain stipulations in articles 1, 5, 6, 7bis and 11 of the ordinance no. 59-273 of 14th of February 1959 related to the French Radio-Television, as well the legal nature of the stipulations of the article 70 of the law no. 61-1396 of 21st of December 1961, the finances law for year 1962, Collection of the Conseil Constitutionnel decisions, published at p. 33, Official Journal of 4th of April 1964). This Decision is available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1964/64-27-l/decision-n-64-27-l-du-17-mars-1964.6628.html>.

⁹⁰⁹ Decision 81-129 DC.

⁹¹⁰ “In the respect of the principles and rules of constitutional value.” The same constitutional requirements apply to the telecommunications sector. See, Décision n° 96-378 DC, 23 juillet 1996, Loi de réglementation des télécommunications, (Law regulating the telecommunications) Recueil, p. 99 ; RJC, p. I-675 – Official Journal of 27th of July 1996, p. 11400. This Decision is available online at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1996/96-378-dc/decision-n-96-378-dc-du-23-juillet-1996.10818.html>.

d'opinion.⁹¹¹” The Conseil went on to decide on the alleged violation of the equality principle, as the Loi gave the possibility to apply for licenses only to associations and not to individual or legal entity⁹¹². The Conseil justified the legislator’s choice based on the scarcity of frequencies⁹¹³. Furthermore, given the fact that all interested parties could still form an association with the scope of obtaining a radio license, the right to free speech was not violated⁹¹⁴.

The scarcity rationale permeated the constitutional court’s case law in the years to come. In 1982 the Conseil delivered a decision in which it admitted that the prior administrative authorization does not conflict in any manner with the free communication of ideas and opinions⁹¹⁵. This constraint upon this freedom is justifiable in light of the technical conditions of transmission and in light of the necessity to ensure the respect of various objectives of constitutional value, among which “the maintenance of the pluralistic character of currents of social-cultural expression.”⁹¹⁶ Thus licensing is needed not only because frequencies are scarce, but also because, and precisely considering this technical constraint, the media diversity principle cannot be sustained otherwise. This in turn may give leeway to the regulatory agencies to incorporate media diversity concerns in their administrative procedures.

⁹¹¹ “To ensure the free and pluralistic expression of ideas and currents of opinion.” Decision 81-129 DC.

⁹¹² Decision 81-129 DC.

⁹¹³ It is important to note that this justification finds its way to the recent literature. See, Alain Lancelot, Rapport au premier ministre sur les problèmes de concentration dans le domaine des médias, (Report to the prime minister on the problems of concentration in the media) Décembre, 2005, at p. 30. Available at: http://www.ddm.gouv.fr/IMG/pdf/rapport_lancelot.pdf. See, also, Dominique Rousseau, *ibidem*, at p. 396, for the “only legal modality capable to ensure the respect of pluralism.”

⁹¹⁴ Decision 81-129 DC.

⁹¹⁵ Decision 82-141.

⁹¹⁶ See, Decision 82-141, in Charles Debbasch, *supra*, at p. 198.

The 1984 decision⁹¹⁷ came in response to the first law to deal with concentration in printed press⁹¹⁸. The Conseil derived the constitutional objective of media pluralism from the text of article 11 of the Constitution⁹¹⁹. It also affirmed the primacy of this objective over the constitutional right to freely develop a business. Ultimately, the Conseil started to draw the circle around the concept of pluralism, a circle that came to a closure in future decisions, as well as expressly refused to leave the media to the forces of the market.

In the Decision no. 84-181 the Conseil Constitutionnel reviewed in 1984 the *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*⁹²⁰. The Loi established limits to press ownership⁹²¹. The Conseil Constitutionnel derived first the *objectif de valeur constitutionnel* of *le pluralisme des quotidiens d'information politique et générale* from article 11 of the 1789 Declaration⁹²². It reminded that, although the legislator can, according to article 34 of the Constitution, enact legislation on the exercise of a fundamental right, it must nevertheless do so only to make the right more effective or to reconcile it with the other *règles ou*

⁹¹⁷ Decision no. 84-181, *supra*, Decision 86-217.

⁹¹⁸ Law no. 84-937 of 23 October 1984, on limiting the concentration and on ensuring the transparency and pluralism of the press enterprises (“Loi n°84-937 du 23 octobre 1984 visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse”).

⁹¹⁹ Article 11 of the Constitution was drafted in general enough terms allowing it to serve as “foundation for the most diverse and the most modern modalities of communication.” See, Thierry S. Renoux, Michel de Villiers, *Code constitutionnel: commenté et annoté*, (“Constitutional Code: commented and annotated”), Paris: Litec, 1994, p. 89.

⁹²⁰ Decision 84-181 DC.

⁹²¹ According to article 10 of the Law of 23rd October 1984 on concentration in the printed press, a person cannot own or control more than 15% of all the national magazines of political and general information. Article 11 establishes the same limit as applied to the regional/local market. Article 12 of the Loi establishes that a person cannot own or control both a regional/local and national magazines if their ownership will exceed 10% in each market. See, para. 40 of Decision 84-181.

⁹²² Article 11 of the Declaration of Men and Citizens states: “The free communication of thoughts and opinions is one of the most precious human rights; every citizen can therefore talk, write, print freely, being in the same time responsible of the abuse of this freedom and in the cases determined by law.” See, in Decision 84-181, at para. 35.

*principes de valeur constitutionnelle*⁹²³. The *Loi* was said⁹²⁴ to impair upon the freedom of the business establishment, *liberté d'entreprendre*, derived from article 4 of the 1789 Declaration⁹²⁵. However, the Conseil decided that article 13 of this *Loi* (which dealt with time application of the *Loi*), should be interpreted as providing that the ownership limits will be applicable only for future takeovers and control acquisition. Thus, the ownership limits did not apply to natural development of the business, or to the creation of new press companies, and therefore the constraints of the law were justifiable in light of the objective protected⁹²⁶. The Conseil envisioned plurality in the sense of a sufficient number of publications of different tendencies and characters – internal pluralism. It also called for the consumers' complete freedom from both public and private influence and it expressly left the domain of the press out of the game of the market⁹²⁷.

The complexity of the Conseil's decisions increased when in 1986 the institution needed to decide on several statutory points' conformity with the Constitution⁹²⁸. The

⁹²³ Decision 84-181 DC.

⁹²⁴ Decision 84-181 DC.

⁹²⁵ Decision 84-181 DC.

⁹²⁶ See, also, D. Rousseau, *ibidem*, at p. 393. D. Rousseau observes the primacy of pluralism of opinion over other constitutional rights, such as freedom of business establishment and the right to property.

⁹²⁷ "Considering that the pluralism of magazines of political and general information to which the provisions of title II of the law are dedicated is itself an objective of constitutional value; that in fact the free communication of thoughts and opinions, guaranteed by article 11 of the Declaration of the Right of Men and Citizens of 1789 would not be effective if the public to which these magazines address themselves would not benefit from a sufficient number of publications of different tendencies and characters ; that ultimately the objective to realize is that the readers that are the essential addressees of the liberty proclaimed by article 11 of the 1789 Declaration benefit in the same time of the exercise of their free choice without the possibility that private interests or public powers substitute to their own decisions and without making this objective the object of the market." Decision 84-181 DC, para. 38.

⁹²⁸ Decision 86-217. This decision came after the Chirac government sought to reform broadcasting in a number of ways. A major part of the reform was the privatization of the main television station, TF1. The reform also involved a measure of relaxation in the regulation exercised over broadcasting and the creation of a more independent regulatory authority, the National Commission for Communication and Liberties, which replaced the existing regulatory authority and its members. Private television channels had already been allowed by Loi no. 85-1317 of 13 December 1985, and the first private channel, Canal 5, had been awarded to Socialist supporters. Before they left office in March 1986, the Socialists had already announced plans for additional private channels. See, John Bell, "French Constitutional Law," Clarendon Press, Oxford, 1992, at p. 330.

1986 decision gave the Conseil the opportunity to elaborate more on the regulatory agency's competence in the audiovisual sector and on the rules that it must apply in light of the already established and reaffirmed media pluralism objective. It noted the ownership limits as means to tackle media concentration, while pointing out to its several shortcomings⁹²⁹. In this decision⁹³⁰ the Conseil Constitutionnel had the opportunity to reaffirm the *objectif* of media pluralism when reviewing la *Loi relative à la liberté de communication* (the "*Loi*").⁹³¹ The following aspects of the *Loi* were reviewed for their constitutionality: the replacement of the *Haute autorité de la communication audiovisuelle* with the *Commission nationale de la communication et des libertés*, the authorization regime for utilizing frequencies for radio, terrestrial television and satellite television, the specific rules on pluralism in communications and the transfer to the

⁹²⁹ Decision 86-217. Although my paper does not analyze the printed press, it is worth mentioning that the Conseil Constitutionnel found unconstitutional a loi that would deregulate ownership limits on printed press. See, Décision n° 86-210 DC, Loi portant réforme du régime juridique de la presse (Law reforming the juridical regime of the press), 29 July 1986. Recueil, p. 110 ; RJC, p. I-270 – Official Journal 30th of July 1986, p. 9393. The decision especially mentioned the lack of reference to direct or indirect control for the scope of share attribution. It was followed by Loi no. 86-1210 of 27 November 1986. See, for this decision and for an extremely brief discussion of this decision, Guillaume Drago, "L'exécution des décisions du Conseil Constitutionnel," ("The enforcement of the Conseil Constitutionnel decisions"), *Economica*, 1991, at p. 135. This Decision is available online at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1986/86-210-dc/decision-n-86-210-dc-du-29-juillet-1986.8277.html>.

⁹³⁰ Decision 86-217. Although my paper does not analyze the printed press, it is worth mentioning that the Conseil Constitutionnel decided in the same year to repel a loi that would deregulate ownership limits on printed press. See, Décision n° 86-210 DC, Loi portant réforme du régime juridique de la presse (Law reforming the juridical regime of the press), 29 July 1986. Recueil, p. 110 ; RJC, p. I-270 – Official Journal 30th of July 1986, p. 9393. The decision especially mentioned the lack of reference to direct or indirect control for the scope of share attribution. It was followed by Loi no. 86-1210 of 27 November 1986. See, for this decision and for an extremely brief discussion of this decision, Guillaume Drago, "L'exécution des décisions du Conseil Constitutionnel," ("The enforcement of the Conseil Constitutionnel decisions"), *Economica*, 1991, at p. 135. This Decision is available online at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1986/86-210-dc/decision-n-86-210-dc-du-29-juillet-1986.8277.html>.

⁹³¹ Loi n°86-1067 du 30 septembre 1986. Loi relative à la liberté de communication * Loi Léotard *version consolidée au 10 février 2010 - version JO initiale. (Law of 30th September 1986. Law related to the freedom of communication. Law Leotard – consolidated version of 10 February 2010, initial Official Journal version). Both the current version and the initial one (in facsimile), available in French on [Legifrance.gouv.fr](http://legifrance.gouv.fr) website.

private sector of T.F.1⁹³². Considering its coverage of various issues and its statutory consequences, I analyze Decision no. 86-217 in more detail.

Article 1 of the *Loi* under review referred to frequency assignment by the new regulatory agency while respecting *la liberté et de la propriété d'autrui et de l'expression pluraliste des courants d'opinion*⁹³³. It furthermore charged the new regulatory agency in article 3 with favoring *la libre concurrence et l'expression pluraliste des courants d'opinion*⁹³⁴. It is especially important to note that the new regulatory agency was also supposed to monitor *la défense et à l'illustration de la langue française*⁹³⁵.

The Conseil decided that it is the legislator's discretionary choice to trust an administrative agency with the assignment of frequencies, on the condition to ensure the guarantee of *des objectifs de valeur constitutionnelle*⁹³⁶. Among these objectives, the Conseil enumerated *la préservation du caractère pluraliste des courants d'expression socioculturels*⁹³⁷. The Conseil gave a more detailed description to the concept of pluralism when it referred to "*programmes qui garantissent l'expression de tendances de caractères différents dans le respect de l'impératif d'honnêteté de l'information.*"⁹³⁸ The Conseil furthermore pointed out to the pluralism in the public sector, which was ensured through the access of the political parties, of the public government and of French

⁹³² TF 1 is the first French television of general theme programming, with holdings in content production for the audiovisual market and CD/DVD music distribution market. See, on its official website: http://www.tfl.finance.fr/groupe-presentation_generale.php. See, also, for an overview of its activities: <http://www.tfl.finance.fr/groupe-activites.php>.

⁹³³ "The freedom and the property of the other, the pluralistic expression of currents of opinion."

⁹³⁴ "The free competition and the pluralistic expression of currents of opinion."

⁹³⁵ "The defense and the promotion of the French language."

⁹³⁶ "It is permitted to the legislator to submit the private sector of the audiovisual communication to an administrative authorization regime, under the reservation to ensure the guarantee of the objectives of constitutional value." See, para. 9, Decision 86-217. The Conseil Constitutionnel recalled article 34 of the French Constitution that entrusts the legislator to establish the rules concerning the manner of exercising the fundamental rights. See, para. 7, Decision 86-217.

⁹³⁷ "The preservation of the pluralistic expression of currents of socio-cultural expression."

⁹³⁸ "The programmes that guarantee the expression of tendencies of different character, in the respect of the imperative of honesty of information." See, para. 11, Decision 86-217.

religious sects to public television, and through the right to reply. Furthermore, all these guarantees were stated in the *cahiers des charges*⁹³⁹ that the public television companies must first submit to the national regulatory agency.

An important role that the discussion on these constitutional decisions serves is to show how the media ownership restrictions developed to address concentration on different product and geographical markets. They also point to the importance attached in the European legislations and case law to the public broadcaster's contribution to a diverse media.

Considering the ownership limits prescribed by the *Loi*, the Conseil emphasized the shortcomings to be addressed by future legislation. The applicants submitted that they were inefficient or insufficient given that article 39 of the *Loi* targeted only limits on internal ownership⁹⁴⁰ and that article 41 did not put any obstacle to the possibility for one operator to acquire national coverage and that, finally, pluralism is endangered by the proposed transfer of TF 1 to the private sector⁹⁴¹.

At the time in 1986, the *Loi* obliged any person that detained more than 20% of the capital or of the rights to vote of an audiovisual company to inform the national regulatory agency⁹⁴². One single individual or legal entity could not, directly or indirectly, own more than 25% of the capital of a private licensed terrestrial television company⁹⁴³. Article 40 prohibited that more than 20% of the capital or voting rights of

⁹³⁹ Conventions concluded between the public broadcaster and the state, including the public broadcaster's obligations.

⁹⁴⁰ "Only within one company and it does not put any limit on a person becoming a shareholder, cumulatively up to 25%, in many companies." See, Decision 86-217, para. 10.

⁹⁴¹ TF1 was privatized in 1987, to Groupe Bouygues. See, <http://www.tflfinance.fr/groupe-historique.php?YEAR=1987>.

⁹⁴² Art. 38, Loi Leotard, version of 1986.

⁹⁴³ Art. 39, Loi Leotard, version of 1986. This provision came to be modified in 1994 and increased to 49% by Loi no. 94-88 of February 1st; furthermore, through Loi no. 2001-624 of 17 July 2001 applicable only to

either a radio, television or printed press company be owned by a foreigner⁹⁴⁴, except if the programming was in the French language. A person could not own more than one license for national terrestrial television or could own more than one license for a radio company with national coverage only if the new license would cover an area with a population inferior to 15 million people⁹⁴⁵.

The Conseil Constitutionnel observed that these provisions did not consider in any manner the possibility of one person owning many terrestrial television licenses in many metropolitan areas⁹⁴⁶ and that it did not limit in any manner cable ownership⁹⁴⁷. The Conseil Constitutionnel observed that the *Loi* did not furthermore put any limit to cross-ownership⁹⁴⁸. The Conseil concluded therefore that article 39 and article 41 of the *Loi* do not “satisfy the constitutional exigency of preserving pluralism, either in the audiovisual communication sector, either in the communication sector in general⁹⁴⁹.” As a consequence, they do not appear in the published version of the *Loi*⁹⁵⁰.

As to the transfer to the private sector of TF1, the applicants contended that the transfer should be made in the context of the legal regime of public concession and that the transfer of 50% of the shares to a single group was contrary to the principle of

services which the average annual audience surpasses 2,5% of the total audience, and limited through Loi no. 2004 – 669 of July 9 2004 to metropolitan areas, that is to areas with a population counting more than 10 million. No similar provision applies to radio. These Laws modified Loi Leotard and their modifications to Loi Leotard are available on legifrance.gouv.fr website.

⁹⁴⁴ See, also, Alain Lancelot, *ibidem*, at p. 37.

⁹⁴⁵ Art. 41, Loi Leotard, version of 1986.

⁹⁴⁶ Para. 31, Decision 86-217.

⁹⁴⁷ Para. 32, Decision 86-217.

⁹⁴⁸ Para. 33, Decision 86-217.

⁹⁴⁹ See, para. 36, Decision 86-217.

⁹⁵⁰ See, the initial version of the 1986 Loi on freedom of communication, available on [Legifrance.gouv.fr](http://legifrance.gouv.fr) in facsimile. Direct link: http://www.legifrance.gouv.fr:80/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19861001&pageDebut=11755&pageFin=&pageCourante=11758.

pluralism and to the principle of competition⁹⁵¹. In deciding upon this point the Conseil Constitutionnel created a mixed image of how the media pluralism might be protected in the most efficient manner. This picture is composed of both internal pluralism, ensured especially through the *cahiers des charges* – by extension, through the private conventions concluded by the private broadcasters⁹⁵² – and through the licensing process when the national regulatory agency evaluates content, and external pluralism, which is increased by privatizing the public broadcasters, and which is not highly distorted by the public broadcaster's initial advantage on the market. The following lines will elaborate more on the Conseil's arguments that depict a mixed "picture" of the best legal protection for media pluralism.

The Conseil Constitutionnel stated first that it is up to the legislator to decide the functioning and organization of the public television⁹⁵³. Furthermore, the "*group d'acquéreurs*" that would acquire TF1 was made up of two or more individuals or legal entities that must be legally distinct entities with no legal right of control one over the other⁹⁵⁴. The Conseil Constitutionnel found that the obligation of this "*group d'acquéreurs*" to submit a *cahier des charges* containing the general programming rules, especially the honesty and the pluralism of information and programming was enough to ensure that the group would respect the imperative of pluralism⁹⁵⁵. Furthermore, the *Commission nationale de la communication et des libertés* was to observe the "triple necessity to diversify the operators, to ensure the pluralism of opinion and to avoid the

⁹⁵¹ Para. 38, Decision 86-217.

⁹⁵² See, *infra*, on these two regulatory instruments, section III.3.

⁹⁵³ See, Decision 86-217.

⁹⁵⁴ See, Decision 86-217.

⁹⁵⁵ See, Decision 86-217.

abuse of dominant position.⁹⁵⁶ The Conseil detailed even more on the matter, stating that the national regulatory agency must ensure the pluralism of opinions through the choice of operators, therefore through licensing⁹⁵⁷.

The applicants submitted that the transfer of TF1 to the private sector would violate the principle of competition among private activities⁹⁵⁸. This principle derives from the ninth paragraph of the Preamble of 1946 Constitution⁹⁵⁹. TF1, by entering the market would violate this principle as it would have a double advantage, vis-a-vis the public service broadcasters that would still have to abide by the public service obligations, and vis-a-vis the private broadcasters that do not benefit from the wide audience that TF1 acquired throughout the years⁹⁶⁰. The Conseil answered that the *Loi* under review did not establish a private monopoly, it privatized just one company and that this operation would still not create barriers to entry the market for terrestrial television⁹⁶¹.

If only powerful groups have the possibility to air the type of content that represents their interests, then many societal issues and concerns will remain unaddressed by the media. The issue of the access to broadcasting by financially potent political groups was discussed from the perspective of the constitutional principle of equality. According to article 14 of the *Loi* the political advertising is restricted only to the period outside the electoral campaign⁹⁶². The applicants contented that this article created an unfair competition among the political parties, as their access to television is dependent

⁹⁵⁶ See, para. 42, Decison 86-217.

⁹⁵⁷ See, para. 42, Decison 86-217.

⁹⁵⁸ See, Decison 86-217.

⁹⁵⁹ See, Decison 86-217.

⁹⁶⁰ See, Decison 86-217.

⁹⁶¹ See, Decison 86-217.

⁹⁶² Para. 63, Decison 86-217.

on their financial resources. On this line of thought it would violate the principle of equality⁹⁶³ in article 2 of the Constitution and the principle of article 4 of the Constitution that states that “the parties and the political groups compete in the electoral campaign” and that they “form and exercise their activity freely.” In deciding the constitutionality of this provision the Conseil Constitutionnel reminded that such an unfair political game would not take place given the ambit of the *Commission nationale de la communication et des libertés*⁹⁶⁴. This Commission was to set up the appropriate rules and to monitor the existing ones in order to “guarantee the democratic expression of diverse currents of ideas and opinions.”⁹⁶⁵

Ultimately, the Conseil identified the addressee of article 11 of the French Declaration as the audience⁹⁶⁶, which is entitled to exercise their free choice without either private interests or public powers’ interference. It restated the belief that broadcasting should not be left to the caprice of the market⁹⁶⁷. In light of this decision it would be interesting to speculate on whether the United States doctrine of corporate free speech would stand any chance in front of the French Constitutional Council.

⁹⁶³ The equality principle came into play also in relation to alleged discrimination because articles 31 and 34 of the *Loi* authorized the frequencies’ use for radio and satellite, terrestrial and cable television only for companies, and not for persons. The Conseil Constitutionnel did not agree that this would violate the principle of equality as the interested parties could always group themselves in the form of a legal entity, and the frequency scarcity called for such a legal arrangement. See, para. 75, Decision 86-217.

⁹⁶⁴ Decision 86-217.

⁹⁶⁵ See, para. 67, Decision 86-217. The Conseil had a similar approach in 1988 when it decided that the financial contributions allotted to political candidates should not compromise the democratic expression of different currents of ideas or opinions. See, Décision n° 88-242 DC, 10 March 1988, *Loi organique relative à la transparence financière de la vie politique*, (Organic law related to the financial transparency in the political life) Recueil, p. 36 ; RJC, p. I-331 – Official Journal of 12 March 1988, p. 3350. See, for this Decision and for an extremely brief discussion of this decision and its relation to media pluralism, Francois Luchaire, *Le Conseil Constitutionnel. Tome III – Jurisprudence. Deuxieme et troisieme parties : L’Etat*, (The Conseil Constitutionnel. Tome III – Jurisprudence. The second and the third parts : the state) Economica, 1999, p. 16.

⁹⁶⁶ See, also, Guy Carcassonne, “La constitution,” (The Constitution), Paris: Editions du Seuil, 2004, at p. 401.

⁹⁶⁷ See, para. 11, Decision 86-217.

Besides these ownership restrictions that protect media diversity, licensing measures are also addressed by the main French broadcasting law, *Loi Leotard*. Among the conditions of frequency assignment and licensing are the necessity to diversify the operators and to ensure the plurality of ideas and opinions, the applicant's commitment to air premiere works of French expression and the necessity to avoid the abuse of dominant position and the practices hindering the competition in the communications sector⁹⁶⁸. Furthermore, the candidate for television license must commit to at least one or more of a series of actions that promote educational and cultural programs or programs broadcast abroad⁹⁶⁹. The regulatory agency assigns the licenses taking all the time into account the necessity to preserve *l'expression pluraliste des courants d'opinion*.⁹⁷⁰ This regulatory agency has the liberty to recommend to the government solutions to develop competition in the audiovisual sector and to notify and to be notified by the other administrative and judicial authorities on the potential restrictive economic practices and on economic concentrations in the sector⁹⁷¹.

Part of the media pluralism is the regulator's concern for localism. The Conseil Constitutionnel decided that allowing the national channels to broadcast locally, without distinct authorization, does not violate in any manner the media pluralism as objective of constitutional value⁹⁷². The Conseil based its decision first on the internal pluralism safeguards that the *cahiers des charges* of the channels broadcasting nationally already contained, and secondly on the fact that the reviewed law did preserve the anticoncentration measures in the previous ones. Furthermore, the national channels were

⁹⁶⁸ See, art. 29 of *Loi Leotard*.

⁹⁶⁹ Art. 30, *Loi Leotard*.

⁹⁷⁰ See, para. 22, Decison 86-217.

⁹⁷¹ See, article 17 of *Loi 86-1067 du 30 septembre 1986*, consolidated version.

⁹⁷² Decision 93-333 DC of 21 January 1994.

permitted to broadcast locally only for three hours a day and without any advertising during this period⁹⁷³.

In 2000⁹⁷⁴ the Conseil Constitutionnel re-iterated the pluralism of currents of social-cultural expression as *objectif de valeur constitutionnel*⁹⁷⁵. It derives and it is a pre-requisite of article 11 of the 1789 Declaration and it addresses principally to the audience. It is a measure against which the legislator must weigh its actions⁹⁷⁶. The new version of the *Loi Leotard*⁹⁷⁷ establishes a right for first access to the radio-electric resources of distribution and transmission for national programming societies⁹⁷⁸ in order for these societies to accomplish their public service mission. The Conseil Constitutionnel refuted the alleged discriminatory treatment in favor of these public channels⁹⁷⁹. It stated that the *Loi* was restricted only to affiliates of France Television that do not receive funds from subscription, only to digital TV and only to the measure that was strictly necessary to accomplish their public service mission stipulated in the *cahiers des charges*⁹⁸⁰. The preferential right of access was legally circumscribed and it was even more justified by the fact that the public service operators needed to abide by their public mission and

⁹⁷³ See, article 7, Loi n° 89-532 of 2nd of August 1989.

⁹⁷⁴ The Conseil Constitutionnel gave another opinion related to the audiovisual communication in 1989. While the decision dealt with procedural issues involved in the authorization process and with advertising, it stated that the freedom of communication might be limited only to the extent required by the pluralistic character of the expression of currents of opinion and ideas. See, para. 13 and 19, Decision 88-248 DC.

⁹⁷⁵ Decision 2000-433.

⁹⁷⁶ "Considering that it is up to the legislator, competent according to article 34 of the Constitution to establish the rules concerning the fundamental guarantees of the citizens for the exercise of their public liberties, to reconcile, in light of the state of the technology and the economic necessities of general interest, the exercise of the freedom of communication derived from article 11 of the 1789 Declaration with from the one part with the constraints inherent to the audiovisual communication and to its operators and from the other part the objectives of constitutional value that are the safeguard of the public order, of the other's freedom and of the preservation of the pluralistic character of the currents of social cultural expression." Decision 2000-433 DC – para. 12-26.

⁹⁷⁷ Loi Leotard modified by Loi 2000-719 of 1 August 2000. See, art. 26.

⁹⁷⁸ That are mentioned in article 44 of the *Loi Leotard*.

⁹⁷⁹ Decision 2000-433.

⁹⁸⁰ Decision 2000-433.

therefore they were in a different legal situation than the private ones⁹⁸¹. The law should in conclusion treat different situations differently.

The modified version of the *Loi* prescribes different regimes for cable and satellite operators⁹⁸². While the cable operators still need prior authorization for frequency usage because of their near monopoly in the local area and because of the network development, in the intent to promote digital television the legislator allowed for the satellite operators to submit just a prior declaration to the Conseil Supérieur de l'Audiovisuel⁹⁸³. This declaration should include the composition and the structure of the offer of services and a decree of the Conseil d'Etat would establish the minimal proportion of services independent of the satellite operators to be there included⁹⁸⁴. The Conseil Constitutionnel argued that this difference in legal regime is even more explained in light of the Conseil Supérieur de l'Audiovisuel's objective to preserve pluralism⁹⁸⁵. More importantly, this Decision shows how the legal actors – both the Constitutional Council and the legislator – pushed forward technological development – in this case satellite – that would increase the number of possible means of transmission and ultimately media diversity.

Another new rule refers to media ownership limits. One person owning a license for national television in analogue mode can acquire up to five more licenses for national television in digital mode, on the condition that their content is edited by distinct societies⁹⁸⁶. However, one cannot own more than four national television societies in

⁹⁸¹ See, Decision 2000-433 DC.

⁹⁸² See, art. 34, Loi Leotard.

⁹⁸³ See, *infra*, section III.2.2.

⁹⁸⁴ See, Decision 2000-433 DC.

⁹⁸⁵ See, Decision 2000-433 DC.

⁹⁸⁶ See, art. 41, Loi Leotard.

digital mode if one of these services consists in the retransmission of the analogue service⁹⁸⁷. Furthermore one cannot own more than 15% in two of these companies or 5% in three⁹⁸⁸. The national cap was raised to 49% for both analogue and digital television⁹⁸⁹. The applicants in the 2000 Decision⁹⁹⁰ argued that this situation favors again the public service broadcasters that could own up to 100% of its companies. They further argued that the article imposed a restriction on the *liberté d'entreprendre*⁹⁹¹. The Conseil Constitutionnel rejected these arguments. It stated that the means employed by the legislator, especially given the scarcity of frequency and in order to attain the constitutional objective of pluralism were not manifestly inappropriate to the targeted purpose⁹⁹². The Conseil seemed to establish a certain rational connection between the means and the aim and it expressly stated that it is not its mission to establish if the means that the legislator employed were the least restrictive.

In 2001 the Conseil Constitutionnel decided upon the constitutionality of a *Loi* that further modified the *Loi Leotard* of 1986⁹⁹³. This new *Loi* deregulated the audiovisual sector by adding another condition to the ownership limits. Article 39 of the new version of the *Loi* added to the 49% national cap the condition that the company's average national audience for the channels transmitted through all the means of transmission, either cable, satellite or terrestrial, either in analogue or digital mode should

⁹⁸⁷ See, art. 41, *Loi Leotard*.

⁹⁸⁸ See, art. 39, *Loi Leotard*.

⁹⁸⁹ See, art. 39, *Loi Leotard*.

⁹⁹⁰ Decision 2000-433 DC.

⁹⁹¹ Decision 2000-433 DC.

⁹⁹² “*de prévenir, par des mécanismes appropriés, le contrôle par un actionnaire dominant d'une part trop importante du paysage audiovisuel*” (to prevent, through appropriate mechanisms the control by one dominant shareholder of a too important part of the audiovisual paysage). See, Decision 2000-433 DC, para. 43.

⁹⁹³ Decision 2001-450 DC - 11 juillet 2001, *Loi portant diverses dispositions d'ordre social, éducatif et culturel* (Law on diverse social, educational and cultural provisions) – para. 12-26, <http://www.conseil-constitutionnel.fr/decision/2001/2001450/2001450dc.htm> (hereinafter Decision 2001-450).

overpass 2,5%. The Conseil rejected the argument that the legal means to attain the legislator's objective to promote digital television were imbalanced. It emphasized the fact that these rules actually contribute to the programming diversity and that contrary to the assertion that they tend to impair the pluralism of currents of social cultural expression they in fact favor it⁹⁹⁴.

These decisions influenced the development of the French statute on broadcasting. After the Conseil Constitutionnel decisions the *Loi Leotard* was amended⁹⁹⁵ so that article 39 prohibited one person from owning more than 25% of the capital in a national licensee, nor more than 15% in each of two⁹⁹⁶. Note however that as of 2009 the cap was raised to 49% in any national licensee that reaches more than 8% of the audience⁹⁹⁷. It was further forbidden by article 41 of this Loi to accumulate licenses for two national television services, or one national service and one local or regional service.⁹⁹⁸ Subsequent changes in this *Loi* changed this second part of the national ownership limit so that one entity or person may not own both shares in a national licensee that broadcasts terrestrially and reaches more than 8% of the total audience and shares in an analogical broadcaster that is not national and that is similar in nature⁹⁹⁹.

After the Decision of 1986, it was however still possible to accumulate regional television licenses, provided the population covered by these franchises did not in

⁹⁹⁴ In a sided observation the Conseil Constitutionnel counter the argument that the printed press does not have such a restrictive regime with the argument that the technical and economic context of the two sectors are different. Decision 2001-450 DC.

⁹⁹⁵ See, Loi n°2009-258 du 5 mars 2009, relative à la communication audiovisuelle et au nouveau service public de la télévision (Law no. 2009-258 of 5 March 2009 related to the audiovisual communication and to the new public television service) available on Legifrance.gouv.fr website.

⁹⁹⁶ Art. 39, Loi Leotard.

⁹⁹⁷ See, Loi n°2009-258 du 5 mars 2009, relative à la communication audiovisuelle et au nouveau service public de la télévision (Law no. 2009-258 of 5 March 2009 related to the audiovisual communication and to the new public television service) available on Legifrance.gouv.fr website.

⁹⁹⁸ See, art. 41 of the Loi Leotard in its version from 28 November 1986 to 2 February 1994.

⁹⁹⁹ See, Law n. 258 of 5 March 2009, supra.

combination exceed 6 million – increased to 12 million in 2004¹⁰⁰⁰, and the same was true for cable, provided the population covered did not exceed 8 million – limit totally eliminated in 2003¹⁰⁰¹. Article 41-1, inserted after the Conseil’s ruling of 1986, contains complex rules designed to multimedia holdings. For example, no license for television or radio can be issued if the holder would then find that he had interests in more than two kinds of media, radio, television, cable, and the press, with more than a prescribed coverage¹⁰⁰².

In 2004 the Loi Leotard was further amended¹⁰⁰³ and it limits foreign ownership to 20% of the social capital or rights of vote in a company.¹⁰⁰⁴ As amended in 2004 the *Loi Leotard* establishes a complicated system of ownership limits. It covers all the levels of the market -national/local- and of the means¹⁰⁰⁵ and manner of transmission satellite/terrestrial and digital/analogue¹⁰⁰⁶. It mandates notification to the Conseil de l’Audiovisuel in regard to shareholders ownership¹⁰⁰⁷.

The above analysis went through the long and complicated process that established media pluralism as an objective of constitutional value and through its impact

¹⁰⁰⁰ Loi n° 2004-669 du 9 Juillet 2004 relative aux communications électroniques et aux services de communication audiovisuelle (Law 2004-669 of 9 July 2004 on the electronic communications and services of audiovisual communication).

¹⁰⁰¹ Loi n° 2003-1365 du 31 décembre 2003 relative aux obligations de service public des télécommunications et à France Télécom et liens vers les décrets d'application (Law no. 2003-1365 of 31 December on obligations of the public telecommunications service and on France Télécom and links to the application decrees).

¹⁰⁰² See, art. 41-1 Loi Leotard.

¹⁰⁰³ The Loi Leotard refers to “direct or indirect” holding of capital or voting rights – see article 39 of Loi Leotard.

¹⁰⁰⁴ Article 40, Loi Leotard, modified by Loi n°2004-669 of 9th July 2004 art. 37, art. 108 (JORF 10 juillet 2004).

¹⁰⁰⁵ Although it left out the cable.

¹⁰⁰⁶ See article 39 and the following of the Loi Leotard. There is a prohibition to cumulate analogue plus analogue or digital plus digital in the same local market. See, Article 39, and, also, Article 41, Article 41-1, Article 41-1-1, Article 41-2, Article 41-2-1, Article 41-3, Article 41-4, Loi Leotard, all modified by Loi n°2004-669.

¹⁰⁰⁷ Article 38, Modified by Loi n°2004-669 du 9 juillet 2004 art. 37 (JORF 10 juillet 2004) (Law no. 2004-669 of 9 July 2004 art. 37 (Official Journal of the French Republic of 10 July 2004)).

on legislation. The Conseil Constitutionnel played nevertheless the crucial role in shaping media policy in France. I showed above how after almost each decision *Loi Leotard* was changed, especially in regard to ownership restrictions. Because the above decisions are fairly complex and descriptive, I pinpoint here the major contributions of the French constitutional decisions to media diversity's protection.

First, media diversity is recognized as a constitutional value. Second, it is not only up to the forces of the market to regulate the media industry in order to achieve media diversity. Regulation, such as ownership restrictions (especially cross-ownership), access rules and licensing are all contributing to the achievement of this goal. Most importantly, the Constitutional Court was careful to inquire into whether these rules are efficient in actually promoting media diversity on the market and when they were deficient in this regard, they were struck down. Third, the French Constitutional Court balances this constitutional value against other constitutional rights such as the right to establish a business. The vision that one has of the French concept of media diversity is a media composed of both public and private broadcasters, with the public broadcaster being helped to resist competition from private broadcasters.

The main difference between the reviews performed by the French Constitutional Court and the United States Supreme Court rests in the fact that the former decides prior to a statute's promulgation and does not get to review the regulatory agency's regulatory instruments. This situation ensures that the constitutional fate of the structural regulation designed to further media diversity is more predictable. The legislative response to any finding of unconstitutionality is also more immediate. The French Constitutional Court is keen on enforcing ownership restrictions and structural regulations in general that are

efficiently promoting media diversity. In order to increase the efficiency of these rules, this Court relies in main part on the role that the regulatory agency has in monitoring and enforcing this type of regulation. The reverberances of these decisions are to be found also in the regulatory instruments employed by the Conseil Supérieur de l'Audiovisuel that are to be discussed later.

III. 2. 2. 2. German contribution to diverse media: dual pluralism

Viewed within its historical context, the development of the German printed and electronic media seems highly dependent on political influences of the moment¹⁰⁰⁸. The German printed press developed under strict state control during Bismarck and it moved to more politically free and diverse during the Weimar Republic.¹⁰⁰⁹ As to radio broadcasting, it started in 1923, under governmental control, which facilitated its use by the National Socialists' propaganda after 1933¹⁰¹⁰. The German media system started at the "Hour Zero" after the defeat of 1945¹⁰¹¹. The German printed "party press" that preceded the Second World War was now strongly discouraged¹⁰¹². The occupation forces handed back the broadcasting stations to the Germans in the late 40s¹⁰¹³.

¹⁰⁰⁸ See, Kenneth Dyson and Peter Humphreys, "Regulatory Change in Western Europe: From National Cultural Regulation to International Economic Statecraft," in Kenneth Dyson and Peter Humphreys with Ralph Negrine and Jean-Paul Simon, "Broadcasting and New Media Policies in Western Europe. A Comparative Study of Technological Change and Public Policy," Routledge, 1988, at p. 126.

¹⁰⁰⁹ See, Peter J. Humphreys, "Mass Media and Media Policy in Western Europe," Manchester University Press, 1996, at p. 22. See, also, Eli Noam, "Television in Europe," Oxford University Press, 1991, at p. 73. Radio facilities and devices were closely supervised by the state under the Weimar Republic. See, E. Noam, "Television in Europe," at p. 73-75.

¹⁰¹⁰ See, Wolfgang Hoffman-Riem, "Federal Republic of Germany," in "International Handbook of Broadcasting Systems," Philip T. Rosen, ed., Greenwood Press, 1988, at p. 91. Television started in 1935. See, E. Noam, "Television in Europe," at p. 79.

¹⁰¹¹ In 1933 radio became the central propaganda tool of the Third Reich. See, Hans J. Kleinsteuber, "Germany," in Kelly, Mary J., "Media in Europe: The Euromedia Research Group," London, GBR: Sage Publications, Incorporated, 2004, p. 78. See, also, E. Noam, "Television in Europe," at p. 76-77.

¹⁰¹² See, Peter J. Humphreys, "Mass Media and Media Policy in Western Europe," at p. 28.

¹⁰¹³ See, E. Noam, "Television in Europe," at p. 77.

The future of broadcasting at that point had to be decided between the Western Allies who pushed for a structure of independent broadcasting and the new German politicians who desired the re-installment of state control¹⁰¹⁴. Political involvement in broadcasting is shown by the manner in which political parties supported or not new technologies – for the ones already in power, they were a threat to their position, for the ones that desired to be in power, they were a potential ally. The Western German government led by the Social Democrat Chancellor Helmut Schmidt did not sustain new technologies at the time, such as cable¹⁰¹⁵. The Christian Democrats and Christian Socials welcomed cable in the hope that it may help them win again political power¹⁰¹⁶. The public monopoly in broadcasting survived until the early 1980s,¹⁰¹⁷ which explains in turn the strength of public broadcasting in Germany¹⁰¹⁸. Following the Second World War and willing to protect itself from the dangers of the past, Germany introduced article 5 of the Basic Law¹⁰¹⁹, which guarantees free broadcasting against state censorship¹⁰²⁰.

Article 5 of the Basic Law states:

“Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and freely to inform himself from generally

¹⁰¹⁴ See, E. Noam, “Television in Europe,” at p. 77. Deutsche Post claimed its previous World War II ownership of broadcasting transmission facilities, but was denied. The transmitters were given instead to the state. Bundespost, successor to Deutsche Post, never gave up its ambitions to own transmission facilities, and in 1961 the Federal Constitutional Court “gave it the right to new broadcast transmission, while leaving the existing transmitters to the states.” See, E. Noam, “Television in Europe,” at p. 79.

¹⁰¹⁵ See, K. Dyson and P. Humphreys, *ibidem*, in K. Dyson and P. Humphreys with R. Negrine and Jean-Paul Simon, *ibidem*, at p. 95.

¹⁰¹⁶ See, K. Dyson and P. Humphreys, *ibidem*, in K. Dyson and P. Humphreys with R. Negrine and Jean-Paul Simon, *ibidem*, at p. 97.

¹⁰¹⁷ Hand J. Kleinsteuber and Bettina Peters, “Media Moguls in Germany,” in Michael Palmer, “Media Moguls,” Florence, KY, USA: Routledge, 1991, p. 195.

¹⁰¹⁸ See, also, on the influence of history on German media market, Kleinsteuber Hans J., “Germany,” in *Media in Europe*, *ibidem*, p. 78.

¹⁰¹⁹ Previously, the German Constitution stated in art. 118: “Every German is entitled within the limits of the general law freely to express his opinions by word of mouth, writing, printing, pictorial representation or otherwise.” See, Heinrich Oppenheimer, “The Constitution of the German Republic,” Stevens and Sons, Limited, Chancery Lane (1923) Gaunt, Inc., Reprint 1999, at p. 193.

¹⁰²⁰ See, K. Dyson and P. Humphreys, *ibidem*, in K. Dyson and P. Humphreys with R. Negrine and Jean-Paul Simon, *ibidem*, at p. 125.

accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.¹⁰²¹”

German law therefore explicitly protects broadcasting freedom (*Rundfunkfreiheit*). Freedom of broadcasting serves the same goal as all guarantees in art. 5(1) GG: “ensuring free individual and public formation of opinion within the communication process”¹⁰²². In the words of the Court:

“On the one hand, this presupposes the liberty to express and disseminate opinions and on the other, the liberty to take note of opinions once expressed, to inform oneself. Since art. 5(1) of the GG guarantees the freedom to express and disseminate opinions and freedom of information as human rights, it also seeks to protect this process constitutionally. [] in this context, it also gives freedom of opinion the force of law by making it an objective principle of the overall legal system, whereby subjective and objective legal elements modify and support one another¹⁰²³.”

The Federal Constitutional Court has been active in establishing the guidelines that the legislature must follow in order to preserve and ensure media diversity in broadcasting¹⁰²⁴.

Several points summarize the Court’s contribution to the protection of media diversity. First, the Court framed the definition of media diversity and it allowed for the principle of media diversity to permeate the regulatory norms that govern both public and private broadcasting. In so doing the Court placed more emphasis on public broadcasters’ obligation to follow such constitutionally mandated commands (while the private

¹⁰²¹ Basic Law for the Federal Republic of Germany (Grundgesetz, GG). In the version promulgated on 23 May 1949 (first issue of the Federal Law Gazette, dated 23 May 1949), as amended up to and including 20 December 1993. <http://www.iuscomp.org/gla/statutes/GG.htm>.

¹⁰²² BVerfGE 57, 295 1 BvL 89/78 3, Rundfunkurteil – “Third Broadcasting Case” (FRAG case), June 16, 1981, available online at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=641. Hereinafter, Third Broadcasting Case.

¹⁰²³ See, Third Broadcasting Case, citing Luth case, BverfGE 7, 198 [204 f].

¹⁰²⁴ See, also, K. Dyson and P. Humphreys, “Regulatory Change in Western Europe: From National Cultural Regulation to International Economic Statecraft,” *ibidem*, at p. 124.

broadcasters are still scrutinized for media diversity compliance especially in the licensing procedure¹⁰²⁵) and it provided state legislatures with guidance for strengthening the role and structure that broadcasters' internal structures have in protecting media pluralism. It is clear from the decisions analysed here that the German media industry was not to be left to the market's forces¹⁰²⁶.

The scarcity rationale in the Court's case law is understood as encompassing not only technical considerations, but economic factors as well. This understanding makes the policies to further media diversity more likely to be constitutionally justified, especially if one compares it to the United States Supreme Court focus on technical scarcity. What emerges from the German Court's case law is a system in which public broadcasting is seen as the most reliable source of media diversity and in which the Federal Constitutional Court mandates positive state action to protect media pluralism¹⁰²⁷.

I start with general considerations, I continue with internal/external pluralism as a more specific realization of the media diversity requirement in German broadcasting and I end with technical, operational details in the broadcasters' structure that the Constitutional Court deemed necessary to address as part of its contribution to media diversity protection.

¹⁰²⁵ The commissions responsible for licensing broadcasters need to comply with "the principle of internal pluralism." See, also, W. Hoffman-Riem, in P. T. Rosen, *ibidem*, at p. 93.

¹⁰²⁶ See, also, W. Hoffman-Riem, in P. T. Rosen, *ibidem*, at p. 92. See, also, E. Noam, "Television in Europe," *ibidem*, at p. 80.

¹⁰²⁷ "To protect freedom of broadcasting, it is [] not sufficient that the state refrains from interfering; rather, the state must provide regulations ensuring that the exercise of that right is not exclusively available to certain groups." See, Sabine Michalowski, Lorna Woods, "German Constitutional Law. The protection of civil liberties," Ashgate, Dartmouth, 1999, at p. 213.

Generally, diverse programming refers to comprehensive programming¹⁰²⁸ as well as to regional and local representation¹⁰²⁹. Media diversity is about plurality of topics, that is plurality of programming kind and subject matter and plurality of opinions and viewpoints, sometimes conflicting, that are representative and serve the society as a whole¹⁰³⁰. In order to be diverse, programming should further be “dynamic and open both in terms of topics and times,” subject and opinion, and it should educate, entertain, contribute to culture, art and advising the public, taking into account regional composition and cultural diversity as well as minority interests¹⁰³¹. The Court explicitly includes in this definition the representation of minority voices so “that broadcasting does not distort the opinion-formation process through programming that is biased or that neglects minority interests.”¹⁰³² Elaborating further, media diversity means serving different functions. In this sense one would expect on television or radio a “comprehensive overview of international¹⁰³³ and domestic events in all essential areas of life. Programming is not limited to that, however; rather, in addition to informing it must

¹⁰²⁸ In the Third Broadcasting Case the Court asserted that the Saarland Broadcasting Company shall structure its programming within the framework of the constitutional, democratic order. Broadcasts are to facilitate the independent formation of opinion and may not unilaterally serve one party, one confession, one point of view, one profession, one community of interests or some other particular group. They must take into account the religious, moral and cultural concerns of the population of the Saarland.

¹⁰²⁹ BVerfGE 83, 238 1 BvF 1/85, 1/88 6. Rundfunkurteil North Rhine-Westphalia Broadcasting Case, 05 February 1991, available at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=627.

Hereinafter, North Rhine Case. See, also, section 10 of the Saarland Media Law Statute, quoted in Third Broadcasting Case. “They must take into account the religious, moral and cultural concerns of the population of the Saarland.”

¹⁰³⁰ See, North Rhine Case.

¹⁰³¹ See, North Rhine Case.

¹⁰³² See, North Rhine Case.

¹⁰³³ Section 10 of the Saarland Media Law Statute, in Third Broadcasting Case: “The Saarland Public Broadcasting Company is to promote international understanding, advocate peace and social justice, defend democratic freedom and only be committed to the truth.”

also serve to educate and entertain. It must offer contributions to culture, art, and advising the public.¹⁰³⁴”

Preventing domination of public opinion by concentrated interests is part of what media diversity means in concept and pursues in practice. “All tendencies in opinion, including those of minorities” should have “secured expression in private broadcasting” and “the one-sided, largely imbalanced influence of individual producers of programmes on the formation of public opinion,” including “the emergence of predominant power over opinion” must be excluded.¹⁰³⁵ Opinions must be balanced and one-sided viewpoints should be avoided¹⁰³⁶. Media diversity at its strongest understanding is “impartial.”¹⁰³⁷ An important role of the law is to promote a healthy rivalry of opinion and viewpoints – referred to by the Federal Constitutional Court as journalistic (*publizistische*) rivalry,¹⁰³⁸ similar to the marketplace of ideas in the United States case law and doctrine. Diversity of opinions may further be ensured through participation of editorial staff in the configuration of and responsibility for programming¹⁰³⁹.

¹⁰³⁴ See, North Rhine Case.

¹⁰³⁵ BVerfGE 73, 118 1 BvR 1/84 4. Rundfunkurteil, “Fourth Broadcasting Case,” 04 November 1986, available http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=636. Hereinafter, Fourth Broadcasting Case.

¹⁰³⁶ “[Broadcasters] may not unilaterally serve one party, one confession, one point of view, one profession, one community of interests or some other particular group.” Section 10, Saarland Media Law Statute, quoted in North Rhine Case.

¹⁰³⁷ The private broadcasters are allowed to be less “impartial” in their pursue of diversity than the public broadcasters. BVerfGE 74, 297 1 BvR 147, 478/86 5. Rundfunkurteil “Fifth Broadcasting Case (Baden-Württemberg Private Broadcasting Case),” 24 March 1987, available online at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=635. Hereinafter, Fifth Television Case.

¹⁰³⁸ See, Fifth Television case.

¹⁰³⁹ See, North Rhine Case.

Comprehensive and varied media is essential to the development of an informed society¹⁰⁴⁰. The so-called dual pluralism system¹⁰⁴¹ or two-column model, often mentioned in the Federal Constitutional Court jurisprudence¹⁰⁴² encompasses on the one hand, external pluralism - private and public broadcasting, and on the other hand internal pluralism. The ultimate goal in choosing, implementing and constantly monitoring an appropriate media regulation within the dual pluralism model is “the securing of balanced diversity¹⁰⁴³.”

Within the internal pluralism model, the German broadcasters are bound by certain positive programming obligations closely related to the notion of pluralism. These obligations are part of the licensing procedure and precedence is given to the company offering the most comprehensive treatment of local and regional issues¹⁰⁴⁴. The requirements refer in general to the showing of a range of programmes. They vary,

¹⁰⁴⁰ “Free formation of opinion, a prerequisite for development of both individual personality and a democratic constitutional order, occurs in a process of communication. This process cannot be maintained without media that transmit information and opinions, including their own. Broadcasting has special importance among the media due to its broad effect, its immediacy, and its suggestive power. Free formation of opinion, therefore, will succeed only to the extent that broadcasters freely, comprehensively, and truthfully inform. As a result, under the conditions of modern mass communication, attainment of Art. 5(1)'s normative goal depends essentially on constitutional protection of broadcasting' s communicative function.” See, BVerfGE 90, 60 1 BvL 30/88 Cable penny –decision, 22 February 1994, available online at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=622.

Hereinafter the Cable Penny Case.

¹⁰⁴¹ The term is used by the Federal Constitutional Court. See, for instance, Fourth Broadcasting Case: “the outline of a dual broadcasting system becomes visible.” See, also, for a general presentation of the dual pluralism in “Germany,” Bernd Malzanini, “Promotion of Media Pluralism – European experiences and Polish expectations,” Warsaw, December 2004, available online at: www.krrit.gov.pl/bip/Portals/0/.../dm_konf_041209Malzanini.ppt. See, also, Wolfgang Hoffmann – Riem, “Regulating Media. The Licensing and Supervision of Broadcasting in Six Countries,” *ibidem*, p. 130 – 135, where the author emphasizes the consideration placed on the diversity requirement in the process of licensing, although he becomes skeptical on p. 137 where he points out that “the attempts to check excessive consolidation in Germany have largely come too late.”

¹⁰⁴² See, Cable Penny Case. The Federal Constitutional Court held in the Cable Penny Case that the decision on 14 June 1983 by the Parliament of the Free State of Bavaria, confirming the Interstate Compact Assessing the Amount of the Broadcasting User Fee and Amending the Interstate Compact Equilibrating Funds Between the Public Broadcasters, signed between 6 July and 26 October 1982, was incompatible with the Basic Law's Art. 5(1), second sentence to the extent that Art. 1 of the Interstate Compact is concerned. See, also, North Rhine Case.

¹⁰⁴³ See, North Rhine Case.

¹⁰⁴⁴ The diversity of opinion criterion is a proper criterion when granting license. See, North Rhine case.

however, considerably. While they are specifically directed to certain channels, sometimes they are couched in general terms. Such is the case of the guidelines provided by the recent German Interstate Broadcasting Treaty (Rundfunkstaatsvertrag, RstV): programmes transmitted throughout the country must respect human dignity and moral, religious, and cultural values, and should promote unity in Germany and international understanding¹⁰⁴⁵. The image that ideally emerges from such legal provisions is one of diverse programming, made up of special and general channels, and with the general channels composed of a variety of programming genres¹⁰⁴⁶.

While the public broadcasters must comply with pluralism requirements *par excellence*, the private broadcasters are under obligation to comply with less stringent conditions¹⁰⁴⁷. In the following lines I analyze the legal requirements imposed upon, differentially, public and private broadcasters, within the “internal pluralism” model.

Public broadcasting is bound by “cultural responsibility,” at the national and regional level¹⁰⁴⁸. The notion of public mandate permeates the Federal Constitutional Court’s broadcasting related jurisprudence¹⁰⁴⁹ especially since the public broadcasters were under public interest related mission and obligations since their inception.¹⁰⁵⁰ This facilitated the Constitutional Court’s rationale that the private broadcasters should be

¹⁰⁴⁵ “The [basic provision] task [] embraces the essential functions of broadcasting for the democratic order and for cultural life in the Federal Republic.” See, Fourth Broadcasting Case.

¹⁰⁴⁶ See, also, on German broadcasting programming, W. Hoffman-Riem, in P. T. Rosen, *ibidem*, at p. 95-97.

¹⁰⁴⁷ See, Fourth Broadcasting Case.

¹⁰⁴⁸ See, Cable Penny Case; Fifth Television Case.

¹⁰⁴⁹ “In the dual order of broadcasting at present emerging in the majority of German Länder on the basis of the new Media Acts, the essential “basic provision” is a matter for the public corporations whose land-based programmes reach almost the whole population and which are capable of a range of programmes comprehensive in their content. The task thereby set embraces the essential functions of broadcasting for the democratic order and for cultural life in the Federal Republic.” Fourth Television Case.

¹⁰⁵⁰ See, Fourth Broadcasting Case: “As long and insofar as performance of the tasks mentioned by public broadcasting is effectively ensured, it seems justified not to place the same high requirements as to breadth of programme range and the ensuring of balanced pluralism as on public broadcasting”

subject to less onerous programme restrictions, given that the principal public service functions of broadcasting are the responsibility of the public broadcasters¹⁰⁵¹. The Basic Law however does not prescribe any particular method of organizing it. It is left up to the states (*Laender*)¹⁰⁵² to decide whether to impose lower standards of comprehensiveness and impartiality for private broadcasters. What is important is that the public broadcasters carry on their fundamental responsibility of providing the community with a wide range of programs¹⁰⁵³. Diversity of opinion is still a factor however, when licensing new private broadcasters.¹⁰⁵⁴” The significance of outlining this difference in the imposition of internal programming obligations – *par excellence* for public broadcasters and to a lesser degree for private broadcasters – lays in the fact that the application of antitrust and ownership limits/access/licensing regulatory mechanisms to ensure media diversity seems more stringent in the case of private broadcasters since the public broadcasters are under strict obligations to respect media diversity.

The Constitutional Court tried to mitigate the political influences coming from both the Christian Democrats – whose policies pushed for private media and the Social

¹⁰⁵¹ See, Fourth Broadcasting case.

¹⁰⁵² It is not under the competence of the federal government to form television. See, BVerfGE 12, 205 2 BvG 1,2/60 1. Rundfunkurteil (Deutschlandfernsehen case) “First Television Case” 28 February 1961. Hereinafter First Television Case. Broadcasting falls under the states’ cultural affairs competence. See, also, K. Dyson and P. Humphreys, “Regulatory Change in Western Europe: From National Cultural Regulation to International Economic Statecraft,” *ibidem*, at p. 127.

¹⁰⁵³ See, Fifth Television Case, and North Rhine Case.

¹⁰⁵⁴ “The requirements of broadcasting freedom are met by a conception of the order of private broadcasting financed by advertising which, alongside general minimum requirements, clearly defines the conditions for the required ensuring of plurality and balance in programmes, entrusts the concern for maintaining these and all decisions of importance for the content of programmes to an external body independent of the State and influenced by the decisive social forces and tendencies, and takes effective statutory measures against a concentration of power over opinion.” See, Fourth Broadcasting Case. “Diversity of opinion is a proper criterion for determining whether to authorize applicants to commence private broadcasting. Editorial participation in broadcasters’ management and programming responsibility ensure that private companies will comply with media diversity requirements.” See, North Rhine Case.

Democrats – who were concerned for public broadcasting’ strength on the market¹⁰⁵⁵. The Fourth Television case envisioned the development of broadcasting under private auspices as a gradual process of transition from a public monopoly to a multitude of private broadcasters that would nevertheless ensure external pluralism and even a minimum level of internal balance¹⁰⁵⁶. Coming out of the Social Democrats’ era, the broadcasting technologies developed under the Christian Democrats led by Helmut Kohl¹⁰⁵⁷. As public broadcasting came under criticism for being politicized¹⁰⁵⁸, private broadcasting became more attractive. Initially, private television in Germany was largely transmitted via cable¹⁰⁵⁹. However, after the Fourth Television case and the agreement of the Staatsvertrag of 1987, the state licensing authorities allocated new terrestrial frequencies both to local companies and to large private consortia¹⁰⁶⁰. The latter, especially SAT1 and RTL, have established a national service through cable retransmissions of their satellite programs¹⁰⁶¹.

The Constitutional Court had the chance to rule on the compatibility of private broadcasting with article 5 of the Basic Law in the Third Broadcasting case¹⁰⁶². The Court noted that, unlike the printed press that had a long history and had the time to develop and adjust to the market while still preserving to a certain extent its public

¹⁰⁵⁵ See, K. Dyson and P. Humphreys, “Regulatory Change [],” *ibidem*, at p. 129. The Social Democrats were interested in keeping the development of cable and satellite under their control. See, *ibidem*, at p. 130.

¹⁰⁵⁶ See, Fourth Broadcasting Case.

¹⁰⁵⁷ The Christian Democrats came to power in 1982. See, K. Dyson and P. Humphreys, “Regulatory Change [],” in *ibidem*, at p. 131.

¹⁰⁵⁸ See, also, W. Hoffman-Riem, in P. T. Rosen, *ibidem*, at p. 97-98; E. Noam, *ibidem*, at p. 82.

¹⁰⁵⁹ Cable was at some point the “new media.” See, Kenneth Dyson and Peter Humphreys, “The Context of New Media Politics in Western Europe,” in K. Dyson and P. Humphreys, *ibidem*, at p. 36. The authors describe the role that newspapers had in the development of broadcasting in Western Germany. See, *ibidem*, at p. 35-39.

¹⁰⁶⁰ See, Eric Barendt, ‘Broadcasting Law. A comparative study,’ *ibidem*, p. 23.

¹⁰⁶¹ See, Eric Barendt, ‘Broadcasting Law. A comparative study,’ *ibidem*, p. 23.

¹⁰⁶² See, Third Broadcasting Case.

interest mission¹⁰⁶³, broadcasting should not be left to market forces to ensure that a wide variety of voices enjoy access to it and it should therefore be regulated. Private broadcasters are not bound by similarly strong public service requirements. Their more recent history, coupled with the fact that they are not publicly financed¹⁰⁶⁴, make them a less appealing and a less willing candidate for ensuring the proper level of media diversity on the market.

The theoretical perspective discussed above is put into practice by the advisory council (broadcasting council or advisory committee)¹⁰⁶⁵ for public broadcasters. This body is generally composed of representatives of the State Government, the Catholic Church and the Evangelical Church, every faction in the State (Laender) Parliament, and twenty additional members elected following proposal by the Committee for Culture, Education and Sport¹⁰⁶⁶. This organizational structure ensures that “large groupings within public life, in particular, from the cultural, social and economic areas¹⁰⁶⁷,” to be proportionally and efficiently represented¹⁰⁶⁸. One may argue that by pinning down a certain composition of the advisory council, the legislature imagined at the level of the broadcaster’s internal structure a real marketplace of ideas in the initial (with American

¹⁰⁶³ The Court noted that “With regard to the press, historical developments have resulted in a certain equilibrium, such that the guarantee of comprehensive information and formation of opinion through the press today may be satisfied by ensuring the status quo; but in the field of private broadcasting, it cannot be assumed that such a situation exists, at least not yet.” See, the Third Broadcasting Case. See, also the First Television Case.

¹⁰⁶⁴ See, Fourth Broadcasting Case: “private producers [] which finance their activities chiefly from the proceeds of advertising and are more subject to the laws of the market than the public corporations.”

¹⁰⁶⁵ See, art. 32 of the Interstate Broadcasting Treaty. While the Interstate Broadcasting Act refers to the Advisory Council, the States’ acts use other titles as well.

¹⁰⁶⁶ See, Third Broadcasting Case.

¹⁰⁶⁷ See, Third Broadcasting Case.

¹⁰⁶⁸ See, Third Broadcasting Case.

First Amendment connotations) sense of a community where the people had a chance to be heard, such as the “town” meetings¹⁰⁶⁹.

The efficiency of the representation means that the groups in the socially representative body play a meaningful role in programming decisions. However, special dangers loom in view of the profit making motive associated with private financing and moreso, due to the possibility of unilateral exercising of influence by a dominant group. These dangers were addressed by the Federal Constitutional Court. Thus, in the Third Television case¹⁰⁷⁰, the Saarland Broadcasting Act failed to adequately guarantee that “all societal relevant groups [] exercise[d] influence [] and ha[d] a say in the [] overall programming¹⁰⁷¹” and failed as well to provide adequate assurance against the danger that broadcasting power would be concentrated in one societal group. In that case, the Advisory Committee contributed two members to the Supervisory Board¹⁰⁷². However, such participation did not ward off the dangers of unilateral power positions/deficiencies in societal representation. Thus, the Supervisory Board, although it included two members of the Advisory Committee, could not properly secure the full achievement of the public interest mandate – protection of freedom of broadcasting¹⁰⁷³.

Further, the Saarland Act allowed the Executive to establish the rules of the broadcasting structure, thus eluding the constitutional requirement that the regulation of broadcasting structure be under the legislature’s jurisdiction¹⁰⁷⁴. Even so, next to the governmental representatives, only two relevant societal groups – the Catholic and

¹⁰⁶⁹ See, Robert Britt Horwitz, “The Irony of Regulatory Reform” 194-95 (1989), in Paul Cowling, “An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation,” 27 *Hastings Comm. & Ent. L.J.* 257, 2005.

¹⁰⁷⁰ See, Third Broadcasting Case.

¹⁰⁷¹ See, Third Broadcasting Case.

¹⁰⁷² See, Third Broadcasting Case.

¹⁰⁷³ See, Third Broadcasting Case.

¹⁰⁷⁴ See, Third Broadcasting Case.

Evangelical churches – were defined by the Act¹⁰⁷⁵. The rest of the provisions referring to social, economic and cultural representatives were too vague and imprecise, overlooking thus constitutional demands for specific criteria, with detailed description and necessary certainty¹⁰⁷⁶. Moreover, the number of the members was set at 13, which was inflexible and not high enough to ensure proportional social representation¹⁰⁷⁷. The Act also failed to set forth the necessary rules in order for the Advisory Committee to have an effective influence or to conduct effective supervision – it was limited to advising, discussing and recommending, its orders did not have binding force, and the Advisory Committee could not impose sanctions¹⁰⁷⁸. Thus, “the Committee’s position [was] too weak for it to be able to effectively advocate the interests of the general public when faced with entrepreneurial or other company’s interests,” lacking a “decisive element” of the guarantee of freedom of broadcasting through an internally pluralistic structure¹⁰⁷⁹.

Media diversity may be protected also through some more technical, corporate means. In the Third Broadcasting Case the Federal Constitutional Court also ruled on the efficiency in protecting media diversity of some guarantees present in the shareholders’ structure and decision-making mechanisms. The Act on the Transmission of Broadcasts in Saarland provided that the “transfer of stock is subject to the approval of the company’ supervisory board or the stockholders’ meeting¹⁰⁸⁰.” The Act provided that: “[a]pproval is to be denied when such transfer results in one person or one unified group of persons acquiring 50% or more of the capital or of voting power”¹⁰⁸¹. This structural provision,

¹⁰⁷⁵ See, Third Broadcasting Case.

¹⁰⁷⁶ See, Third Broadcasting Case.

¹⁰⁷⁷ See, Third Broadcasting Case.

¹⁰⁷⁸ See, Third Broadcasting Case.

¹⁰⁷⁹ See, Third Broadcasting Case.

¹⁰⁸⁰ See, Third Broadcasting Case.

¹⁰⁸¹ See, section 40 of the Act on the Transmission of Broadcasts in Saarland, in Third Broadcasting Case.

however, does not enhance the Advisory Committee's role either, because "it does not necessarily follow that the various groups of shareholders are identical with the relevant societal forces"¹⁰⁸².

Per contrast, an example of a more efficient broadcasting law was the West German Broadcasting of Cologne Act of 1985¹⁰⁸³. This Act provided more autonomy from state interference and gave the Broadcasting Council precedence in the exercise of fundamental attributions over the Administrative Council¹⁰⁸⁴. The Constitutional Court found the Act more satisfying for media diversity protection also because it offered a broader social representation. Thus, the Broadcasting Council was composed of 41 members: 12 members of the legislature, 17 appointed by societal groups and institutions, 9 from journalism, culture, art and science, 1 representative each from among senior citizens, the disabled, and foreign residents forming together the citizens branch and a percentage properly accounting for the women¹⁰⁸⁵.

The bottom line to such programming requirements is that they are needed to supplement for the lack of binding conditions attached to private broadcasting. It is the public broadcasting that is the most reliable source of diverse media in a dual system. The hierarchy of variety expectations and reliability is therefore first: public broadcasters, "securing for the people their basic broadcast programming needs"¹⁰⁸⁶ and only secondarily private broadcasters. While the private broadcasters may indulge themselves in less quality journalism, "it would be incompatible with [the public service mandate]

¹⁰⁸² See, Third Broadcasting Case.

¹⁰⁸³ See, North Rhine Case.

¹⁰⁸⁴ See, North Rhine Case.

¹⁰⁸⁵ See, North Rhine Case.

¹⁰⁸⁶ "It allows broadcasters to offer programming that, independent of viewer numbers and advertising commissions, meets the constitutional requirements for variety of topic matter and opinion. Its justification lies in unrestricted fulfillment of this function." See, Cable Penny Case.

perhaps with an eye toward increasing revenue or competing with private broadcasters, to pull out of certain sectors of programming or to neglect or favor particular sectors.” In brief, the public broadcasters should not “commercialize” their programming. All such constitutional guarantees avoid “the danger [that public broadcasting] could change into a quasi-private, massive enterprise that could pursue merely economic goals and thereby undermine the dual broadcasting order.” Therefore, where private broadcasters fail in providing the Germans with what they need or want, the public broadcasters step in to supply necessary programming: “private broadcasting’s current deficit of topical broadness and thematic variety is acceptable only to the extent which and so long as public broadcasting remains fully capable of functioning well ¹⁰⁸⁷”.

The decision of the Court in the Fifth Television Case sent a message of permanent concern with public broadcasting’ strife and strength on the market and especially in competition with the private broadcasters: “The functionality of broadcasting, and with it the guarantee of the pluralism and comprehensiveness of information, depends for the foreseeable future on the unrestricted guarantee of public broadcasting; private broadcasting could at present merely be seen as an additional offer.”¹⁰⁸⁸ The Court alludes to a hierarchical interpretation of Article 5 (1) of the Basic Law: this article was intended primarily for the public broadcasters’ protection and this should be the states’ legislators main concern. The private broadcasters receive a lower constitutional protection. Even if free competition requires that private broadcasters

¹⁰⁸⁷ See, North Rhine Case. See, also, “less stringent demands for private broadcasters than for public broadcasters concerning breadth of program offerings and securing of balanced diversity. Concessions of this sort, however, can be accepted without enduringly jeopardizing the normative goal of the Basic Law’s Art. 5(1), second sentence, only so long as and insofar as public broadcasting’s undiminished ability to provide the public with the indispensable basic service remains effectively guaranteed.” See, North Rhine Case.

¹⁰⁸⁸ See, Fifth Television Case.

compete on equal footing with public broadcasting, this goal cannot be accomplished at the expense of public broadcasters' strength on the market.

The public broadcaster might be tempted to compete on the market with the private broadcaster and dilute its public mandate. Cooperation leads to joint decisions taken by two institutions – public and private broadcasters – that are normally bound to have different and sometimes contradictory goals. Cooperation might undermine the goals of public broadcasting mandate and the regulatory rules should avoid the danger that the public broadcaster “is not eclipsed and eventually eviscerated by other particularly ideological or commercial orientations.”¹⁰⁸⁹ As a consequence, the public and private broadcasters may cooperate only to pursue the public interest¹⁰⁹⁰. The Lander’ statute should ensure that the public broadcaster’s “programming principles remain unaffected”¹⁰⁹¹. The cooperation must be so structured so as to allow a distinction between the private/public sectors, which are further clearly attributable to the private/public broadcasters involved in the cooperation. Within the confines of this beautifully regulated cooperation, the question of creating a dominant position on the market should become, at least in theory, moot¹⁰⁹².

The role that the Federal Constitutional Court has in encouraging positive state action to protect media diversity stems from the development of the constitutional adjudication in Germany.¹⁰⁹³ Because the Basic Law of the Weimar Republic was mostly a technical device that would allow the existence of an objective order, the law’s

¹⁰⁸⁹ See, North Rhine Case.

¹⁰⁹⁰ See, North Rhine Case.

¹⁰⁹¹ See, North Rhine Case.

¹⁰⁹² See, North Rhine Case.

¹⁰⁹³ See, on the initial development of constitutional adjudication of constitutional rights in Germany, Michael Stolleis, “A History of Public Law in Germany,” Translated by Thomas Dunlap, Oxford University Press, 2004, at p. 87 et seq.

interpretation and application in life are both political acts¹⁰⁹⁴. The constitutional rights were not initially judicially enforceable because courts did not have the authority to make decisions with political implications¹⁰⁹⁵. The Constitutional Court however developed a large body of adjudication. And, because the Constitutional Court sees individual liberties such as the freedom of speech as corroborated with the general right to liberty¹⁰⁹⁶ and with the right to equality,¹⁰⁹⁷ this corroboration has important implications when reviewing the justifications for certain restrictions on individual rights¹⁰⁹⁸.

The German Constitutional Court orchestrates the interplay between public and private broadcasters in order to efficiently protect the media diversity. However, does this Court go further to insinuate that positive state action is constitutionally permissible to protect media diversity? Freedom of broadcasting is a “serving freedom¹⁰⁹⁹,” – “it serves free individual and public [opinion] formation¹¹⁰⁰”, which is the result of communication - a constitutionally protected process. Besides a negative protection from state influence, in order to fully achieve the constitutional goal laid out in Article 5 of the Basic Law, a positive protection, in the form of regulation that enhances media diversity – such as ownership limits and content related obligations - is necessary.¹¹⁰¹

Whereas the German Federal Constitutional Court recognized, as did the United States Supreme Court, that threats to media diversity may come from both the state and

¹⁰⁹⁴ See, Mathias Kumm, “Who is Afraid of the Total Constitution, Constitutional Rights as Principles and the Constitutionalization of Private Law, German Law Journal,” Vol. 07, No. 4, at p. 343.

¹⁰⁹⁵ See, Kumm, *ibidem*, at p. 343.

¹⁰⁹⁶ Art. 2 section 1 of the Basic Law.

¹⁰⁹⁷ See, Kumm, *ibidem*, at p. 346.

¹⁰⁹⁸ See, Kumm, *ibidem*, at p. 346.

¹⁰⁹⁹ See, North Rhine Case.

¹¹⁰⁰ See, North Rhine Case.

¹¹⁰¹ See, North Rhine Case. See, also, Third Broadcasting Case: “a positive order [] which ensures that the variety of existing opinion is expressed in broadcasting as widely and completely as possible and that in this way, comprehensive information is offered. In order to achieve this, substantive, organizational and procedural rules are necessary that are oriented to the mandate of freedom of broadcasting and are thus suited to giving effect to that which art. 5(1) GG seeks to guarantee.”

private interests,¹¹⁰² unlike the United States Supreme Court, the Federal Constitutional Court urges in fact for state positive action¹¹⁰³ to protect broadcasting integrity and diversity. The Federal Constitutional Court constantly reaffirms its commitment to positive action in the spirit of attaining “the highest possible extent of balanced plurality in private broadcasting.”¹¹⁰⁴

“Therefore, it would not be enough to understand the Basic Law’s Art. 5(1) second sentence merely as a negative or defensive right only limiting state action. Broadcasting may not be abandoned either to the state or to any societal group []. The fundamental right of broadcasting freedom thus calls for a positive legal order that insures that broadcasting addresses and conveys the variety of topics and opinions, which play a role in society. This in turn requires substantive, organizational, and procedural regulations that are informed by broadcasting’s task and capable of attaining what Art. 5(1) as a whole seeks to achieve.”¹¹⁰⁵

Broadcasting is neither the market’s mission, nor the executive’s responsibility; the legislative body, as quintessential representative of the people is best placed to properly secure its integrity, impartiality and diversity¹¹⁰⁶. This is a natural consequence of both the separation of powers and the importance attached to media diversity

¹¹⁰² “It is not only the state that threatens such uses of broadcasting, but also societal forces.” See the Cable Penny decision. The same narrative one finds in other constitutional decisions: “A conception of the Basic Law’s Art. 5(1), second sentence, that did not extend beyond mere prevention of state influence, leaving broadcasting otherwise to be shaped by other societal forces, would not do justice to broadcasting freedom’s serving character.” See, North Rhine Case.

¹¹⁰³ “Certainly the legislature has a duty both to protect broadcasting freedom from non-communications interests of third persons and to create the positive legal order that guarantees attainment of Art. 5(1)’s normative goal.” See, Cable Penny Case.

¹¹⁰⁴ See, Fourth Broadcasting Case: “The [basic right of broadcasting freedom] requires [...] a positive legal order which ensures that broadcasting is not abandoned to individual societal groups any more than it is to the state, and that it instead records and passes on the diversity of topics and opinions which play a role in society as a whole.”

¹¹⁰⁵ See, Cable Penny Case. See, also, North Rhine case: “The Basic Law’s Art. 5(1), second sentence, obligates the state to guarantee the basic service for which public broadcasting is responsible in a dual broadcasting order.”

¹¹⁰⁶ It is still “the responsibility of the legislature to ensure that an overall pallet of programming comes into existence in which a forum is available for a variety of opinions, which is so essential for democracy. It is necessary to avert the danger that opinions in search of dissemination are shut out from the process of formation of public opinion and that those in possession of transmission frequencies and financial resources have an overwhelming influence on the formation of public opinion. It is of course not possible to ensure this with absolute certainty; nevertheless, it must be at least sufficiently likely that this sort of balanced variety comes about within the statutorily structured broadcasting system.” See, Third Broadcasting Case.

regulation. The Constitutional Court may declare a law unconstitutional or it may encourage national legislation to protect media diversity, however it lacks the power to make a legislative proposal that would, for instance tighten media ownership rules. Law making in this area is the Bundestag's role. While the Constitutional Court's commandment to the legislator and other legal actors involved to protect media diversity is laudable on paper, in practice the German media market is still highly concentrated, with some of the leading European media players being located in Germany¹¹⁰⁷. The Constitutional Court scrutinized – as discussed above - regulation designed especially for the media sector. However, it also considered whether antitrust alone may withstand the dangers of media concentration and promote diversity of content sources and viewpoints on the market.

What I call the antitrust law question – whether and to what extent is antitrust enough to protect media diversity - was dealt with by the Federal Constitutional Court in the North Rhine Case¹¹⁰⁸. The question appeared in the context of avoiding the danger of public broadcasters' monopoly or of them acquiring unlimited market power through economic cooperation with private enterprises¹¹⁰⁹. The Court dismissed application of antitrust law as moot since there were strong statutory requirements that such cooperation strictly and narrowly pursues only the goals of the public service mandate¹¹¹⁰. These requirements avoided any threat to market competition and kept in check public broadcasting market behavior and accountability to the public¹¹¹¹. In a different case,

¹¹⁰⁷ See, Kleinstaub Hans J., Germany, in Kelly, Mary J, ed., "Media in Europe," p. 78.

¹¹⁰⁸ See, North Rhine Case.

¹¹⁰⁹ Such cooperation is constitutionally permissible and it is provided in some media state laws for producing individual sound and motion picture transmissions jointly and having access to transmissions or parts of programmes. See, the Baden-Württemberg media law statute, in the Fifth Television Case.

¹¹¹⁰ See, Fifth Television Case

¹¹¹¹ See, Fifth Television Case.

because of the importance attached to broadcasting, the Court noted that the potential of misuse and the threat of attempting market domination were higher in the media than in other industries.¹¹¹² An antitrust only approach would not properly serve media diversity because:

“Rather, it is the responsibility of the legislature to ensure that an overall pallet of programming comes into existence in which a forum is available for a variety of opinions, which is so essential for democracy. It is necessary to avert the danger that opinions in search of dissemination are shut out from the process of formation of public opinion and that those in possession of transmission frequencies and financial resources have an overwhelming influence on the formation of public opinion¹¹¹³.”

The Court recognizes thus broadcasting’s importance to the democratic society and the danger for complex forces to possibly undermine its mission. Considering this paramount objective, the Court rejects the laissez faire, market only approach¹¹¹⁴. The constitutional guarantees of broadcasting freedom shifted direction and extrapolated scope. They do not address only the state, but the private companies also, discarding in the process any political influence, regardless of the propagator¹¹¹⁵.

Only one case made use of the scarcity rationale as justification for broadcasting regulation. The Federal Constitutional Court employs the same understanding of scarcity in the media realm as its American counterpart, both physical – in terms of frequencies’ scarcity – and economic – in terms of prohibitively high level of investment at start up.

¹¹¹² “Moreover, the possibility of concentration of power over opinion and the danger of misuse in order to gain unilateral influence over public opinion must, particularly with a medium as significant as broadcasting, be taken into account.” See, Third Broadcasting Case.

¹¹¹³ See, Third Broadcasting Case.

¹¹¹⁴ “The legislator was therefore prohibited from handing over public broadcasting functions to the market.” See, Fifth Television case.

¹¹¹⁵ “The fundamental constitutional communications rights originally were aimed at preventing the state from subjugating the communications media, and today these rights play their most important role in fending off state control of news and information reporting []. Art. 5(1), second sentence prohibits the state from directly or indirectly controlling a corporation or public institution that broadcasts []. But this prohibition encompasses more than the guarantee of broadcasting freedom vis-à-vis the state. It further prevents all uses of broadcasting as a political instrumentality.” See, Cable Penny Case.

However, the German Court does place a higher consideration in relation to the latter type of scarcity. While the technological developments diminish physical scarcity, they do not however make less pertinent the existence of the economic scarcity and hence the need for broadcasting regulation¹¹¹⁶.

It is here the point to discuss the regulatory implications of technological change. The German Federal Constitutional Court seems more cautious than the United States Supreme Court. The impact of technological progress in terms of media diversity goals cannot be asserted with confidence¹¹¹⁷. Frequency scarcity, even when obsolete, still does not seem to end the justification for statutory broadcasting regulation. The Federal Constitutional Court does not elaborate on this matter; however it states that the precedents of the Court itself were consistent in the sense of preserving regulation while assuming that technical scarcity existed and never blatantly asking what would be the statutory regulation's faith in case such technical scarcity subsided or disappeared. The Court went to say that even in such scenarios it envisions that statutory safeguards will remain necessary.¹¹¹⁸ Further, even if the technological change would bring about more diversity and increased access to media, the uncertainty of the situation still demands regulatory caution.

Two aspects should be highlighted. First, this cautionary approach adopted by the German Constitutional Court to how the new technologies will affect media diversity

¹¹¹⁶ “[Regulation] is also necessary when the special situation of broadcasting, occasioned by the scarcity of frequencies and the great financial expense associated with the transmission of broadcasts, is no longer pertinent in light of modern developments. See, Third Broadcasting Case.

¹¹¹⁷ “It is therefore uncertain whether by remedying the deficiencies existing in “overall programming” - a term that can be used to denote the embodiment of all programs broadcast domestically - all or at least an appreciable number of societal groups will actually have their say, i.e., whether a “market of opinions” will arise in which the spectrum of opinions finds unabridged expression.” See, Third Broadcasting Case.

¹¹¹⁸ “Even if the existing restrictions were to be removed, it could not be expected with any degree of certainty that the entire spectrum of programming would meet the requirements of freedom of broadcasting by virtue of the precepts inherent in competition.” See, Third Broadcasting Case.

protects the realization of this principle against media concentration. Second, technological progress in the media realm does not refer only to frequencies – although frequencies expanded to accommodate more channels on the same bandwidth. Technological development concerns also the increase in available means of transmission of media content. However, even if the alternative means of transmission may increase media diversity in terms of more diverse (or in plain language, several or many) means of transmission, other aspects still remain debatable. First, media diversity is not only about availability of diverse means of transmission but also and more importantly about the availability of diverse content. Second, the interchangeability aspect of alternative modes of transmission is still open to discussion. Third, the economic scarcity that would still justify media regulation that protects media diversity survives the technology saves media diversity slogan.

At this state in our analysis, and given that the Federal Constitutional Court did not issue a recent decision on the issue of the impact of new technological changes on questions of media diversity, it is assumed that from a constitutional law perspective, the new technology will not change the broadcasting structure, functioning and role to such an extent that regulation becomes obsolete. In the decisions in which it dealt with the issue of technological impact on the market, the Constitutional Court made it clear that the basic service mandate as well as the entire remit of the constitutional duty extends to “new technologies.”¹¹¹⁹ “the basic service mandate can be fulfilled in the dual system only when public broadcasting is guaranteed not only in its present condition, but also in its future development.”¹¹²⁰ One may argue that today such constitutional protection is

¹¹¹⁹ See, North Rhine Case, para. 1, letter c.

¹¹²⁰ See, North Rhine Case.

needed with even more strength given that when the Court issued its decisions, while the Court did not exclude the possibility that they might do so in the future, the new mediums did not yet usurp the traditional functions of the traditional media¹¹²¹.

The dangers of politicization affect both the public and the private broadcaster. This danger is more obvious in the case of public broadcaster, which at least in theory should be neutral and impartial. Adjacent to media diversity discussion is whether public funding is state interference, thus violating Article 5(1), second sentence of the Basic Law. The danger of political bias arising out of public financing emerged as a constitutional issue in the Cable Penny decision.¹¹²² A better alternative was argued that would help the public broadcasters to avoid submitting to political demands coming from one or another party in power at a certain moment in order to get funding. This alternative was to establish a fee in the public broadcasters' by laws¹¹²³.

The set up of such user fee is for the time being, however, under the Landers' competence, as an extension of their jurisdiction over broadcasting¹¹²⁴. Although the Court acknowledged the legitimacy of the fear of misuse of such power for political purposes considering that funding is attached to the fulfillment of precise programming requirements, it observed that the main requirement for public funding is for the fee not to interfere with programming choices. Editorial freedom is to be preserved, being a safeguard for diversity and keeping in check any private or public unwanted influence on programming¹¹²⁵.

¹¹²¹ See, North Rhine Case.

¹¹²² See, Cable Penny Case.

¹¹²³ See, Cable Penny Case.

¹¹²⁴ See, First Television Case.

¹¹²⁵ See, Cable Penny Case.

Another non-interference check is transparency of the assessment in the funding related decision making process¹¹²⁶. Public funding decisions are made on the basis of the public broadcasters' real, specific needs. Thus, Section 10 of Article 1 of the 1991 Interstate Compact on Broadcasting in Unified Germany (which is in fact a repetition of the 1987 similar Compact¹¹²⁷) establishes the guiding principles for public broadcasting funding: the principle of financing adequate to functions performed and the principle of equilibrating funds.¹¹²⁸ Funding assessment considers issues such as the continuation and improvement of radio and television programming, as well as innovation issues¹¹²⁹. The Cable Penny decision declared unconstitutional spending from user fees collected under interstate agreement¹¹³⁰ for other purposes than the ones especially complying with statutory conditions. In that instance, the funds were dedicated to private experiments in new technologies¹¹³¹ and, although the users might have in the future benefited from such technologies, the equivalence of pay and benefit was not actual¹¹³².

¹¹²⁶ "Since it was not possible, to make the substantive criteria for the fee decision more objective, the fee assessment procedure had to be improved. To this extent ARD and ZDF suggest adoption in an interstate compact of criteria for the establishment of the funding needs, of a regulation of the assessment procedure, and of provisions concerning the status and composition of a modified Funding Needs Committee." See, Cable Penny Case.

¹¹²⁷ The 1987 provisions of the Interstate Broadcasting Compact on Reform of the Broadcasting System were in essence adopted in the 31 August 1991 Interstate Compact on Broadcasting in Unified Germany, which is comprised of six separate interstate compacts. See, in Cable Penny Case.

¹¹²⁸ See, section 10 of the 1991 Interstate Compact on Broadcasting in Unified Germany, in Cable Penny Case: "Financing Adequate to Functions Performed; Principle of Equilibrating Funds: (1) The provision of funds must place the public broadcasters in a position from which they can fulfill their constitutional and legal duties; in particular it must guarantee the broadcasters' future existence and development. (2) The equilibration of funds among the Land public broadcasting corporations is part of the ARD's financing system; in particular it secures functionally adequate performance of their tasks by the following broadcasters: Saarland Broadcasters, Radio Bremen, and Free Berlin Broadcasting. The volume of such financial resources and its adjustment to accord with the broadcasting user fee is regulated by the Interstate Compact on Broadcast Financing."

¹¹²⁹ See, in Cable Penny Case, Section 12.1 of the 1991 Compact.

¹¹³⁰ See, in Cable Penny Case, 5 December 1974 Interstate Compact on the Broadcasting User Fee §3(2).

¹¹³¹ See, in Cable Penny Case, Art. 3 of the 1982 Interstate Compact Assessing the Amount of the Broadcasting User Fee and Amending the Interstate Compact Equilibrating Income Differences Between the Public Broadcasters obligated the Land public broadcasting corporations and ZDF (Second German

The Court recognized the difficulties in solving the paradox within the public funding mechanism: the legislative needs to on the one hand establish programming guidelines and to ultimately approve funding while acting as the representative of people's needs and on the other hand to keep absolutely away from any direct, indirect or even the most subtle influence. Given the fact that an objective assessment might never be possible, the solution is a compromise: "the legislature must grant the public broadcasters funding of those programs, the creation of which not only accords with the broadcasters' specific function, but also is necessary to safeguard this function"¹¹³³. Such a compromise fulfills the demands of both the listeners and the broadcasters and the requirements of flexibility in the dynamic technological context:

"This formulation strikes an appropriate balance between the broadcasters' constitutionally protected programming autonomy and the legitimate viewer and listener interests that the legislature must protect. It also allows adjustments when needed. After all, what it takes specifically to fulfill broadcasting's function depends on changing circumstances, particularly technological developments and actions of private broadcasters – against whom their public counterparts must remain competitive in order for the dual system as a whole to meet the requirements of Art. 5(1) second sentence [of the Basic Law]."¹¹³⁴

The discussion on constitutional protection of media diversity in Germany warrants several observations.

First, groups' representation in public broadcasters' councils is an important tool in protecting media diversity. However, these management bodies need to be carefully structured to avoid the dangers of monopolization and undue influence. For instance, a clear separation between the advisory council and the supervisory council of a

Television) to make available a sum of DM 35 million for each project conducted in the experiment with broadband cable television.

¹¹³² See, Cable Penny Case.

¹¹³³ See, Cable penny Case.

¹¹³⁴ See, Cable Penny Case.

broadcaster would ensure a better monitoring of the broadcaster's compliance with media pluralism commandments. The advisory body's social representative mission must be accomplished through a detailed description of its composition, function and enforcement mechanism. Another means to protect media diversity is through internal ownership control mechanisms – approval of a stock transaction is submitted to the condition of the acquirer not to hold more than 50% of the media company's shares. However, since the supervisory board takes the most important decisions on a company's actions, this should be made up of enough members of the advisory council so as to ensure that all societal groups are properly represented.

Second, the freedom of speech is classically understood as a negative freedom – the state should not interfere. The issue of regulation that suppresses to some extent the freedom of speech in order to enhance media diversity is a difficult one. For instance, the Italian theory of “*par condicio*”¹¹³⁵ that entitles the state to take legal measures to ensure a level playing field for all the political formations – measures such as equal time during electoral campaigns or in political debates¹¹³⁶ would be met in practice with little success. It is inevitable that one political orientation or organization would always get ahead, since the public is exposed to political opinions not only through broadcasting but also through other layers of civic society¹¹³⁷. The German Constitutional Court considers however that the regulation that furthers media diversity (to the expense of some speech) is necessary to further the very freedom of speech that the same regulation is said to have curtailed.

¹¹³⁵ See, Roberto Zaccaria, “Diritto dell' Informazione e della Comunicazione,” CEDAM-Padova, Quinta Edizione, 2004, at p. 99 et seq.

¹¹³⁶ See, Bognetti Giovanni, “Costituzione, Televisione e legge antitrust,” Giuffrè Ed., 1996, at p. 74, referring to P. Barile's work, “Idee per il sistema radiotelevisivo.” See, also, E. Bettinelli, “Par Condicio, Regole, opinioni, fatti,” Torino. 1995.

¹¹³⁷ See, Bognetti, *ibidem*, at p. 76.

This approach of the German Court is mostly shown in upholding public interest related obligations incumbent upon broadcasters, both private and public (although heaviest for public broadcasters) and management structures, such as the public broadcasters' advisory committees that represent social groups and interests.

Further, the market forces do not adequately regulate the media market. Antitrust is first not adequate to deal with some aspect of media regulation – such as the alleged monopoly of public broadcasting discussed by the Constitutional Court and second it is not enough to protect media diversity. Scarcity is both physical and economic, the latter being able to justify media regulation even when physical scarcity is doubted.

Finally, an aspect of interest to many European jurisdictions with strong public broadcasting, the potential for public broadcaster's politicization – such as through public funding – is countered by editorial freedom safeguards and by clear, transparent destination for the public funds. Thus, the most important manner in which one may ensure the public broadcaster's independence from the state is, at least in this European context, to place the broadcasting structure under the legislature's control.

The Federal Constitutional Court firmly proclaims various constitutional safeguards for media diversity¹¹³⁸. The concept of media diversity in the German constitutional jurisprudence encompasses two main elements: internal and external pluralism. These elements need to function together and adjust to one another so that the overall structure properly ensures media diversity requirements. Public broadcasting has a constitutionally privileged role and a constitutionally mandated duty to abide to media diversity ideology.

¹¹³⁸ See, also, Ulrich Karpen, "Freedom of Expression," at p. 100 in Ulrich Karpen, ed., "The Constitution of the Federal Republic of Germany. Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law," Nomos Verlagsgesellschaft, Baden-Baden, 1988.

Media diversity, though, is a complex phenomenon. The German constitutional jurisprudence touches upon various factors related to media diversity. These factors are: societal forces representation, viewpoints balance, private interests influence on programming, ownership and content interdependence, impact of public funding on the public broadcasting's essential role in fulfilling its public service mandate and on the overall broadcasting structure. Questions regarding the role of antitrust law, especially in light of the anticipation of technological impact, are answered in a firm manner – if the regulatory mechanisms put in place to protect media diversity are efficient, then antitrust is hardly necessary¹¹³⁹. It is difficult to imagine a moment when regulation will lose efficiency. In respect to its firm commitment to regulation and public broadcasting, the German Constitutional Court is unique.

III. 2. 2. 3. The Italian Constitutional Court

The country that offers the most challenging example for an assessment of the history/politics influence is however (and remains) Italy. Currently, the Italian broadcasting market is mainly characterized by the existence of two broadcasters: one public, RAI and second, private, Fininvest. The history of regulation (or better said, lack thereof) explains to a certain extent the development of Berlusconi's empire¹¹⁴⁰. In Italy, like in the other European countries discussed here, broadcasting started out as state monopoly, in 1924.¹¹⁴¹ Mussolini exercised total control over the medium and

¹¹³⁹ See, North Rhine case.

¹¹⁴⁰ See, E. Noam, "Television in Europe," *ibidem*, at p. 149. See, also, in Italian, a presentation of the history of the radio: <http://www.radio.rai.it/storiadellaradio/>.

¹¹⁴¹ Unione Radiofonica Italiana. See, E. Noam, *ibidem*, at p. 149.

immediately before as well as during the Second World War radio played an important role in Fascist propaganda¹¹⁴².

The Italian 1948 Constitution declined to expressly mention broadcasting and it provides in article 21 that “everyone has the right freely to manifest their own thoughts in words, writing and through every other means of diffusion¹¹⁴³.” It was noted that such a reluctance to refer to broadcasting was due to fear of “private monopolization¹¹⁴⁴” as well as to desire of political influence over such an important means of transmission¹¹⁴⁵. In 1954, with the development of television¹¹⁴⁶, Radio Audizioni Italia becomes Radiotelevisione Italiana (RAI)¹¹⁴⁷.

Since its beginning, the Italian political parties did not want to relinquish control over broadcasting. This was especially the case with the Christian Democrats’ influence over RAI¹¹⁴⁸. The Christian Democrats had however by the 70’s to accept that RAI would be under Parliament control¹¹⁴⁹. Since all the parties were interested in having control over broadcasting, RAI 2 was created, leaning towards the Socialists, RAI 3

¹¹⁴² Roberto Grandi, Italy, at p. 163 in *International Handbook of Broadcasting Systems*, Ed., Philip T. Rosen, Greenwood Press, 1988.

¹¹⁴³ As a historical intermezzo, the Italian philosopher Rosmini included this citizen’s right to free press in his ideal Constitution, at art. 37, but warned about the dangers of its abuse and demanded “civil regulation” to control this potential misuse of this right. See, Antonio Rosmini, “The Constitution under Social Justice” (1848) translated by Alberto Mingardi, Lexington Books, 2007, at p. 96.

¹¹⁴⁴ See, R. Smith, *ibidem*, at p. 35.

¹¹⁴⁵ “By the second half of 1946, the Christian Democrats had already gained control of the radio services.” See, R. Smith, *ibidem*, at p. 36.

¹¹⁴⁶ See, E. Noam, “Television in Europe,” *ibidem*, at p. 150.

¹¹⁴⁷ See, La storia della radio, <http://www.radio.rai.it/storiadellaradio/index.cfm?candidato=storia3.cfm&switch=>.

¹¹⁴⁸ Roberto Grandi, “Italy,” at p. 164 in “*International Handbook of Broadcasting Systems*,” Philip T. Rosen, Ed., Greenwood Press, 1988.

¹¹⁴⁹ Law no. 103 of 1975 provided that RAI’s management structure be composed of ten members appointed by the Parliament and six appointed by the shareholders – the majority shareholder was however Istituto per Ricostruzione Industriale, which led to RAI still being under governmental control. See, E. Noam, “Television in Europe,” *ibidem*, at p. 150, and at p. 151.

towards the Communists, while the initial RAI stayed with the Christian Democrats¹¹⁵⁰. This political division of RAI (which is termed “*lottizzazione*”) that started during the First Republic was kept in place in the Second Republic¹¹⁵¹, up to nowadays, with various degrees of intensity of the political parties’ influence¹¹⁵².

The most obvious possibility to politically influence the public broadcaster is through the power of appointment. The five members of the board of directors of RAI were appointed in 1993 by decision adopted in agreement by the Presidents of the Chamber of Deputies and of the Senate of the Republic, for not more than two business years¹¹⁵³. Previously, the duration of the board’s office was identical to that of the legislature¹¹⁵⁴ - exposing the Board to political forces – and had entrusted the appointment to the Parliamentary commission on broadcasting services¹¹⁵⁵. Nowadays RAI’s board of governors has nine members – seven of them named by the

¹¹⁵⁰ “According to a 1983 newspaper compilation, the party affiliations of editors of RAI-1 news programs were as follows: Christian Democrats, 65 percent; Socialists, 11 percent; and Communists, 7 percent. The party affiliations of editors of RAI-2 news programs were Socialists, 38 percent, Christian Democrats, 35 percent, and Communists, 19 percent. In voting in the early 1980s the Christian Democrats generally won the support of about 35 percent of the electorate, the Communists held about 30 percent and the Socialists won 10 to 15 percent.” See, E. Noam, “Television in Europe,” *ibidem*, at p. 151.

¹¹⁵¹ See, Chris Hanretty, “The Gospel truths of Italian media bias,” *Comunicazione politica*, vol. VIII, n. 1, primavera 2007, at p. 32. Available online at: <http://eui.academia.edu/ChrisHanretty/Papers/11011/The-Gospel-Truths-of-Italian-Media-Bias>.

¹¹⁵² Or *lottizzazione*. Chronologically, the extent of political interference may be categorized as: “pre [] *lottizzazione*,” “classical,” “complete” and “late”. See, Cinzia Padovani, “A Fatal Attraction: Public Television and Politics in Italy,” Rowman & Littlefield Publishers, Inc. 2005, at p. 53. See, also, “Crisis in Italian Media, How Poor Politics and Flawed Legislation Put Journalism under Pressure, European Federation of Journalists,” Report of the IFJ/EFJ Mission to Italy, 6-8 November 2003 (EFJ Report).

¹¹⁵³ See, art. 2 of the Law no. 206 of 25th of June 1993, “Disposizioni sulla società concessionaria del servizio pubblico radiotelevisivo” (Provisions on public service broadcasting). Available online at: http://www.associazionedeicostituzionalisti.it/materiali/atti_normativi/XIII/pdf/11993_00206.pdf. See, also, Giovanni A. Pedde, Eleonora Andreatta, “Broadcast Regulation in Italy: Debating New Rules to Join the European Audio-visual Market,” *Ent.L.R.* 1995, 6(1), 7-12.

¹¹⁵⁴ Article 25 (2) of the Law no. 223 of 1990, of 6 August 1990, “Disciplina del sistema radiotelevisivo pubblico e privato,” *Gazzetta Ufficiale della Repubblica italiana* del 9 agosto 1990, n. 185, Supplemento Ordinario, available at: http://www2.agcom.it/L_naz/1223_90.htm.

¹¹⁵⁵ Giovanni A. Pedde, Eleonora Andreatta, *ibidem*.

Parliamentary Commission¹¹⁵⁶ monitoring the field (voting on the list proposed by the Ministry of Economy and Finance and proportional in number to the state's participation in RAI and previously discussed with the mentioned Parliamentary Commission) and two, among which the President (however after approval by the same Commission) by the majority shareholder, the state, represented by the Ministry of Economy and Finance¹¹⁵⁷. Their term in office is of 3 years¹¹⁵⁸.

Besides the natural skepticism over any political interference in the public broadcasters' management and editorial line, this aspect of political partition of the public broadcaster has a negative impact on the media diversity in Italy also because of the special case of the Italian media. Consider the impact that the Italian Prime Minister has on the Italian broadcasting system – he owns the dominant private broadcasters¹¹⁵⁹ and he has the potential to influence the public broadcaster. The law on conflict of interests did nothing to solve this problem¹¹⁶⁰ because, unsurprisingly since it was enacted during the

¹¹⁵⁶ “*Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi.*” See, Article 20, para.5 of the Law 112 of 2004, of 3 May 2004, “Norme di principio in materia di assetto del sistema radiotelevisivo e della RAI-Radiotelevisione italiana Spa, nonché delega al Governo per l'emanazione del testo unico della radiotelevisione,” *Gazzetta Ufficiale* n. 104 del 5 maggio 2004 - Supplemento Ordinario n. 82, available online at: <http://www.camera.it/parlam/leggi/041121.htm> (law Gasparri). A discussion of Law Gasparri is available by Marco Cuniberti, “La legge n. 112 del 2004: aspetti generali,” in Marco Cuniberti, Giulio Enea Vigevani, “La Riforma del Sistema Radiotelevisivo. Aggiornamento a Percorsi di Diritto dell'Informazione,” G. Giappichelli Editore, Torino, Stampatre s.r.l, 2004, at p. 9 et seq.

¹¹⁵⁷ See, Article 20 of the Law 112 of 2004 (law Gasparri). See, also, art. 21 (6) of “Lo statuto della nuova RAI Radiotelevisione Italiana S.p.a.” (the Statute of RAI Radiotelevisione Italiana S.p.a). Available at: <http://www.rai.it/dl/docs/%5B1232098952384%5DStatutoRAI.pdf>. See, also, art. 49 of the Decree Law no. 177 of 31 July 2005 (“Testo Unico della Radiotelevisione”). *Gazzetta Ufficiale della Repubblica italiana* n. 208 del 7 settembre 2005 - Supplemento Ordinario n.150. Available online at: http://www2.agcom.it/L_naz/dl177_05.htm.

¹¹⁵⁸ See, art. 21 (3) of RAI' Statute, *infra*.

¹¹⁵⁹ See, on the dominant position of Mediaset, *Autorita per le Garanzie nelle Comunicazioni* (see, *infra* in section III.3.2.), hereinafter Agcom, Agcom's decision 226/2003. “Delibera n. 226/03/CONS, Procedimento finalizzato alla verifica della sussistenza delle posizioni dominanti nel settore televisivo ai sensi dell'art. 2, comma 7 della legge 31 luglio 1997 n. 249,” *Gazzetta Ufficiale della Repubblica italiana* del 2 agosto 2003, n. 178 - Suppl. Ordinario n. 126, available at: http://www2.agcom.it/provv/d_226_03_CONS.htm.

¹¹⁶⁰ See, Zaccaria, *ibidem*, at p. 106.

Berlusconi's government, it allowed for the individuals that held public office and other incompatible positions, such as ownership over an important part of the media, to entrust the management of their other businesses to agents¹¹⁶¹, such as members of their families¹¹⁶².

The Italian Prime Minister is nominated by the President of the Republic¹¹⁶³ and upon his advice, the President also nominates the members of the Council of Ministers, among whom ministers that have competences in the broadcasting field¹¹⁶⁴ and whom the Prime Minister leads in their activity¹¹⁶⁵. The Prime Minister also countersigns the laws after the President signed them¹¹⁶⁶. The "*lottizzazione*" issue was on the agenda of European bodies many times.¹¹⁶⁷ It is not surprising that many of RAI's directors resigned towards the years, either as a consequence of criticism of their political bias or in protest against such political bias¹¹⁶⁸. One could only wonder what could be the

¹¹⁶¹ Art. 2 (2) of Italian Law no. 215 of 20 July 2004 on conflicts of interest, "Norme in materia di risoluzione dei conflitti di interessi," Gazzetta Ufficiale n. 193 del 18 agosto 2004, available at: <http://www.camera.it/parlam/leggi/042151.htm>.

¹¹⁶² The Italian Law on conflict of interest no. 215 of 20 July 2004 does not distinguish, making reference to the art. 2203 to 2207 of the Civil Code, which requires a power of attorney for the "istitutori" to represent the public official in his or her private business. See, the text of the Italian Codice Civile, at: <http://www.altalex.com/index.php?idnot=34794>. Berlusconi took advantage of this disposition and members of his family are on the boards of directors of his Mediaset. See, http://www.mediaset.it/investor/governance/organi_en.shtml.

¹¹⁶³ Art. 92 of the Italian Constitution.

¹¹⁶⁴ Such as the Ministry of Economy (see, for instance, art. 32 of the RAI' Service Contract of 5th of April 2007 – Contratto di Servizio 2007-2009, available at: http://www.rai.it/dl/docs//%5B1254996210634%5Dcontratto_servizio_5_aprile_2007.pdf) and the Ministry of Communications (see for instance art. 9 of the Law on Testo Unico).

¹¹⁶⁵ Art. 95 of the Italian Constitution.

¹¹⁶⁶ Art. 89 of the Italian Constitution.

¹¹⁶⁷ See, Zaccaria, *ibidem*, at p. 100. See, Written question E-0541/02 by Reino Paasilinna to the Commission, 27th of February 2002, followed by Answer given by Mr. Monti on behalf of the Commission, (2003/C 28 E/038), available on EUR-Lex website. See, also, Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information, 2003/2237(INI), European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, 5th of April 2004 available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2004-0230+0+DOC+XML+V0//EN> (EUP Report). See, further, Council of Europe, Parliamentary Assembly Recommendation 1641 (2004). Available online at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/erec1641.htm>.

¹¹⁶⁸ See, for instance, Roberto Zaccaria, who resigned in 2002, being replaced by Antonio Baldassarre, who

incentive of the government presided by Berlusconi to propose legislation that would disfavor his own media and political interests as well as what would motivate the members of the RAI's board to encourage criticism of this government. Besides the public broadcaster, the Italian private broadcasting system has its peculiarities that stem from its manner of inception and its development, which were influenced by the Constitutional Court's decisions.

The Italian private broadcasting was slow to develop, mainly because of the political parties' reluctance to release their control. Several decisions of the Constitutional Court, which will be discussed below, are part of the efforts to allow the development and flourishing of private broadcasting in Italy. Decision 226 permitted for a station that challenged RAI's monopoly to continue to operate¹¹⁶⁹. Decision 202 came after pirate radio and television stations started to appear, and although it did not allow for private networks to form and to transmit national programming (fearing monopolistic power in the hands of private holders and still reluctant to relinquish control over national news)¹¹⁷⁰, it still allowed for private broadcasting to take off. Thus, the economic drive behind national networks combined with the political slow acceptance of private broadcasting, led to the creation of some "*de facto*" networks¹¹⁷¹. Canale 5 was formed in 1980, although Berlusconi entered the printed press business in 1977 when he acquired Il

resigned after accusations of lack of independence and impartiality, Paolo Mieli, appointed by the Parliament in 2003, who resigned failing to reach a compromise on his proposals aiming to increase independence – among which to hire back two critical journalists. See, Reporters sans Frontieres, "Italy. A Media Conflict of Interest: Anomaly in Italy," Investigation by Soria Blatmann April 2003. Available online at: <http://en.rsff.org/IMG/pdf/doc-2080.pdf>. See, also, Lucia Annunziata, who resigned in 2004, in protest against the Berlusconi partisanship of the public broadcaster. See, "Italy media boss quits in protest. The chairwoman of the Italian public broadcaster, Rai, has resigned." <http://news.bbc.co.uk/2/hi/europe/3683843.stm>.

¹¹⁶⁹ See, E. Noam, "Television in Europe," *ibidem*, at p. 152.

¹¹⁷⁰ See, E. Noam, "Television in Europe," *ibidem*, at p. 152.

¹¹⁷¹ See, E. Noam, "Television in Europe," *ibidem*, at p. 155.

Giornale¹¹⁷². Berlusconi bought Italia 1, Rete 4¹¹⁷³ and ended up by 1986 with an audience almost equal with that of RAI¹¹⁷⁴. The laws passed at the time, such as Mammi, were kind with Berlusconi, who managed to keep his most precious holdings, his television networks¹¹⁷⁵.

The Italian legal system that protects the media diversity faces a paradox. Within the context of the constitutional courts analysed in this paper, the Italian Constitutional Court is active¹¹⁷⁶ in promoting and protecting media pluralism. However, as the exploration below shows, the impact of the Court's decisions on the Italian broadcasting legislation is questionable.

I first discuss the substantive provisions in the Italian Constitution that protect media pluralism, albeit indirectly; I further look into the manner in which the Constitutional Court's decisions took into account the principle of pluralism derived from the constitutional substantive provisions and how these decisions translated into recommendations for the legislator to change the broadcasting laws in the direction of protecting media pluralism. I intend to mark throughout this part of my paper the influence that the Constitutional Court's decisions had on the Italian broadcasting system and the extent to which these decisions had a positive impact on the promotion and the protection of media pluralism. I further intend to show the limited influence of these decisions on broadcasting legislation. Although the general impression that one gets is that the Constitutional Courts' decisions in broadcasting are followed by a legislative

¹¹⁷² See, for the history of the FININVEST Group, their official website, in Italian, at: <http://www.fininvest.it/gruppo/storia.shtml>.

¹¹⁷³ Rete Europa is liquidated. See, E. Noam, "Television in Europe," *ibidem*, at p. 156.

¹¹⁷⁴ See, E. Noam, "Television in Europe," *ibidem*, at p. 160.

¹¹⁷⁵ See, E. Noam, "Television in Europe," *ibidem*, at p. 159-160.

¹¹⁷⁶ See, also, Mary L. Volcansek, "Constitutional Politics in Italy. The Constitutional Court," St. Martin's Press, Inc., 2000, at p. 1, on the "progressive role" played by this court in politics, citing Donald Sassoon, "Contemporary Italy: Politics, Economy and Society since 1945," Longman, 1986, at p. 207.

response, in fact the broadcasting legislation managed to this day to avoid a strong declaration against the RAI/FININVEST duopoly in the Italian broadcasting. Before going however into the above aspects, I briefly describe the effect that the Constitutional Court's decisions have on the Italian legal system in general¹¹⁷⁷, so as to better understand the effects that these decisions have on the broadcasting legislation.

Following a “*sentenza di accoglimento*”¹¹⁷⁸, the Constitutional Court might uphold a law unconstitutional. In this case the respective law becomes ineffective as of the day after publication of the Court's decision in the *Gazzetta Ufficiale*¹¹⁷⁹. The effect of this decision of unconstitutionality is *erga omnes* and not limited to the case in which the question was constitutionally answered¹¹⁸⁰.

The Constitutional Court's role in protecting media pluralism stems¹¹⁸¹ from a progressive interpretation of the article 21 of the Italian Constitution¹¹⁸², which protects the “*liberta di manifestazione del pensiero*”¹¹⁸³ by any means of communication, including thus the “*diritto all'informazione*”¹¹⁸⁴. “To give voice to the plurality of the social, political and cultural tendencies present and active in the society”¹¹⁸⁵ is a constitutional value¹¹⁸⁶. This value stems first and foremost from art. 21 mentioned above. It further finds constitutional roots in art. 43, broadcasting being a service of

¹¹⁷⁷ See, also, M. L. Volcansek, *ibidem*, at p. 116 et seq.

¹¹⁷⁸ See, “The Italian Constitutional Court,” at: http://www.cortecostituzionale.it/versioni_in_lingua/eng/lacortecostituzionale/cosaelacorte/cosaelacorte.asp.

¹¹⁷⁹ Official Gazette.

¹¹⁸⁰ See, the Italian Constitution, Art. 136.

¹¹⁸¹ See, Roberto Zaccaria, “Diritto dell' Informazione e della Comunicazione,” Quinta Edizione, at p. 64.

¹¹⁸² See, also, Roberto Zaccaria, “Diritto dell' Informazione e della Comunicazione,” at p. 60.

¹¹⁸³ “Freedom of expression.” Art. 21 of the Italian Constitution. The Italian Constitution is available online in English at: http://www.servat.unibe.ch/law/icl/it00000_.html.

¹¹⁸⁴ “The right to information.” See, Boggetti Giovanni, *ibidem*, at p. 36.

¹¹⁸⁵ See, G. Boggetti, *ibidem*, at p. 36.

¹¹⁸⁶ See, G. Boggetti, *ibidem*, at p. 36 and 92.

“*preminente interesse generale*¹¹⁸⁷” and in art. 49 and art. 33 that guarantee cultural and political pluralism¹¹⁸⁸.

The broadcasting legislation carries the marks of the Constitutional Court’s decisions¹¹⁸⁹. A potential brief understanding of the legal guarantee envisioned by the Court for media pluralism would picture a line at the beginning of which state monopoly was, surprisingly though understandable in light of the frequencies scarcity¹¹⁹⁰, the best solution for ensuring media pluralism, at the middle of which the antitrust law seemed to properly manage the new market situation and at the end of which the regulation was needed to tackle issues beyond the competences and abilities of antitrust law.

The television transmissions started in 1954 under the state’s monopoly¹¹⁹¹. The Constitutional Court legitimized this monopoly in 1960 in the decision no. 59¹¹⁹². Thus, the public monopoly over the activities of radio and television was permitted since it was the sole means to protect media pluralism¹¹⁹³. However, the Constitutional Court showed very clearly that it would not allow it more than necessary. Decisions no. 225¹¹⁹⁴ and 226¹¹⁹⁵ of 1974 marked the beginning of the period of erosion of the public monopoly.

This period of erosion started out slowly and it covered at the beginning narrow parts of public broadcasters’ activities. Thus, Decision 225 declares unconstitutional the

¹¹⁸⁷ “Prominent general interest.” See, G. Boggetti, *ibidem*, at p. 36 and 120. See, section 2 of the Italian Constitutional Court’s Decision no. 59 of 1960, available in Italian at: <http://www.giurcost.org/decisioni/1960/0059s-60.html> (hereinafter, Decision 59).

¹¹⁸⁸ See, G. Boggetti, *ibidem*, at p. 36.

¹¹⁸⁹ See, Zaccaria, “Radiotelevisione,” at p. 114.

¹¹⁹⁰ See, also, Zaccaria, “Diritto dell’ Informazione[]”, at p. 205.

¹¹⁹¹ See, E. Noam, *ibidem*, at p. 150.

¹¹⁹² See, Roberto Zaccaria, “Radiotelevisione,” at p. 107. See, Decision 59.

¹¹⁹³ Cinzia Padovani, “Pluralism of Information in the television sector In Italy: History and Contemporary Conditions,” at p. 292. Available online at: www.intellectbooks.co.uk/File:download,id.../9781841502434.289.pdf.

¹¹⁹⁴ Decision no. 225 of 10 July 1974, available in Italian at: <http://www.giurcost.org/decisioni/1974/0225s-74.html> (hereinafter, Decision 225).

¹¹⁹⁵ Decision no. 226 of 1974, available in Italian at: <http://www.giurcost.org/decisioni/1974/0226s-74.html> (hereinafter Decision 226).

public monopoly over the activity of retransmission of foreign programming and it opens up this activity to private entities¹¹⁹⁶. At the same time the Court did not rule out the constitutionality of the public monopoly:

“Resides in the rationale that where it does not exist or it is not possible the free competition... the state’s monopoly guarantees better the interests of the community, which is more valid in regard to the activity in question [television], which beyond its economic relevancy touches closely upon the fundamental aspects of the democratic life.”¹¹⁹⁷

Further on, the Court added that the broadcasting is an essential public service, which is “characterized by a preeminent general interest that the constitutional norm admits to be reserved to the state.”¹¹⁹⁸ Therefore, the Constitutional Court did not entirely dismiss the public monopoly; it only took away part of it where the scarcity of frequency rationale no longer applied. At the same time, Decision no. 225 consecrates the constitutionality of the parliamentary commission overseeing the broadcasting domain and composed of representatives of various societal groups¹¹⁹⁹.

The slow erosion of the public monopoly continued with Decision no. 226, which declared unconstitutional the public monopoly over the cable television¹²⁰⁰ and it opened up the path for the private initiative, conditional upon the granting of administrative authorizations¹²⁰¹. The unconstitutionality was limited however to the local level¹²⁰², while the public monopoly over cable television at the national level was still

¹¹⁹⁶ See, in general, Decision 225.

¹¹⁹⁷ See, Decision 225, at para. 4.

¹¹⁹⁸ See, Decision 225, para. 2 letter c.

¹¹⁹⁹ See, Boggetti, *ibidem*, at p. 14.

¹²⁰⁰ See, Decision 226, para. 5.

¹²⁰¹ See, Decision 226, para. 4, penultimate sentence.

¹²⁰² “nella parte in cui riserva allo Stato anche l’installazione e l’esercizio di reti locali di televisione via cavo” (“in the part in which it reserves to the State also the installation and the operation of the local cable television networks”) See, in Decision 226, para. 5, last sentence.

constitutionally justifiable¹²⁰³. The Court found that the public monopoly was not anymore justified in light of the nature of the technical medium, the cable, which was susceptible to guarantee a (theoretically) unlimited use.¹²⁰⁴

In an interesting touch of creativity, we see how in this above mentioned decision the Italian Constitutional Court looks at real life and concrete business situations. The barriers to entry – the high investment required by the establishment of a national cable network¹²⁰⁵ - were thus identified as a potential problem for pluralism. Given that it was feasible for private entrepreneurs to undertake the business of setting up a cable network locally, the Constitutional Court allowed for this domain to become private. However, setting up a national cable network involved an investment of a different magnitude and it was justifiable for the Court to consider that this domain should stay, for the time being, under state's monopoly. On the one hand, where the business is relatively easy to start, we may envision enough competition – enough media companies interested in setting up cable – to promote media pluralism. On the other hand, where the start up cost is prohibitive, opening up the road to private entrepreneurship might lure only one or two companies financially ready for an investment of this calibre. This situation would in turn endanger pluralism and thus, keeping this domain to the state was the best option.

Since the material that the Constitutional Court offers to the broadcasting legislation is relatively dense, I stop here to present the set of “commandments¹²⁰⁶” that the Constitutional Court provided to the legislator to guide him in the enactment of the broadcasting law and their immediate impact. These are drawn from the three decisions

¹²⁰³ Boggetti, at p. 36.

¹²⁰⁴ See, Decision 226, para. 3.

¹²⁰⁵ “del costo elevatissimo della loro realizzazione” (“the high cost of their construction”) See, Decision 226, para 2, letter b.

¹²⁰⁶ Zaccaria, “Diritto dell’Informazione[]”, at p. 83.

presented above, decision no. 59 of 1960 as well as the decisions no. 225 and no. 226 of 1974. These “commandments”¹²⁰⁷ referred to an increase in the role of the Parliament in guiding the activity of the public service broadcasters¹²⁰⁸ and a symmetrical decrease in the Government’s role, as well as to ensuring that all the cultural and political tendencies are represented¹²⁰⁹ and the access to the broadcasting forum¹²¹⁰.

Following these decisions, the legislature passed Law no. 103 of 1975¹²¹¹. Article 1 of this Law stated that the television is “an essential public service, with a character of prominent general interest.”¹²¹² Article 2, in line with the above mentioned Constitutional Court’s decision¹²¹³, excluded state monopoly over retransmission of foreign programming and cable television at the local level. Article 39 of the same Law included a limitation on foreign ownership¹²¹⁴. Thus, while retransmission of foreign programming could have been done by private companies also, these should have still been either of Italian or European citizenship/nationality and they have their headquarters in Italy¹²¹⁵.

The above mentioned Law no. 103 elaborated as well on the requirement for access to the media established by the Constitutional Court in the Decision no. 225¹²¹⁶. In this sense, article 6 of this Law fixed at 5% of the total hours of television transmission

¹²⁰⁷ Zaccaria, “Diritto dell’Informazione[.]”, at p. 83.

¹²⁰⁸ Boggetti, *ibidem*, at p. 14.

¹²⁰⁹ See, Cuniberti, *ibidem*, at p. 16, referring to art. 6 of Law Gasparri. See, also, Zaccaria, “Diritto dell’Informazione[.]”, at p. 63, on the “external” and “internal” pluralism.

¹²¹⁰ Boggetti, *ibidem*, at p. 14.

¹²¹¹ Legge 103/75, “Nuove norme in materia di diffusione radiofonica e televisiva” (New rules in the field of radio and television transmission) available online at: http://www2.agcom.it/L_naz/1103_75.htm (hereinafter Law 103).

¹²¹² See, art. 1 of Law 103.

¹²¹³ See, Decision 59.

¹²¹⁴ See, art. 39 of Law 103.

¹²¹⁵ See, art. 39 of Law 103. Though not the topic of my dissertation, it is worth mentioning here in connection with the Constitutional Court’s active role in the Italian broadcasting legal system that the Law also prohibited the retransmission of the advertising included in the foreign programming. The Constitutional Court declared the unconstitutionality of this provision in the decision n. 231 of 1985, available in Italian at: <http://www.giurcost.org/decisioni/1985/0231s-85.html>.

¹²¹⁶ See, Decision 225, para. 4, sentence 2.

and at 3% of the radio transmission the time allotted for access to the media of certain social, political, cultural and religious groups¹²¹⁷. Article 7 stipulated the right to reply for everybody who feels that his/ her material or moral interests might be damaged¹²¹⁸. One may argue that both the right to access and the right to reply increase internal pluralism in the sense that they give air time to various societal interests as well as providing the opposite view on a certain issues, thus exposing the viewer or the listener to an increased variety of viewpoints and information.

Decision no. 202 of 1976¹²¹⁹ justified the existence of the public monopoly over the cable broadcasting at the national level, while opening up the local market to the private enterprise¹²²⁰. The most important reasons that the Court put forward to explain the persistent public monopoly over the broadcasting industry were the scarcity rationale and the essential public service characteristic of the medium. However, decision no. 202 of 1976 mainly relied on the increasing technical possibilities of the medium¹²²¹. The scarcity rationale started thus to lose force, and the Court acknowledged that a mixed system of both public and private broadcasters, for the moment limited to the local level, with the potential to increase the number of the operators, would constitute a sufficient guarantee for pluralism. As noted above, national networks flourished in spite of constitutional and political considerations. The modern broadcasting system in Italy started in 1980s as a duopoly – RAI, the public service broadcaster and Fininvest, the

¹²¹⁷ Law 103, art. 6 para. 1.

¹²¹⁸ Law 103, art. 7 para. 2.

¹²¹⁹ See, Decision no. 202 of 1976, available in Italian at: <http://www.giurcost.org/decisioni/1976/0202s-76.html> (hereinafter Decision 202).

¹²²⁰ See, Zaccaria, "Diritto dell'informazione," at p. 93.

¹²²¹ See, Zaccaria, "Diritto dell'informazione," at p. 93.

company owned by Silvio Berlusconi¹²²², former and current President of the Council of Ministers. The Constitutional Court had to accommodate to the new reality and make sure that the requirements of media diversity would apply to the newly formed networks as well.

The Constitutional Court's Decision no. 420 of 1994¹²²³ defined "*pluralismo informativo*"¹²²⁴ as "the obligation for the legislator to create the access conditions to the information market for the most possible number of voices."¹²²⁵ Decision no. 420 of 1994 declared the unconstitutionality of article 15 point 4 of the Law no. 223 of 1990, the so-called Mammi Law¹²²⁶. This legal provision allowed one single entity to own or to control 25% of the television networks, however, not more than 3 television networks (from a total of 12 television networks that were assigned initially in the national plan of frequency assignment)¹²²⁷. In its reasoning, the Constitutional Court recalled the example of the printed press, in which the antitrust limit is fixed at 20% of the national readership¹²²⁸. The Court applied this same limit in striking down article 15 point 4¹²²⁹.

¹²²² Silvio Berlusconi does not hold the presidency of Fininvest anymore. However, his daughter as President of the Board of Directors, another daughter and his son as advisors on the Board of Directors raise some questions as to whether the Italian Prime Minister still has influence over this media holding. See, <http://www.finvest.it/holding/cda.shtml>.

¹²²³ See, in Zaccaria, "Diritto dell'informazione[]," at p. 388. See, Decision no. 420 of 1994, available in Italian at: <http://www.giurcost.org/decisioni/index.html> (hereinafter Decision 420). At para. 14.6.

¹²²⁴ "The informative pluralism." See, Decision 420.

¹²²⁵ See, Decision 420. See, also, Zaccaria, "Diritto dell'informazione[]," p. 86, referring to Decision of Constitutional Court no. 112/1993. Ibidem.

¹²²⁶ See, in Zaccaria, "Diritto dell'informazione[]," at p. 388. See, Law no. 223 of 6 August 1990, on the regime of the public and private radiotelevision system, available in Italian at: http://www.agcom.it/L_naz/L223_90.htm.

¹²²⁷ See, in Zaccaria, "Diritto dell'informazione[]," at p. 388. See, article 15 point 4 of the Law no. 223 of 1990.

¹²²⁸ See, in Zaccaria, "Diritto dell'informazione[]," at p. 388.

¹²²⁹ See, in Zaccaria, "Diritto dell'informazione[]," at p. 388.

However, the decision of the Court did not immediately become effective, because it did not question the constitutionality of another law, Law no. 422 of 1993.¹²³⁰ Thus, while the Court declared the Mammi Law unconstitutional, the Law 422 of 1993 would apply temporarily, some broadcasters using temporary authorizations granted under the latter¹²³¹. Their frequencies were however not assigned according to the national plan on assignment of frequencies¹²³² and the law of 1993 provided for a future reevaluation of the temporary authorizations¹²³³.

As we have seen, one of the most important aspects of the Mammi Law 223 of 1990 was the introduction of antitrust rules¹²³⁴. These rules were introduced as a commitment to “pluralism, objectivity, completeness and impartiality of information,” and to “the openness to diverse political, social, cultural and religious tendencies.”¹²³⁵ This Law, however, did next to nothing to put an end to the existing RAI-Fininvest duopoly. It established in this sense an ownership ceiling that coincided with the existing ownership interests of the two moguls. As if in a Constitutional Court – Parliament – Government hide and seek game¹²³⁶, this approach was taken against the

¹²³⁰ Testo del decreto legge 27 agosto 1993, n.323 (in Gazzetta Ufficiale serie generale-n.202 del 28 agosto 1993), coordinato con la legge di conversione 27 ottobre 1993, n.422 (in Gazzetta Ufficiale serie generale n.253 del 27 ottobre 1993), recante: “Provvedimenti urgenti in materia radiotelevisiva” pubblicato in Gazzetta Ufficiale n.260 in data 5 novembre 1993, available online at: http://www.consiglio.regione.toscana.it/corecom/normativa/noramtiva_doc/leg_442_93.html (hereinafter Law 422).

¹²³¹ The Law 422 prolongation of these authorizations for three years. See, art. 1 of Law 422.

¹²³² Art. 3 of Law 422.

¹²³³ Decree Law no. 444 of 1996, Decree Law no. 545 of 1996 converted into Law 650 of 1996, Law no. 249 of 1997, and finally Law no. 122 of 1998. The last extension allowed these temporary authorizations to last until January 31, 1999. For discussion of this series of laws, see P. Roberto, p. 388.

¹²³⁴ Roberto Zaccaria, “Radiotelevisione”, at p. 137.

¹²³⁵ See, art. 1 para. 2 of the Law no. 223 of 1990, in Zaccaria, “Diritto dell’informazione[]”, at p. 98.

¹²³⁶ See, Paolo Barile and Giuseppe Rao, “Trends in the Italian Mass Media and Media Law,” *European Journal of Communication*, *European Journal of Communication*, Vol. 7, No. 2, 261-281 (1992). The article documents the long sinuous process of applying strict antitrust laws to the media industry. It traces back to the beginning of the conflict between the Constitutional Court and the legislator. This perpetual opposition between the two institutions made that “the current level of mass media concentration in Italy is now unparalleled in any other country with a market – based economy.” See, *Ibidem*.

recommendations of the decision of the Constitutional Court no. 826 of 1988¹²³⁷. This decision affirmed that “the pluralism at the national level cannot be realized through the participation of a public operator and a private operator, which would be either represented by an unique subject or which holds a dominant position in the private sector.”¹²³⁸ Although the decision no. 420 of the Constitutional Court took some time to have a substantive impact on the broadcasting law (because, as shown above, it did not question the law of 1993), it was an important step towards Law No. 249 of 1997¹²³⁹ (although this Law no. 249 also extended the temporary authorizations granted in 1993). The Constitutional Court further consecrated the principle of financial transparency as an important means to protect media pluralism in Decision No. 826 of 1988¹²⁴⁰.

The Constitutional Court’s decision no. 161 of 10 May 1995 debated whether regulating television is paternalistic, since it assumes that for democracy’s purposes the programming should expose the population to diverse content. Thus, the Constitutional Court argued, by placing “*sfiducia nelle capacita dell’uomo della strada, del comune cittadino*,”¹²⁴¹ that the viewer is free to use the remote control in order to avoid being exposed to political propaganda. However, such a faith in common man’s understanding of how psychological manipulation works is far fetched. One could imagine a manner of dividing the political program so that the viewer is exposed to different political viewpoints and make his own “free” mind on how to vote or how to politically affiliate

¹²³⁷ Decision no. 826 of 1988, available in Italian at: <http://www.giurcost.org/decisioni/1988/0826s-88.html>.

¹²³⁸ See, Decision no. 826 of 1988, in Roberto Zaccaria, *ibidem*, at p.63.

¹²³⁹ Law No. 249 of 1997 is an organic law, specifically designed to apply competition law to television.

¹²⁴⁰ See, Zaccaria, “Diritto dell’Informazione,” at p. 391. See Law no. 416 of 1981, as modified by Law no. 223 of 1990, which requires a registry of all of the shareholders of broadcasting companies. These two laws were abrogated by Law no. 249 of 1997, which provides for a singular registry for all communications operators.

¹²⁴¹ “trust in the capacity of the lay man of the citizen.” See, Bognetti, *ibidem*, at p. 19.

himself. The same may hold true for other society related viewpoints, not necessarily political.

The Italian regulatory agency and the legislator continued to play with deadlines that would smoothly allow the main players to preserve their position on the media market. The AGCOM¹²⁴² Decision no. 346 of 2001¹²⁴³ fixed 31st of December as the deadline for transferring a Mediaset¹²⁴⁴ channel to satellite and for transforming one of RAI' channels into a channel without publicity¹²⁴⁵. This Decision however provided for a new re-examination prior to the deadline, in light of the new developments in cable and satellite¹²⁴⁶. Due to this uncertainty both of the Law no. 249 and of the AGCOM's decision the Constitutional Court had to intervene in Decision no. 466 of 2002¹²⁴⁷. This Decision declared unconstitutional article 3 of the Law because of the discretionary method of fixing the deadline for the antitrust rules to actually be enforced¹²⁴⁸. The Court analysed the technical development in the market and concluded that, based on a thorough analysis AGCOM, as well as the Parliament, should provide a well thought solution¹²⁴⁹. The Court addressed as well the issue of the technological development and innovation that might make the regulation of the industry obsolete. To this issue the

¹²⁴² Autorita per le Garanzie nelle Comunicazioni – the Italian regulatory agency in the media sector. See, *infra*, for a discussion.

¹²⁴³ See, Zaccaria, "Radiotelevisione," at p. 138. See, Decision n. 346/01/CONS. Terms and criteria of updating the provisions of art. 3, para. 6, 7, 9, 11, of Law no. 249 of 31 July 1997, available in Italian at: http://www.agcom.it/provv/d_346_01_CONS.htm.

¹²⁴⁴ Which is under Fininvest's control.

¹²⁴⁵ See, Zaccaria, "Radiotelevisione," at p. 138.

¹²⁴⁶ See, Zaccaria, "Radiotelevisione," at p. 138.

¹²⁴⁷ See, Zaccaria, "Radiotelevisione," at p. 138. Decision no. 466 of 20 November 2002, available in Italian at: <http://www.giurcost.org/decisioni/2002/0466s-02.html>

¹²⁴⁸ See, Cuniberti, *ibidem*, atp. 14-15.

¹²⁴⁹ See, Zaccaria, "Radiotelevisione," at p. 139: "With this argument, the Court seems to send a signal to the future legislator, declaring itself against accepting as good the "a priori" normative solutions in regard to pluralism that are based on hypothetical and non verified aspects."

Court's response was a lack of trust in the real and immediate potential of the new technology to provide an infinite number of channels¹²⁵⁰.

A more recent decision involving media diversity aspects, Decision no. 151 of 2005 reminds the importance of the principle of pluralism, "the actualization of the principle of the external informative pluralism, unavoidable imperative and preliminary condition for the actualization of the principles of the democratic state."¹²⁵¹,

The Constitutional Court faces continuous opposition from the legislator. The *sentenze* on the unconstitutionality of the various norms were received with reluctance by the legislator and the law changed slowly. The Court's decisions go into the same direction. These decisions lack the courage to put a stop to the "transitory" period that was perpetually taken advantage of for the benefit of companies exceeding the 20% national limit for national television¹²⁵². The 1990 Law seems to be clearly unconstitutional. The subsequent laws were/are not any better. Though the majority of the scholars agrees with this conclusion¹²⁵³, nothing seems to be happening and the Italian media seems to be outside the rule of law.

¹²⁵⁰ See, Zaccaria, "Radiotelevisione," at p. 139.

¹²⁵¹ See, Decision no. 151 of 04 April 2005, available online in Italian at: <http://www.giurcost.org/decisioni/index.html>, quote translated by the author.

¹²⁵² Carlo Magnani, "Radiotelevisione: per la Corte serve un termine certo al regime transitorio previsto dalla legge n. 249 del 1997," (Radiotelevision: For the Court it serves a precise deadline to the transitory regime of the Law no. 249 of 1997) <http://www.associazionedeicostituzionalisti.it/cronache/file/sent2002466.html>

¹²⁵³ Vincenzo Zeno – Zencovich, *La libertà d'espressione. Media, mercato. Potere nella società dell'informazione*, at p.42. See, Zaccaria, "Radiotelevisione," at p. 137. Further, Paolo Barile and Giuseppe Rao, "Trends in the Italian Mass Media and Media Law," *European Journal of Communication*, 1992; 7; 261. See, also, Corte Costituzionale della Repubblica Italiana, Discorso del Presidente emerito della Corte costituzionale, Prof. Leopoldo Elia, in occasione del sessantesimo anniversario della Costituzione della Repubblica italiana (Discourse of the Honorary President of the Italian Constitutional Court, Prof. Leopoldo Elia, on the occasion of the sixtieth anniversary of the Italian Constitutional Court), Roma, Palazzo della Consulta, 29 febbraio 2008, available in Italian at: http://www.astrid-online.it/Dossier--r/Studi--ric/60-anni-de/ELIA-Corte-cost-29_02_08.pdf.

III. 2. 3. Preliminary conclusions on the constitutional protection of media diversity

Several preliminary observations follow from the constitutional treatment of the media diversity principle. All the constitutional courts discussed above (Romania skipped because it minimally considered the media diversity issue¹²⁵⁴) consider that media diversity is an important value that should be protected and sometimes balanced against other constitutional rights. The scarcity rationale served in Europe an important role since it justified the existence of public monopoly at the beginning of broadcasting's history. Considering this aspect, paradoxically, another justification for the preservation of the public monopoly was that this was the only manner of achieving media diversity. On this line, seen from an United States' perspective, the fact that the constitutional courts had to decide whether private broadcasting was constitutional appears almost odd. This in turn is explained by reference to history. Started as public monopoly, the public broadcasting in Europe is obviously stronger than in the United States. Further, even the private broadcasters in Europe did not escape the more paternalistic nuances of the European broadcasting laws.

Both the French and German constitutional courts consider that regulation is necessary since the media market should not to be left to the market forces. Scarcity is both physical and economic (in contrast with the United States Supreme Court's primary focus on technical scarcity) allowing thus for a better justification of regulation even in

¹²⁵⁴ See, Decision no. 857 of 9 July 2008 regarding the unconstitutional objection of the Law amending art. 28 of Audiovisual Law no. 504/2002 ("referitoare la obiectul de neconstituționalitate a Legii privind completarea art.28 din Legea audiovizualului nr.504/2002", Monitorul Oficial nr.535 (16.07.2008)). The Decision argued that the article of the challenged Law that required broadcasters to present negative and positive news in proportional amount, did not comply with the constitutional requirements (art.31 (1)-(4) and 30 (2) of the Romanian Constitution) referring to the public's right to receive correct, comprehensive and impartial information.

times of technological change. The German Constitutional Court is a very strong protector of media diversity, favoring positive action to protect media diversity.

The German Court is also the one that offers us a comprehensive concept of media diversity, which encompasses programming that is diverse, that represents minorities, that serves different functions, that is balanced and not concentrated. The term “journalistic rivalry” (Fifth Television case) and the internal – programming obligations and the external pluralism – a combination of private/ public broadcasters and many private broadcasters are the two most important contributions of the German Constitutional Court to the protection of the media diversity.

The constitutional courts’ decisions discussed above influenced the broadcasting legislation, however to different degrees. The French court has an almost immediate effect on legislation and attempts to offer criteria against which ownership restrictions to be evaluated for their efficiency in protecting media diversity. The same may be said in relation to the German court, which is careful that the advisory councils represent a wide variety of societal interests. While the Italian broadcasting might seem peculiar to say the least, the country’s constitutional court is involved in trying to protect media diversity, although its relation with the legislature seems to be disconnected.

III. 3. Regulatory instruments that protect media diversity

III. 3. 1. Preliminary considerations

The national regulatory agencies that regulate broadcasting are all concerned with media diversity. They make it a priority in their regulatory commitment. However, their efficiency in maintaining a vigorous and diverse media market, with diverse viewpoints

and diverse sources of information, with a wide representation of the minorities, is not always commendable. It is a paradox in every jurisdiction analysed here. Rules proclaim the goal of media pluralism as one of the most important goals of broadcasting law, but still they fail to provide for real solutions to the problem of media concentration that, paradoxically, continues to exist throughout Europe.

France, Germany, Romania and Italy, all have regulatory agencies that are all under obligations to maintain a level of media diversity. They employ similar tools to keep the media market diverse. In licensing, they need to take into account whether a newly licensed broadcaster will add to a more diverse market. In approving a merger or a transfer of assets or shares they need to evaluate whether such action will not contribute to more concentration on the market. When so doing they use specific legal norms, such ownership and/or cross-ownership limits, rules regarding financial and ownership transparency as well as must carry provisions. A weakness either in the rules themselves or in their enforcement, or a combination of these two, may explain why they fail in stopping media concentration.

The following lines mostly describe the regulatory mechanisms in the chosen jurisdictions. A first conclusion is that the rules are extremely similar. However, some of the regulatory agencies, such as the French, are more active than the others. The comparative analysis is weakened to a certain extent by the author's inability to read in German. Thus, the German's national regulatory agency's active role in protecting media diversity could not be comprehensively assessed.

A second conclusion is that the regulatory agencies' role complements the work done by the competition law bodies. The extent to which they cooperate in practice and

the efficiency of their collaboration in protecting media diversity remains however to be evaluated by other studies in the field. What can be assessed from this study is that both competition and regulatory agencies tackle the media concentration issue from two angles that although not entirely different, carry separate nuances that are important enough to deserve the treatment and protection of two different areas of law. Regulation is better suited to protect the media product¹²⁵⁵ as a democratic/public/cultural good and competition law is more geared towards a media product as a market participant that faces market challenges. As it was outlined at various places in this paper, a combination of these two regimes will recognize this ambivalence of the media product and best protect media diversity.

Not essentially different, the regulatory regime still has its particularities in the countries discussed here. I first discuss the role that the regulatory agencies play in protecting media diversity. Secondly I refer to the specific pieces of legislation related to plurality of voices and I then assess the outcome of the judicial application of such aspects from the perspective of media diversity's protection.

III. 3. 2. The agency

This section briefly introduces the reader to the national regulatory agencies that monitor the enforcement of the media diversity enhancing regulations.

The French media regulatory agency went through various denominations and structural adjustments. In 1974 the audiovisual sector was under the competence of

¹²⁵⁵ See, also, Wolfgang Hoffmann-Riem, "Regulation of Broadcasting in Germany – Current State and Prospects," in *European Revue of Public Law*, Vol. 8 – No.3, Autumn 1996, at p. 801. The author Hoffmann-Riem points out to the "unfitness" of the concept of broadcasting as a society trustee and the "philosophy of deregulation and privatization and of trust in the economic market."

seven independent regulatory agencies¹²⁵⁶. The 1982 *Loi* established the *Haute autorité de la communication audiovisuelle*, composed by nine members, chosen in equal number by the President of the Republic, by the President of the Assembly, and, respectively, by the President of the Senate¹²⁵⁷. In 1986 the *Commission nationale de la communication et des libertés* replaced the previous institution and was constituted of thirteen members, appointed by governmental decree¹²⁵⁸. The regulatory agency was to perform its duties independently¹²⁵⁹. It assumed responsibility for licensing radio and television channels, terrestrial, satellite and cable. The *Loi* of 17 January 1989 replaced this latter *Commission* with the *Conseil Supérieur de l'Audiovisuel*.

The Conseil Supérieur de l'Audiovisuel¹²⁶⁰, administrative independent authority created by *Loi* of 17th of January 1989, guarantees in France the exercise of the freedom of communication in the conditions defined by *Loi* of 30th of September 1986, modified¹²⁶¹. According to article 1 of this 1986 *Loi*, the exercise of the freedom of audiovisual communication can first be limited to the extent required, especially, by the “respect for the pluralistic character of the expression of the currents of thought and

¹²⁵⁶ See, in Moinot Report, the French *Loi* n°74-469. Because of the difficulties in correlating their activities, the Moinot Report dedicates an entire part to the need for the existence of two independent agencies, the Haute Autorité and the Conseil national de l'Audiovisuel with complementary competencies in the audiovisual sector, though the last institution seemed to have more consultative role. See, in Moinot Report. This Report is one of the very few accounts of the legal and regulatory situation of that time. See, for instance in one of the most comprehensive sources on media pluralism in France, Philie Marcangelo-Leos, *ibidem*, at p. 60.

¹²⁵⁷ The same composition and manner of selection applies to the current Conseil Supérieur de l'audiovisuel.

¹²⁵⁸ Among these members, two were nominated by the President of the Republic, two by the President of the National Assembly, two by the President of the Senate, one member by the Conseil d'Etat, one member by the Cour de Cassation, one member by the Cour des Comptes, one member by the French Academy, one personality from the audiovisual sector, one personality from the telecommunications sector and one personality from the printed press sector. See, art. 4 of *Loi* n°86-1067 (*Loi* Leotard) consolidated version.

¹²⁵⁹ See, art. 4 of *Loi* n°86-1067, consolidated version (“*Loi* Leotard”).

¹²⁶⁰ Hereinafter, CSA.

¹²⁶¹ See, http://www.csa.fr/conseil/role/role_csa.php. See, *Loi* Leotard, art. 1.

opinion.” Article 3-1 and 13 provide that the CSA guarantees this freedom and it ensures the “pluralistic expression of currents of opinion and thought, especially for the programs of general and political information.”

In Germany broadcasting is regulated by 14 State Media Authorities¹²⁶² “responsible for the licensing and supervision as well as the development of commercial radio and television broadcasting in Germany.”¹²⁶³ The Interstate Agreement on Broadcasting (RStV)¹²⁶⁴ entrusts the German Concentration Commission (KEK) with responsibilities in maintaining media diversity¹²⁶⁵. The KEK is an independent regulatory body composed of 8 independent members appointed for a 5 years term by the heads of the Landers¹²⁶⁶. “KEK is responsible for monitoring and enforcing compliance with the legal provisions designed to ensure diversity of opinion in nationally transmitted private television”¹²⁶⁷. KEK’s decisions are binding on the states but they may be appealed to the Conference of Directors of the State Supervisory Authorities for Private Broadcasters (KDLM) within a timeframe¹²⁶⁸.

As to Romania, public television was created in 1956 and started operating the next year¹²⁶⁹ and only after the 1989 Revolution, the newly created regulatory agency

¹²⁶² Grouped in the Association of State Media Authorities in the Federal Republic of Germany (ALM). See, at <http://www.alm.de/339.html>.

¹²⁶³ See, <http://www.alm.de/338.html>

¹²⁶⁴ See, “Agreement on Broadcasting between the federal states in United Germany incorporating the third amendment adopted between 26 August and 11 September 1996 and came into effect on 1 January 1997.” See, <http://www.kek-online.de/cgi-bin/esc/mission.html>. See, also, the Interstate Broadcasting Agreement, (Rundfunkstaatsvertrag, or RStV) of 31 August 1991 as amended by 11 September 1996) available at: <http://www.iuscomp.org/gla/statutes/RuStaV.htm>.

¹²⁶⁵ <http://www.kek-online.de/cgi-bin/esc/mission.html>.

¹²⁶⁶ Art. 35 (3) of the Interstate Broadcasting Agreement.

¹²⁶⁷ See, <http://www.kek-online.de/cgi-bin/esc/mission.html>. See, also, Article 36 paragraph 1, first sentence, RStV. Section 36(2) of the RStV states that “the KEK shall be consulted prior to the selection and licensing of broadcasters of window programmes.”

¹²⁶⁸ Art. 37, para. 2 of the German RStV, *supra*. If this majority is not realized, art. 37 para. 2 of the German RStV states that the KDLM’s decision shall supersede KEK’s.

¹²⁶⁹ See, http://www.tvr.ro/articol_organizatie.php?id=13.

started granting licenses for private operators¹²⁷⁰. The first broadcasting law in democratic Romania included ownership restrictions¹²⁷¹ and required taking into consideration media pluralism when a license was granted¹²⁷². The Romanian Law on Audiovisual no. 48 of 1992¹²⁷³ created the National Audiovisual Council (NAC). The Council oversees the awarding of television and radio broadcast licenses¹²⁷⁴ and ensures media pluralism and promotes free competition¹²⁷⁵. The members of NAC may not exercise any other public or private function, have any political adherence, or own any interest in the media sector¹²⁷⁶. The Council has a consultative power for all the international acts and negotiations concerning audiovisual matters¹²⁷⁷. The reports that the broadcasters periodically submit to the NAC ensure that they comply with their content related obligations¹²⁷⁸.

The Italian broadcasting regulatory agency is the *Autorita per le Garanzie nelle Comunicazioni* (Agcom), one of whose missions is the safeguard of pluralistic media¹²⁷⁹. Agcom must adopt, among other, the National Plans for Frequency Assignment for Radio-Television Broadcasting¹²⁸⁰, “ascertain the existence of dominant

¹²⁷⁰ See, art. 5, 11 and 12 of Romanian Law no. 48/1992 of 21 May 1992. Official Gazette 104 of 25 May 1992 (please note that this law is abrogated).

¹²⁷¹ See, art. 6 of Law no. 48/1992, *supra*.

¹²⁷² See, art. 12 (4) of Law no. 48/1992, *supra*.

¹²⁷³ See, Romanian Audiovisual Law no. 48 of 21 May 1992, which first set up the Romanian National Audiovisual Council.

¹²⁷⁴ See, art. 10 of the Romanian Audiovisual Law no. 48/1992, *supra*.

¹²⁷⁵ The Audiovisual Law makes reference to the “pluralism of the sources of public information.” See, art. para. 3 let. b and c of the Romanian Audiovisual Law no. 48/1992, *supra*.

¹²⁷⁶ See, art. 18 para. 4 of the Romanian Audiovisual Law no. 48/1992, *supra*.

¹²⁷⁷ See, art. 17 para. 2 of the Audiovisual Law no. 48/1992, *supra*.

¹²⁷⁸ Art. 98, Decision no. 187 of 3 April 2006 regarding the Audiovisual Content Regulation Code (“Romanian Content Code”).

¹²⁷⁹ See, art. 6 para. 12 of the Italian Law no. 249 of 31st of July 1997.

¹²⁸⁰ See, Italian Law no. 78 of 29 March 1999, on the conversion into law, with modifications, of the decree-law no. 15 of Law 30 January 1999 (published in the Official Gazette no. 75 of 31st of March 1999 and available on Agcom’s website) on urgent provisions for the balanced development of the television broadcasting and for the avoidance of the formation or maintenance of dominant positions in the radio-television sector. See, also, art. 6 para. 2 of the Law no. 249 of 31st of July 1997.

positions and verify that antitrust rules are correctly applied.”¹²⁸¹ Agcom is composed of eight commissioners, four appointed by the Senate, four by the Deputies Chamber, upon the President’s nomination, and one president, appointed by the President, upon the nomination of the Prime Minister (with the approval of the Ministry of Communications)¹²⁸².

After having described the organization and functioning of these regulatory agencies, I continue in the following lines to present different types of regulatory instruments designed to further media diversity.

III. 3. 3. Regulatory instruments

III. 3. 3. 1. Statements of principle, *cahiers des charges*, private conventions and socially representative councils

If one looks at the various regulatory instruments that protect media diversity in the jurisdictions analysed here, one is left with the impression that they are dense, complex and even comprehensive. However, whether they contribute to media diversity on the real market is a different assessment. What is clear is that their existence could be at least used as inspiration for regulators and, if one desires for their efficiency to increase, their application should be monitored more carefully and any deviation from their rule should be sanctioned. In this sense, the role that the regulatory agencies have in monitoring these rules’ enforcement is crucial. I discuss the different regulatory norms that fundamentally prescribe and encourage a certain type of content (mostly cultural and mostly European) to be broadcast. Besides statements of principles, what I labeled as referring to the proclamations that the agencies generally make that they would indeed

¹²⁸¹ See, Agcom’s official website. <http://www.agcom.it/>.

¹²⁸² See, art. 3 of Italian Law no. 249 of 1997.

protect media diversity, more specific tools are developed, such as the French cahiers des charges for the public broadcasters and the private conventions, for the private broadcasters, as well as the socially representative councils of the German public broadcasters.

When dealing with the competences of the CSA, the *Loi Leotard*¹²⁸³ refers to “diversity” as well as to the protection and the representation of the French language and culture. The CSA can address recommendations to the broadcasting companies related to the respect of the principles contained in this *Loi*.

Further on, in the licensing process great importance¹²⁸⁴ is placed upon the public interest in the preservation of the diversity of the social – cultural trends, of the diversity of the operators¹²⁸⁵ on the market and in the necessity to avoid the abuse of dominant position on the market as well as the practices impeding upon the free exercise of competition¹²⁸⁶. All the license holders must sign a convention with the CSA, a convention, which includes media pluralism references¹²⁸⁷.

¹²⁸³ Loi n°86-1067, consolidated version. See, Article 3-1, modified by Law no. 2006-396 of 31st March 2006 art. 47 I (JORF 2 avril 2006).

¹²⁸⁴ The CSA can always be notified by third parties on the conduct of an media operator. Loi n°86-1067. See, Article 17-1, created by Law n°2004-669 through art. 35 (JORF 10 juillet 2004). The Conseil can be notified by an editor, by a service distributor, or by other interested parties about any action “prone to impair the pluralistic character of the expression of currents of thought and opinion,” “the quality and the diversity of programming” or “on the objective character, equal and non –discriminatory of the broadcasting conditions of an offer or on the contractual relations between the editor and the distributor”.

¹²⁸⁵ Loi n°86-1067. See, Article 21, modified by Law n°2004-669. According to articles 29, 29-1, 30 and 30-1 of the 1986 Loi the Conseil will take into account in this procedure the legal provisions referring to “the pluralistic character of the expression of the currents of thought and opinion, the honesty of the information and its independence in relation to the economic interests of the shareholders,” as well as to “the contribution to the production of the locally realized programming” and to “the musical diversity.”

¹²⁸⁶ Law n°86-1067 (Loi Leotard), Article 17, modified by Law n°2004-669. The CSA addresses recommendations to the government for the development of the competition in radio and television. It has the competence to notify the judiciary on restrictive practices and economic concentrations. These authorities may ask for the Conseil’s avis.

¹²⁸⁷ Law n°86-1067. Article 28, modified by Law n°2006-396. According to this article, the convention establishes the conditions of usage of the frequencies. Among these conditions are the respect of honesty and pluralism and the competition. See also, Article 29, modified by Law n°2004-669. This article

In order to perform all of the functions mentioned above the CSA developed its own tool to assess media pluralism. The concept of *pluralisme* evolved in the practice of the CSA from the “*regle des trois tiers*”¹²⁸⁸ to the “*principe de reference*.”¹²⁸⁹ This last criterion is a measure objectively quantifiable¹²⁹⁰.

In its endeavor to provide a mathematic formula for calculating diversity, the CSA relies upon “*temps d’antenne*”¹²⁹¹ and “*temps de parole*”¹²⁹². The result of the mathematical formula applied to evaluate pluralism, or perhaps of the manner in which this formula seems to work the best for measuring political broadcasting time is the emphasis on the political aspect of freedom of expression¹²⁹³. The majority of the CSA’s decisions support this conclusion¹²⁹⁴.

emphasizes the general imperatives to conserve the pluralism of the currents of thought and opinion, to diversify the operators, and to avoid the abuse of dominant position as well as the anticompetitive practices.

¹²⁸⁸ This principle refers to dedicating one third of the broadcasting time to the government, one to the parliamentary majority, and one to the opposition. See, “Le principe de référence adopté par le CSA pour l’évaluation du respect du pluralisme politique dans les medias,” (The principle of reference adopted by the CSA for the evaluation of the respect of political pluralism in the media), published on the CSA site on the 1st of March 2000, and adopted by the General Assembly (Assemblée plénière) of 8th of February 2000.

¹²⁸⁹ The editors must respect the balance between the time of the intervention of the members of the government, of the personalities pertaining to the parliamentary majority and of the opposition and they must ensure an equal time of intervention to the members of the political groups not represented in the Parliament. See, “Dossiers d’actualité. Réflexions sur les modalités du pluralisme” (Recent updates. Reflections on the modalities of pluralism), published on the CSA site on the 2nd of August 2006, General Assembly of 18th July 2006. <http://www.csa.fr/index.php>

¹²⁹⁰ One should look to the annexes of the CSA rapport in order to have an overview of the numerical representation of the time consecrated to every political group. See, “Le principe de référence adopté par le CSA pour l’évaluation du respect du pluralisme politique dans les medias,” 2000, *ibidem*, *supra*. The calculation is made for periods inside or outside the electoral process, within general or thematic programming, separately for the parliamentary majority and for the government, and sometimes even for the president of the Republic.

¹²⁹¹ *Temps d’antenne* refers to the totality of the time devoted to station transmissions, reportage and interventions. This indicator allows evaluating the weight given to a subject in the news. See, “Le principe de référence adopté par le CSA pour l’évaluation du respect du pluralisme politique dans les medias,” 2000, *ibidem*, *supra*.

¹²⁹² *Temps de parole* refers to the time when the personality expresses her/himself. See, “Le principe de référence adopté par le CSA pour l’évaluation du respect du pluralisme politique dans les medias,” 2000, *supra*.

¹²⁹³ See, “Quinze ans d’application de la definition de l’oeuvre audiovisuelle” (Fifteen years of application of the definition of the audiovisual work). The study recognizes, though it does not stress, the existence of other categories of opinions on the market, such as documentaries, fiction, divertissement, and so on. No question of diversity arises. http://www.csa.fr/infos/publications/publications_tlevision.php?cat=10. See, also, “Synthèse des auditions sur la définition de l’œuvre audiovisuelle, Analyse des auditions sur la

The political speech pluralism is however only one of the focuses of the regulatory instruments in France that aim at protecting media diversity. In the following lines specific tools that deal with media diversity are analysed. Further, in line with the rest of the countries discussed in this paper, the “French” media diversity is also conceptualized as both internal and external¹²⁹⁵. I discuss the various obligations that both public and private broadcasters have to abide to. They offer a detailed picture of a large range of various content types. The first aspect of external pluralism is the existence of both private and public broadcasters.

The French public broadcasting changed its name and legal form various times.¹²⁹⁶ The public broadcasters started as Radio-France, TF1, Antenne 2, France

définition de l'œuvre audiovisuelle” (Synthesis of auditions for the definition of the audiovisual work. Analysis of the auditions of the definition of the audiovisual work), at: http://www.csa.fr/upload/publication/oeuvre_audiovisuelle.pdf. Both of these studies are available on the CSA's website.

¹²⁹⁴ See, “Campagne officielle en vue du 1er tour de l'élection présidentielle: les conditions de production, de programmation et de diffusion des émissions,” (Official campaign in regard to the first turn of the presidential elections: the conditions of production, programming and programs diffusion), http://www.csa.fr/actualite/decisions/decisions_detail.php?id=122405, which contains the number of broadcasting hours and the time of broadcasting during the day; “Élection présidentielle: le CSA écrit à TF1 au sujet de l'information donnée sur les temps de parole des candidats,” (Presidential elections: the CSA writes to TF1 on the subject of information submitted on the candidates' temps de parole) which ensures the equitable time to reply for the opposed candidate during electoral campaign. The majority of the decisions deal with the issue of broadcasting time during electoral campaigns. See, also, however, the other decisions that, although not reserved to the electoral campaign, still refer only to political information. See, “Traitement des émissions Une semaine sur Public Sénat et Une semaine sur LCP (France 3), Pluralisme sur les antennes: le Conseil répond au président de l'Assemblée de Polynésie française et au président du groupe Tahoeraa Huiraatira” (Programming treatment. A week on the Public Senate and a week on the LCP (France 3), The Pluralism on the waves: the Conseil responds to the president of the Assembly of the French Polynesia and to the president of the Tahoeraa Huiraatira group). http://www.csa.fr/actualite/decisions/decisions_resultats.php. All these studies are available on the CSA's website.

¹²⁹⁵ See, Alain Lancelot, Rapport au premier ministre sur les problèmes de concentration dans le domaine des médias, Décembre, 2005 http://www.ddm.gouv.fr/IMG/pdf/rapport_lancelot.pdf

¹²⁹⁶ In 1974 the Radiodiffusion télévision française was divided in seven national programme companies, one for radio and three public television channels, Television française 1 (TF1), Antenne 2 (A2), and FR3, one for television programme production, another for the transmission and the expansion of networks, and the Institut National de l'audiovisuel. The cahiers des charges that include the programming obligations for broadcasting companies date back that time. Loi no. 64-621 replaced the Radiodiffusion-Télévision Française, created in 1949 and, which replaced the Radiodiffusion française, with the Office de radiodiffusion télévision française, http://www.france5.fr/echo/60_70.htm. See, also, “TV Par Satellite,” “l'histoire de la télévision du siècle,” <http://www.satinfo-site.net/tv-par-satellite>.

Regions 3, which were later renamed France 2 and France 3, La Sept, a satellite and terrestrial channel¹²⁹⁷. TF1 was privatized in 1986¹²⁹⁸. La Cinq¹²⁹⁹ became bankrupt in 1991¹³⁰⁰. It is also worth mentioning Arte¹³⁰¹, a cultural European channel, established through the treaty of 30 of April 1991¹³⁰².

Under the *Loi* of 17 January 1989, as under the *Loi* of 29 July 1982, the public broadcasting authorizations are granted through a contract between the national administrative authority, i.e., the CSA and the applicant. These *cahiers des charges* expressly state that the public broadcasters' mission is to serve the public and not business performance¹³⁰³. Media pluralism falls under the public interest mission¹³⁰⁴. The obligations established in the *cahiers des charges* corroborate to fulfill this mission¹³⁰⁵.

This pluralism is mainly conceptualized in terms of diverse French and European production¹³⁰⁶. They include the channels' commitment to devote time to local

¹²⁹⁷ See, "The Media in Western Europe," *ibidem*, at p. 58.

¹²⁹⁸ See, "The Media in Western Europe," *ibidem*, at p. 58.

¹²⁹⁹ See, for a history of this channel: <http://lacinq.tv.free.fr/historique/historique.htm>.

¹³⁰⁰ See, "The Media in Western Europe," *ibidem*, at p. 58.

¹³⁰¹ Association Relative à la Télévision Européenne. See, its official website, <http://www.arte.tv/fr/70.html>.

¹³⁰² The official website of this channel presents itself as "the cultural, European, French – German channel." <http://www.arte.tv/fr/70.html>. The channel was created by a German – French Treaty, and its status is "European Group of Economic Interest" (Groupement Européen d'Intérêt Economique (G.E.I.E.)). <http://www.arte.tv/fr/tout-sur-ARTE/la-chaine/38976.html>

¹³⁰³ See, Preamble, Décret n° 94-813 of 16 September 1994, portant approbation du cahier des missions et des charges de la société France 2, modified and completed by décret n° 2002-750 du 2 mai 2002, available at:

<http://charte.francetv.fr/Charte%20de%20l'antenne/Cahier%20des%20charges%20%20France%202.htm>.

See, Preamble, Décret n° 95-71 du 20 janvier 1995 portant approbation du cahier des missions et des charges de France 5 (Decree approving the convention of missions and charges of France 5), (JO-21/01/95-p.1134), available at:

<http://charte.francetv.fr/Charte%20de%20l'antenne/Cahier%20des%20charges%20%20France%205.htm>.

¹³⁰⁴ Article 43-11, Loi Leotard, modified by Law n°2006-396.

¹³⁰⁵ Article 48, Loi Leotard, modified by Ordinance n°2006-596. See, also, Article 33-1, modified by law n°2006-396. The conventions are supposed to include measures in favor of social cohesion, cultural diversity and fight against discrimination.

¹³⁰⁶ Loi n°86-1067, Article 28, modified by n°2006-396 du 31 mars 2006 art. 47 I (JORF 2 avril 2006).

See, also, Article 33, modified by Law n°2004-669 of 9th of July 2004 in art. 37, art. 59, art. 60, art. 108 (JORF 10 juillet 2004). Many of the conventions concluded between Conseil Supérieur de l' Audiovisuel and the public broadcasting channels are in fact a copy of the Loi Leotard' s provisions.

programming as well as to a diversified and novel musical offer. The public broadcasters are to ensure respect of pluralism in all the type of programming, either news, cultural, educational, entertainment and sports¹³⁰⁷. They should strive towards content development and diversification, especially interactivity that can keep pace with the technological development and diversification¹³⁰⁸.

As a general observation, they offer a paternalistic view on the meaning of media pluralism. They are eclectic in nature, and they make a multitude of references to various means of increasing diversity of content, all in the process of cultivating the French society. In this sense it is worth pointing out that only their simple enumeration could provide the reader with a genuine picture of the diversity that they envision. In the following lines I will elaborate on these general observations. Although they are very detailed, I believe that they contribute to understanding the media diversity in the sense that they perhaps take this concept to its extremes. One only wonders whether there is any other type of content that could be added to compose the beautiful picture of what media diversity is and that the French legislator or regulator did not already think of.

The imposition of quotas and other rules designed to protect national language and culture have been an important feature of programme regulation in France. The cahiers des charges of the public channels (and the authorizations of the private channels) prescribe that a minimum number of hours of original French language programming be broadcast annually.¹³⁰⁹ They must invest in the creation of European and French content

¹³⁰⁷ See, Preamble, Décret n° 94-813, *ibidem*, *supra*. See, also, article 21, Décret n° 94-813, *ibidem*.

¹³⁰⁸ See, Preamble, Décret n° 94-813, modified and completed, *supra*. See, Preamble, para.2, article 13, Décret n° 95-71, *supra*.

¹³⁰⁹ The Conseil d'Etat has held the French quotas compatible with the Treaty of Rome, art. 7 – prohibition of discrimination against nationality. Decision 97-234 of 21 June 1988. <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX1988X06X0000097234>

such as fiction¹³¹⁰, documentary¹³¹¹, animated and live shows¹³¹². Furthermore they must show a minimum of 120 hours of audiovisual works of European or French origins every year, in the 20-21 time frame¹³¹³.

The above mentioned paternalistic attitude found in these conventions stems from the French legislator's vision of the public broadcasters as public educators¹³¹⁴. Respect for pluralism in information and for pluralistic expression of currents of thought and opinion is a leitmotif, albeit using different syntagmas, of every *cahier des charges*¹³¹⁵. The cahiers des charges abound in references to diversity in its various aspects: “*la diversité des origines et des cultures de la communauté nationale*,¹³¹⁶” “*une image la plus réaliste possible de la société française dans toute sa diversité*”¹³¹⁷,” “*une attention particulière au traitement à l'antenne des différentes composantes de la population*,”¹³¹⁸

¹³¹⁰ Article 60 of the R.F.I Cahier defines the fiction genre as including series, dramas and theatrical and lyrical plays other than retransmission of live events. See, Décret n° 88-66 du 20 janvier 1988 portant approbation du cahier des missions et des charges de Radio France internationale (JO-22/01/88-p. 1049). Available online at: <http://www.rfi.fr/pressefr/images/072/Dcret%20n.doc>.

¹³¹¹ Some of the cahiers des charges make a more elaborate recommendation for documentaries on political, social, cultural, scientific and technical contemporary problems. See, article 27, Décret of 13 November 1987 portant approbation du cahier des missions et des charges de la société Radio France (Decree approving the convention of missions and obligations of the society Radio France), (JO-15/11/87-p. 13326). Available online at: http://www.csa.fr/infos/textes/textes_detail.php?id=9258.

¹³¹² See, articles 26, 31, Décret of 13 November 1987, supra.

¹³¹³ See, article 22, Décret n° 94-813, supra.

¹³¹⁴ A provision in the cahier des charge of France5 states that: “[The public broadcaster] conceives, realizes and distributes programs of access to knowledge, with educative and cultural character, in order for the audience to acquire new information in all the domain. [These programs] are especially conceived so that they can accompany the action of the educative and cultural community addressing the educated public.” See, article 12, Décret n° 94-813, modified and completed, supra. See, Preamble, para.2, Décret n° 95-71, supra.

¹³¹⁵ See, article 4, Décret of 13 November 1987, supra.

¹³¹⁶ “The national communities’ diverse origins and cultures.” See, art. 5-1 of the Décret of 13 November 1987, supra.

¹³¹⁷ “A most realistic possible image of the French society in all of its diversity.” See, art. 5-1 of the Décret of 13 November 1987, supra.

¹³¹⁸ See, article 5-1, Décret of 13 November 1987. A particular attention to the manner in which the different parts of the population are reflected in programming. See, article 3-1, Décret n° 94-813, supra.

“la plus grande diversité possible”¹³¹⁹, “la promotion et à l’illustration de la langue française,”¹³²⁰ and of the French regional dialects¹³²¹, and even the right to reply.¹³²²

They provide for broadcasting time for political parties,¹³²³ for trade unions and professional organization with national representation¹³²⁴, main religious sects,¹³²⁵ government messages on the state of the nation,¹³²⁶ and even for any government message¹³²⁷, for Parliament debates¹³²⁸, the state of the roads¹³²⁹, for consumers information,¹³³⁰ for weather information¹³³¹ and for information dedicated to help foreigners’ social integration,¹³³² for national defense and public security.¹³³³ They should air more than 15 lyrical, choreographic, or dramatic shows produced by theatres, festivals and cultural organizations in a year,¹³³⁴ regular shows dedicated to literary expression, to history, cinema and plastic arts,¹³³⁵ more than two hours in a month of music, especially new talents, and more than 6 hours annually of French and European

¹³¹⁹ The biggest possible diversity. See, Preamble, para. 2, Décret n° 95-71, supra.

¹³²⁰ “The promotion and the reflection of the French language.” See, article 4, Décret n° 94-813. See, article 6, Décret of 13 November 1987, supra.

¹³²¹ See, article 6, Décret of 13 November 1987, supra.

¹³²² See, article 12, Décret of 13 November 1987, supra.

¹³²³ See, article 13, Décret n° 94-813, supra. See, article 16, Décret of 13 November 1987, supra.

¹³²⁴ See, article 14, Décret n° 94-813, supra. See, article 17, Décret of 13 November 1987, supra.

¹³²⁵ See, article 15, Décret n° 94-813, supra. See, article 18, Décret of 13 November 1987, supra.

¹³²⁶ See, article 16, Décret n° 94-813, supra. See, article 19, Décret of 13 November 1987, supra.

¹³²⁷ See, article 13, Décret of 13 November 1987, supra.

¹³²⁸ See, article 15, Décret of 13 November 1987, supra.

¹³²⁹ See, article 17, Décret n° 94-813, supra.

¹³³⁰ See, article 18, Décret n° 94-813, supra.

¹³³¹ See, article 22, Décret of 13 November 1987, supra.

¹³³² See, article 20, Décret n° 94-813, supra.

¹³³³ See, article 9, Décret n° 95-71, supra.

¹³³⁴ See, article 24, Décret n° 94-813, supra.

¹³³⁵ See, article 25, Décret n° 94-813, supra.

classical music,¹³³⁶ a majority of French songs of all genres during the programs so called “*programme de variétés*,”¹³³⁷ educational programming dedicated to the youth¹³³⁸.

They should also broadcast scientific programs¹³³⁹, a large range of sports¹³⁴⁰, games that should stimulate the imagination, the knowledge and the discovery.¹³⁴¹ They should also transmit to the public job offers and describe the employment market¹³⁴². Some public channels seem even more inclined towards the fulfillment of social or local goals¹³⁴³. Réseau France Outre-mer is dedicated to promote the French culture and language to the territories outside the mainland France, while reflecting the local and regional interests¹³⁴⁴. France4 is addressed to the youth¹³⁴⁵. They, too, need to have a

¹³³⁶ See, article 26, Décret n° 94-813, modified and completed, supra. Other cahiers des charges call for a privileged place for French produced songs and for a regional representation. See, article 28-29, Décret of 13 November 1987, supra.

¹³³⁷ See, article 27, Décret n° 94-813, modified and completed, supra. See, article 30, Décret of 13 November 1987, supra.

¹³³⁸ See, article 28, Décret n° 94-813, modified and completed, supra. See, article 23, Décret of 13 November 1987, supra.

¹³³⁹ See, article 29, Décret n° 94-813, modified and completed, supra.

¹³⁴⁰ See, article 30, Décret n° 94-813, modified and completed, supra.

¹³⁴¹ See, article 31, Décret n° 94-813, supra.

¹³⁴² See, paragraph 3 of Preamble, Décret n° 95-71, supra.

¹³⁴³ See, article 13 and 14, Décret n° 95-71, supra. France5 will show programmes related to the professional and economic life. These programmes favor a better knowledge of the employment market, of the development of the employment market and of the company life. They permit the exchange of opinions between employers, employees, jobs searchers, administration, social partners, vocational organizations. They should furthermore present the civic life, the integration of foreigners, the education in the economic, social and sanitary spirit and information on entertainment and sport activities. Article 27 expressly calls for a tight collaboration with the institutions in the above mentioned domains. This is not to say that the other broadcasters should not consider this type of programming. See, article 17, Décret n° 93-535 du 27 mars 1993 portant approbation du cahier des missions et des charges de la Société nationale de programme Réseau France Outre-mer (Decree approving the convention of missions and obligations of the National Society for programs for the Overseas Departments and Territories), (JO-28/03/93-p.5146), available on legifrance.gouv.fr website. Note that this Decree was abrogated in 2009 by Décret n° 2009-796 du 23 juin 2009 fixant le cahier des charges de la société nationale de programme France Télévisions, available on legifrance.gouv.fr website. See, also, article 22, Décret n° 88-66 du 20 janvier 1988 portant approbation du cahier des missions et des charges de Radio France internationale modifié par : Décret n° 2004-743 du 21 juillet 2004 (JO-28/07/04), available at: <http://www.rfi.fr/pressefr/images/072/Decret%20n.doc>.

¹³⁴⁴ See, Décret n° 93-535, supra.

¹³⁴⁵ See, Décret n° 2005-286 du 29 mars 2005 portant approbation du cahier des charges de la société France 4 (Decree approving the convention of missions and obligations of France 4), (JO-30/03/06). The channel is intended to educate the young public on cultural issues, events and life.

general and diversified offer¹³⁴⁶. When there is needed, they provide their content to the Radio France Internationale channel.¹³⁴⁷ This last institution, designed for the French audience and for the promotion of the French culture abroad, is under the obligation to respect pluralism¹³⁴⁸. Although the means to achieve their obligation to respect pluralism is left to their discretion, the public broadcasters¹³⁴⁹ do submit an annual report to the CSA and to the Ministry of Communications on the execution of the obligations in the cahiers des charge¹³⁵⁰.

The *cahiers des charges* describe in detail the obligations imposed on public broadcasters. Though not containing such strict and restrictive content related obligations as the cahiers des charges of the public broadcasters,¹³⁵¹ the conventions of the French private channels all declare their commitment to pluralism¹³⁵². The conventions employ terms such as “*le pluralisme de l’expression des courants de pensée et d’opinion*”¹³⁵³, “*l’expression des différents points de vue,*”¹³⁵⁴ “*la présentation des différentes thèses*”.¹³⁵⁵

¹³⁴⁶ See, Preamble, article 4 and 5, Décret n° 93-535, supra. See, article 2, Décret n° 2005-286, supra.

¹³⁴⁷ See, articles 59-66, Décret n° 93-535, supra. See, also, article 84, Décret n° 88-66, supra.

¹³⁴⁸ See, article 4, Décret n° 88-66, supra.

¹³⁴⁹ See, for example, articles 52-55, Décret n° 94-813, supra.

¹³⁵⁰ See, article 55, Décret n° 94-813, modified and completed. See, article 103, Décret of 13 November 1987. See, article 36, Décret n° 95-71. See, article 94, Décret n° 88-66.

¹³⁵¹ The majority of obligations is related to technical conditions, to minors protection, to territorial coverage, to respect of human dignity and to respect of the authority of the judiciary. Naturally, they are less restrictions on advertising than in the case of public broadcasters.

¹³⁵² See, article 8, Convention de Canal+ (et de Canal+ Cinéma, Canal+ Sport, Canal+ Décalé), Décision n° 2000-1021 du 29 novembre 2000 (JO-12/12/00-p. 19655), modified and completed (hereinafter “Convention de Canal+”).

¹³⁵³ “The pluralism of the expression of currents of thoughts and opinions.” See, Convention entre le Conseil Supérieur de l’Audiovisuel agissant au nom de l’Etat, d’une part, et la Société Planète Cable, ci-après dénommée l’éditeur, d’autre part, concernant le service de Télévision Planète (Convention between on the one part, the Conseil Supérieur de l’Audiovisuel acting in the state’s name and the Society Planet Cable, herein after the editor, on the other part, concerning the service of the Planète Television), 2005, available at: http://www.csa.fr/infos/textes/textes_detail.php?id=12519. Hereinafter, Television Planète Convention.

¹³⁵⁴ The expression of different viewpoints. See, article 8, Décision n° 2000-1021, supra. See also, article 2-3-2 of the Television Planète Convention, supra.

These syntagms conceptualize media pluralism at an abstract level. This abstractness is brought to the concrete by some of the specific requirements of the conventions.

As in the *cahiers des charges*, the promotion and reflection of French language and culture is a repetitive objective. The private channels are subjected to the general broadcasting law and therefore to the rules on promotion and reflection of French and European works, this irrespective of the specific conventions¹³⁵⁶. The conventions demand for journalistic responsibility when it comes to news and information, and a clear distinction between entertainment and information.¹³⁵⁷ They request pluralistic access for political parties¹³⁵⁸ and they establish the right of reply¹³⁵⁹. They repeat the legislative provisions on 60% programming annually dedicated to European audiovisual production and 40% to French¹³⁶⁰. They also prescribe quotas for acquisition and contribution to the production of these types of audiovisual works¹³⁶¹. They require the broadcasting of events of major importance¹³⁶² and the presentation of recent French films¹³⁶³. The companies further commit to ensure equality of treatment among producers and free competition in the audiovisual sector¹³⁶⁴. Most of the channels are general¹³⁶⁵. Some of

¹³⁵⁵ The presentation of different theses. See, article 8, Décision n° 2001-577 du 20 novembre 2001 portant reconduction de l'autorisation délivrée à la société Télévision française 1 (TF1) (Decision for the renewal of the authorization issued to TF1), (JO-21/12/01-p.30301). Hereinafter, TF1 Convention.

¹³⁵⁶ See, article 55, Décision n° 2000-1021, modified and completed, *supra*.

¹³⁵⁷ See, article 18, Décision n° 2000-1021, modified and completed, *supra*.

¹³⁵⁸ See, article 2-3-2, Convention between, on the one part, the Conseil Supérieur de l'Audiovisuel acting the state's name and on the other part, the society BFM TV hereinafter named the editor concerning the services of the BFM TV, last modified in March 2010. Convention entre le Conseil Supérieur de l'Audiovisuel agissant au nom de l'Etat, d'une part, et la Société Planète Cable, ci-après dénommée l'éditeur, d'autre part, concernant le service de Télévision Planète (Convention between on the one part, the Conseil Supérieur de l'Audiovisuel acting in the state's name and the Society Planet Cable, herein after the editor, on the other part, concerning the service of the Planète Television), 2005, available at: http://www.csa.fr/infos/textes/textes_detail.php?id=12519. (hereinafter "BFM Convention")

¹³⁵⁹ See, article 4-1-3, BFM TV Convention, *supra*.

¹³⁶⁰ See, article 24, Décision n° 2000-1021.

¹³⁶¹ See, article 25 and 30, Convention de Canal+.

¹³⁶² See, article 2-2-4, Television Planète Convention.

¹³⁶³ See, article 3-3-5 of the Television Planète Convention.

¹³⁶⁴ See, article 3-2-3 of the Television Planète Convention.

them are specialized¹³⁶⁶, though they might offer different genre to a limited extent¹³⁶⁷. Diversity must be reflected even in the specialized content¹³⁶⁸.

As a general observation on these conventions, they generally prescribe for a clear separation of the interest of the channels' shareholders from the content that they broadcast, especially in informational and general programming. In this sense it is worth mentioning the provision requiring the broadcasting company to inform the public of its financial link with an organization included in its programming¹³⁶⁹. Other provisions call for information independent of the shareholders' interests.¹³⁷⁰ Part of this endeavor to separate business' influence from media content is the provision stipulating that any transfer or acquisition of capital must be notified to the CSA¹³⁷¹. Furthermore, the companies must submit information on all the parties admitted to negotiation that might lead to change of control or other capital movement and information related to any stock exchange activity¹³⁷².

¹³⁶⁵ Such as Canal Plus, TF1 and M6. See, for instance article 1 of M6 Convention, which is Décision n° 2001-578 du 20 novembre 2001 portant reconduction de l'autorisation délivrée à la société Métropole Télévision (Decision for the renewal of the authorization issued to M6), (M6) (JO-21/12/01-p.30453). Hereinafter, M6 Convention See, also article 32 of the TF1 Convention, declaring that the channel offers a general and diversified programming. Even the general programmes must include information and magazines, as well as programmes dedicated to the youth. See, article 34 and 35 of the TF1 Convention, *supra*.

¹³⁶⁶ The channel Gulli is dedicated to children, parents and educators. See, Convention concluded on the 19th of July 2005 between the CSA on the one part, acting in the name of the state, and the society Jeunesse TV on the other part, concerning the television service named Gulli. Available at: http://www.csa.fr/infos/textes/textes_detail.php?id=28729. Hereinafter, Gulli Convention

¹³⁶⁷ Television Planete is dedicated to documentary for instance, however it might still broadcast fiction. See, article 3-1-1 of the Convention. See, also the convention of Europe 2 TV dedicated to music, article 1-1, between the CSA on the one part, acting in the name of the state, and the society MCM on the other part, concerning the television service Europe2 TV. See, also article 3-1-7 of the Gulli Convention referring to health education and nutritional programming.

¹³⁶⁸ For instance programming dedicated to children must include cartoons, documentaries, shows and entertainment magazines. See, Gulli Convention, article 3-1-1, *supra*.

¹³⁶⁹ See, article 20, Convention de Canal+, *supra*.

¹³⁷⁰ See, article 2-3-9 of the Television Planete Convention, *supra*.

¹³⁷¹ See, article 4-1-1 of the Television Planete Convention, *supra*.

¹³⁷² See, article 4-1-1 and 4-1-2, BFM TV Convention, *supra*.

The Conseil can request submission of any activity that the company develops in order to diversify cultural and communications content¹³⁷³. Some channels do in fact commit themselves to continuously diversify their offer¹³⁷⁴. These provisions certainly respond to a certain concern of the legislator that business interests¹³⁷⁵ might stand behind journalistic reporting. Symmetrical to our discussion on the public broadcasters' *cahiers des charges*, one final note should be dedicated to the enforcement of the obligations contained in these conventions. Thus, the CSA must be informed on the programming before this is broadcasted¹³⁷⁶. Posteriori, the regulatory agency receives information related to all the contractual and financial activities of the company¹³⁷⁷.

France relies on *cahiers des charges* and private conventions to instill in public and, respectively, private broadcasters the desire to achieve media diversity. In Romania, the notion of media pluralism may be inferred from the concept of quality media,¹³⁷⁸ which generally defines a balanced presentation of viewpoints¹³⁷⁹ through the inclusion of various kinds of programming – regional, local/national, social, economic, cultural and political¹³⁸⁰. Within news and debates programs that involve public interest issues regarding ethnic, religious or sexual minorities in particular, the viewpoint of such

¹³⁷³ See, article 4-1-2 of the Television Planete Covention, *supra*.

¹³⁷⁴ See, article 32, M6 Convention. See, also article 36 of the same Convention, promising to present a diverse genre of music, while still privileging the French songs.

¹³⁷⁵ See, for instance, TF1, which is owned, according to the information in its Convention, by the Bouygues SA. See, Décision n° 2001-577, *supra*. M6 is mainly owned by RTL Group, conform to the Annexe to the Convention.

¹³⁷⁶ See, article 4-1-3 of the Television Planete Covention, *supra*.

¹³⁷⁷ See, article 4-1-4 of the Television Planete Covention, *supra*.

¹³⁷⁸ See, Silvia Huber, "Media Markets in Central and Eastern Europe. A Network Analytic Investigation," in Silvia Huber, "Media Markets in Central and Eastern Europe," LIT Verlag, 2006, at p. 9.

¹³⁷⁹ The Romanian Audiovisual Law expressly links the balance ("equidistance") with the pluralism. See, Romanian Law no. 504 of 11 July 2002 on audiovisual, art. 17 para. 1 let. d. This Law is available online at: <http://www.cna.ro/Legea-audiovizualului.html>.

¹³⁸⁰ See, art. 10 para. 3 let. d of the Romanian Audiovisual Law 504/2002, *supra*. See, also, Daniela Roventa Frumusani and Theodora – Eliza Vacarescu, "The Quality Press Definition," in "Quality Press in Southeast Europe, "Continuity and Change in the Romanian Cultural Press," Sofia 2004, at p. 242.

minorities should be presented¹³⁸¹. However, the Romanian media was more than once criticized for the negative representation of the Roma population¹³⁸² and for its under-representation of minorities' issues¹³⁸³.

The Romanian private broadcasting is dominated by two foreign investors - Central European Media Enterprises and ProSiebenSat.1¹³⁸⁴ and by two Romanian investors – Sorin Ovidiu Vantu and Voiculescu family. Both the Romanian Competition Council (through its competence in reviewing media mergers and acquisitions) and NAC share tasks in protecting structural pluralism. The Audiovisual Content Regulation Code¹³⁸⁵ sets forth in detail the obligations pertaining to the NAC in regard to monitoring aspects that in general mirror the licensing requirements, such as correct information and the pluralistic expression of ideas and opinions, as well as pluralism of sources of information. Of particular importance is the promotion of cultural pluralism, which

¹³⁸¹ Art. 76, Romanian Council of Audiovisual's Decision no. 187 of 3 April 2006 regarding the Romanian Audiovisual Content Regulation Code, *supra*. Available at: <http://www.cna.ro/Decizia-nr-nr-187-din-3-aprilie.html>

¹³⁸² See, Open Society Institute, "The Programme of Monitoring the Accession to the EU. The Minorities' Rights in Romania (the Roma minority)" (the Roma Programme) See, also, Marian Chiriac, Alina Constantinescu, "Can we get out of this impasse? Inventory of problems and solutions regarding the Roma situation in Romania," ("Se poate ieși din impas? Inventar de probleme și soluții privind situația romilor din România. Cluj : Centrul de Resurse pentru Diversitate Etnoculturală") the Center for Resources for Ethno-cultural Diversity, 2007, available at: <http://www.edrc.ro/docs/docs/Raport%20Roma%202007.pdf>.

¹³⁸³ They are 10 newspapers dedicated to Roma and in the Roma language, no radio programme for the Roma and the only television programme dedicated to this community was canceled. See, the Roma Programme, *supra*, at p.9. As for the media representing Hungarian issues, the situation is better and it definitely improved after the Revolution. For a historical account on how Hungarian media survived or not Communism, see, Bela K. Kiraly, "The Hungarian Minority's Situation in Ceausescu's Romania," Chapter V: Minority Access to Media, Education and Culture. The article briefly shows how the "pluralism of views" dramatically decreased in Romania during Communism (thus, while in the early 1930s the Hungarian media was diverse and numerous, by 1950s the Hungarian journalism "had atrophied completely"). Available online at: <http://www.hungarian-history.hu/lib/humis/humis11.htm>

¹³⁸⁴ See, Open Society Institute, EU Monitoring and Advocacy Program, Open Society Foundation, Media Program, Romanian broadcasting: playground for political and business interests, Press Release, Bucharest and Budapest, 19 May 2008. See, also, the published report, Television across Europe: Follow-up Reports 2008, Romania.

¹³⁸⁵ Decision no. 187 of 3 April 2006 regarding the Romanian Audiovisual Content Regulation Code, *supra*.

includes the preservation of the Romanian language,¹³⁸⁶ respecting the national and European identities,¹³⁸⁷ the reservation of 50% of the broadcasting time, to European audiovisual works,¹³⁸⁸ 10%¹³⁸⁹ to European audiovisual works created by independent producers¹³⁹⁰ and 30%¹³⁹¹ to Romanian audiovisual works¹³⁹².

NAC's pluralism mission¹³⁹³ inspires the obligation for regional or local broadcasters to air local programming¹³⁹⁴. The same umbrella mission leads to the imperative provision requiring broadcasters not to re-transmit other broadcasters' radio programs for more than 180 minutes a day¹³⁹⁵, increasing therefore the incentive to produce in house content. Certain events that are of major public interest contribute to media pluralism and most importantly to public access to a pluralistic media and this is why the law requires them to be widely accessible.¹³⁹⁶

¹³⁸⁶ Art. 88, Romanian Audiovisual Content Code, *supra*.

¹³⁸⁷ Art. 89, Romanian Audiovisual Content Code, *supra*.

¹³⁸⁸ With the exception of time consecrated to information, sports manifestation, games, advertising, teletext or teleshopping services and with the exception of local broadcasters. Art. 94, Romanian Audiovisual Content Code, *supra*.

¹³⁸⁹ Or 10% of the programming budget. Broadcasting time calculated without taking into consideration the exceptions mentioned above. Art. 95, Romanian Audiovisual Content Code, *supra*.

¹³⁹⁰ Art. 94, Romanian Audiovisual Content Code, *supra*.

¹³⁹¹ Broadcasting time calculated without taking into consideration the exceptions mentioned above. Art. 93, Romanian Audiovisual Content Code, *supra*.

¹³⁹² Art. 90, Romanian Audiovisual Content Code, *supra*. Romanian works are: "[i)] works originated in Romania and realized by authors and workers residing in Romania; [(ii)] works originated in other states and realized on the basis of bilateral coproduction treaties, if the Romanian coproducers supply a majority percentage of the total production costs and the total production is not controlled by one or more producers established outside Romania."

¹³⁹³ See, Romanian Audiovisual Law 504/2002, art. 17 para. (1) lit. d)

¹³⁹⁴ In communities of 50.000 to 150.000 people, the programming should be of 20 minutes daily; in communities of less than 50.000 people, the programming should be of 35 minutes daily. See, Decision of the Romanian National Audiovisual Council no. 574 of 26 June 2008 abrogating National Audiovisual Council's Decision no. 401 of 26 June 2006, regarding the broadcasting of local radio programming.

¹³⁹⁵ Increased from 60 minutes per day by Decision no. 12 of 5 January 2007, modifying the Decision of the Romanian National Audiovisual Council no. 401 of 2006 regarding the broadcasting of the local radio broadcasting programs, in M.Of. nr. 36/18 ian. 2007 (Romanian Official Gazette no. 36/18 Jan. 2007) and abrogated by Decision no. 574 of 26 June 2008, Romanian Official Gazette no. 520 of 10 July 2008, abrogated as well by Decision 488 of 29 April 2010, Romanian Official Gazette no. 308 of 12 May 2010.

¹³⁹⁶ The Romanian events of major importance are enumerated in the Government Decision no. 47 from 2003, Official Gazette no. 82 of 10 February 2003.

Despite these diverse content enhancing legal norms, the situation on the ground is different. The mostly watched television channels – Antena 1 and Pro TV – are dominated by entertainment¹³⁹⁷. And, the public television channel, once the carrier of public interest torch, is losing ground in ratings in front of Realitatea TV when it comes to debates and talk shows¹³⁹⁸.

These regulatory instruments that enhance the media content diversity are strikingly detailed. Their detailed nature might on the one hand be seen as almost censoring speech. On the other hand however, they are a thorough picture of how a diverse media may look like. Very detailed, perhaps very paternalistic, emphasizing language and culture, giving access to political parties and to independent third parties, providing for European or national content quotas and putting aside investment for independent productions, these regulations recognize however that unless compelled to do so, broadcasters would try their best to avoid some of this content. If the public broadcaster are under heavy commandments, the private ones are not much happier, since the French private conventions are still detailed and they allow the CSA to intrude in some aspects of their management. One commonality shared by the French and Romanian broadcasting laws is that they emphasize language and European and national identity. The German public broadcasters' advisory councils are discussed in the section on the German Constitutional Court. These councils could be considered more flexible in rapidly reflecting the social variety than the more rigid norms of the French cahiers des charges.

¹³⁹⁷ See, Open Society Institute EU Monitoring and Advocacy Program Network Media Program, Television across Europe: Follow-up Reports 2008, OSI/EU Monitoring and Advocacy Program, 2008, (EUMAP Report), p. 44.

¹³⁹⁸ See, EUMAP Report, p. 44. The Report presents on p. 46 a statistics of the different genres aired on television channels. These statistics show beyond doubt the tendency to air mainly light entertainment.

The content related obligations above mentioned seem superfluous considering this situation on the ground. However, they are law and they constitute a good starting point for any future reform of the broadcasting law. Thorough enforcement of the compliance with the related legal rules as well as close monitoring of any proposed merger or acquisition on the media market are two key solutions to the concentration on the media market. The fact that there are legal norms meant to ensure pluralism of media content but they are not seriously transplanted into practice is a common phenomenon. Many countries analysed here encounter the same discrepancy. This may be a consequence of the law's feature of being more "idealistic" than life and depicting a "to aim for" situation. This may also be a consequence of the broadcasters' resistance against pursuing some abstract goals to the detriment of business interests.

Besides these content related provisions, the regulatory norms that protect media diversity apply to the structure of the media industry as well. The next subsection analyses them.

III. 3. 3. 2. Structural pluralism and media ownership restrictions

Content diversity may be enhanced through the public broadcasters' commitment to follow the rules in their cahiers des charges or in the more general audiovisual codes. In Germany, these public broadcasters must seek the advice of the socially representative bodies that make up part of their management structure. As we saw above, private broadcasters are also bound, but to a lesser extent, by content related obligations. However, the most important means employed to control media concentration are the structural regulations. I discuss first the structural regulations that further media diversity in Germany, Romanian and Italy. The structural norms applicable in France have been

discussed in the section on the French Conseil Constitutionnel's decisions and their impact on the French broadcasting law¹³⁹⁹. Mainly, the following lines present the ownership restrictions (including the legal institution of channels' attribution and their importance for evaluating a media company's market power and audience impact), the access to broadcasting rules (access by third parties, as well as by political parties and access to premium content) and must carry provisions.

The following lines discuss ownership restrictions, licensing and access rules that take into consideration media diversity. They are targeted at protecting the existence and the preservation on the market of a dual pluralism in the sense of a strong public broadcaster and several private broadcasters. Like in the United States, there is still a heavy amount of antitrust in both the regulatory review and the regulatory norms. The ownership restrictions are a complicated mechanism and they involve issues of market definition, of market power and of control (especially due to shares' attribution). Ownership transparency is another, non-regulatory, tool that may contribute to the protection of media diversity. Access to broadcasting by independent third parties is designed to ensure that several opinions are heard. The efficiency of this type of norms that are designed to further media diversity, access related norms, is diminished by broadcasters' choice of pushing the less attractive content that they should carry to non prime time.

The most simplistic approach to understanding the concept of structural regulation is by reference to the existence of both public and private broadcasters. "The Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag* – RStV) from 1987 set the course for the "dual broadcasting system", the side-by-side existence of public and commercial

¹³⁹⁹ See, section III.2.3.1.

broadcasting¹⁴⁰⁰.” The German Interstate Treaty on Broadcasting “harmonizes” state laws on all major aspects of broadcasting,¹⁴⁰¹ including media diversity. This regulatory instrument borrows extensively from antitrust law, though in a creative manner; for instance, market share is replaced by audience share to better fit the peculiarities of the media market¹⁴⁰². Audience share is the main criterion for competition assessments, including channels attribution¹⁴⁰³. Broadcasting time for independent third parties is an additional, non-antitrust element intended to safeguarding media diversity¹⁴⁰⁴. I briefly discuss these main aspects of the Interstate Treaty.

With respect to ownership restrictions, in Germany, “no provider of a nationwide television programme shall have predominant influence on public opinion making,”¹⁴⁰⁵ which applies “if the programmes assigned to this provider accumulate a viewer market share of over 30%.”¹⁴⁰⁶ While this market share (30%) automatically triggers a finding of predominant influence, a presumption exists also, “when the market share reaches 25% if (a) the provider also holds a dominant market position within a related media market or

¹⁴⁰⁰ <http://www.alm.de/338.html>.

¹⁴⁰¹ Wolfgang Schulz, Uwe Juergens, Thorsten Held, Stephan Dreyer, “Regulation of Broadcasting and Internet Services in Germany. A brief overview October 2002 (1st edition), Working Papers of the Hans Bredow Institute No. 13, at p. 8, available at: http://www.hans-bredow-institut.de/webfm_send/50. Gesetzestexte, Inter-State Agreement on Broadcasting, Internationes, Bonn, 1996, at p. 9.

¹⁴⁰² See, article 27 of the German Interstate Broadcasting Agreement or RStV, supra. See, also, art. 38 of the German Act Against Restraints of Competition – market share is calculated on the basis of companies’ turnover; in the case of broadcasting companies however “twenty times the amount of the turnover shall be taken into account” (see para. 3 of art. 38). Gesetz gegen Wettbewerbsbeschränkungen, GWB, available at: <http://www.iuscomp.org/gla/statutes/GWB.htm>.

¹⁴⁰³ Channels attribution is, in brief, a method by which the total of company A’ shares is calculated by adding the shares in another company – company B - in which company A has direct interest, voting rights or influence. See, for details, art. 28 of the Interstate Broadcasting Agreement, supra.

¹⁴⁰⁴ See, art. 31 of the Interstate Broadcasting Agreement, supra.

¹⁴⁰⁵ Wolfgang Schulz, Thorsten Held and Arne Laudien, “Search Engines as Gatekeepers of Public Communication: Analysis of the German framework applicable to internet search engines including media law and anti trust law,” German Law Journal, http://www.germanlawjournal.com/pdfs/Vol06No10/PDF_Vol_06_No_10_1419-1432_Developments_SchulzHeldLaudien.pdf. At p. 1427. See, also, Art. 26(1) of the Interstate Broadcasting Agreement, supra.

¹⁴⁰⁶ Wolfgang Schulz et al., ibidem, at p. 1427. See, also, Art. 26(2) of the Interstate Broadcasting Agreement, supra.

(b) a comprehensive appreciation of his or her activities in the television and related markets equals a viewer market share of 30% in the television market”¹⁴⁰⁷. As the German law does not deal with cross-ownership per se, this is the only cross-ownership related rule at the federal level.¹⁴⁰⁸ This provision takes into account the more subtle ways of increasing market power without holding a large market share.

Foreign investors may participate in broadcasting activities in Germany.¹⁴⁰⁹ Notification of changes in ownership structure ensures transparency and easy monitoring of compliance with media diversity safeguards. The relevant State Media Authority must be notified of any proposed change in the ownership structure of a broadcaster or a company to which a channel is attributed.¹⁴¹⁰

Direct participation¹⁴¹¹, indirect participation¹⁴¹² and comparable influence¹⁴¹³ all add up to the audience shares attributable to the undertaking concerned for the purpose of calculating the audience share on the market.¹⁴¹⁴ For instance, when BSKyB’s acquired shares in Premiere’s parent company, Kirch PayTV,¹⁴¹⁵ it “led to the attribution of the

¹⁴⁰⁷ Wolfgang Schulz et al, *ibidem*, at p. 1427. See, Andreas Grunwald, “Media ownership control in Germany – an inventory review in the light of the Kirch insolvency,” *Communications Law*, Vol. 7, No. 4, 2002, p. 138. See, art. 26 para. 2 of the RStV.

¹⁴⁰⁸ Wolfgang Schulz et al, *ibidem*, at p. 1427. See, Andreas Grunwald, *ibidem*, p. 138.

¹⁴⁰⁹ Norbert Nolte and Annegret König, Germany, in *Getting the Deal Through, Telecoms and Media*, 2007, *Global Competition Law Review*, at p. 155.

¹⁴¹⁰ See, art. 29 of the RStV.

¹⁴¹¹ Direct participation is assumed in the case of ownership of at least 25% in a broadcaster. Article 28 (1) of the RStV.

¹⁴¹² Indirect participation is assumed in the case of affiliates in the meaning of the Company Act. Article 28 (1) of the RStV.

¹⁴¹³ Comparable influence derives from regular supply of substantial parts of programming, or from a position, which confers decisive influence on essential programming related decisions. Article 28 (2) of the RStV.

¹⁴¹⁴ Article 28 of the RStV. See, in general on this issue of shares’ attribution, KEK Summary Report, 2003.

¹⁴¹⁵ See, also, European Commission, Case No Comp/JV.37 - B SKY B / Kirch Pay TV, 21/03/2000. SG(2000) D/102552.

channel Premiere to BskyB [], on the grounds of contractually agreed powers of influence.”¹⁴¹⁶

In Germany, channels’ attribution is another important tool that allows the realistic calculation of a company’s audience share. It is not particular to the media market and it ensures that a proper assessment of one company’s power on the market is performed. This in turn contributes to the protection of media diversity because it acknowledges that in spite of holding a smaller market share, some companies may still influence the amount and diversity of opinions on the media market. Further on, this legal institution – shares’ attribution – takes into account the issue of one company’s control over another company, regardless of the first actually holding shares in the other.

Romania has ownership restrictions similar to Germany. The Romanian Audiovisual Law considers that a media owner has a predominant influence over the market if it has a market share of 30 percent.¹⁴¹⁷ The market shares that are attributable to this owner for the purpose of calculating the predominant influence include companies in which he owns more than 20% of one company’ share capital¹⁴¹⁸ or companies to which he supplies a significant portion of programming¹⁴¹⁹. There is no restriction on foreign capital¹⁴²⁰.

Rules that limit media ownership and rules that require ownership transparency enhance the level of media diversity. Romanian media companies may be required to

¹⁴¹⁶ See, 2003 KEK Summary Report, at p. 23. According to sec. 28 (2) sentence 2 no. 2 RStV.

¹⁴¹⁷ See, art. 44 para. 6 of the Romanian Audiovisual Law. Text available online at: <http://www.cna.ro/Legea-audiovizualului.html>.

¹⁴¹⁸ See, art. 44, para. 3 of the Romanian Audiovisual Law.

¹⁴¹⁹ See, art. 44, para. 2 let. d, Romanian Audiovisual Law no. 504/2002.

¹⁴²⁰ Several of Romanian media companies are owned by foreign companies. See, EUMAP Report, at p. 27.

disclose their financial resources under the Constitution¹⁴²¹ or in accordance with the Romanian Company Law.¹⁴²² However, lack of transparency of media ownership is outlined in a 2008 EUMAP Report and perhaps more is to be done in enforcing these rules¹⁴²³.

The Italian ownership restrictions were discussed when analyzing the constitutional decisions related to Italian broadcasting law. We mention here that these rules proved to be again in this jurisdiction weak in protecting media diversity in spite of the most laudable legislative intentions. Law no. 223 of 1990¹⁴²⁴ had as purpose to establish common principles for both private and public broadcasting¹⁴²⁵. Article 1 (2) of the 223 Law that “pluralism, objectivity, comprehensiveness and impartiality of information; access to various opinions; and to political, social, cultural, and religious trends...represent fundamental principles of the broadcasting system, which must take into account public and private interests...”.¹⁴²⁶ This 223 Law contains the antitrust provisions for both the national¹⁴²⁷/local market. The provisions offer limits for both

¹⁴²¹ Art. 30 para. 5 of the Romanian Constitution.

¹⁴²² See, art. 36 and seq. of Law no. 31/1990 as further amended and completed, http://www.rubinian.com/lsc_00.php

¹⁴²³ EUMAP Report, at p. 50. See, also, Cosmin Popan, “The Romanian Audiovisual rests the playground of the moguls” (“Audiovizualul romanesc ramane terenul de joaca al unei coterii de moguli”), *Cotidianul* newspaper, 19 May 2008, available at : http://old.cotidianul.ro/audiovizualul_romanesc_ramane_terenul_de_joaca_al_unei_coterii_de_moguli-46226.html referring to the EUMAP Report.

¹⁴²⁴ See, Italian Law no. 223 of 6 August 1990, on the regime of the public and private radio-television system, available in Italian at: http://www.agcom.it/L_naz/L223_90.htm

¹⁴²⁵ See, in this sense, Marta Roel, “Audiovisual Digitalization in Spain and Italy: from Neo-Television to Post-Television,” *Observatorio (OBS*) Journal*, 4 (2008), 095-112, at p. 097, available online at: www.obercom.pt/ojs/index.php/obs/article/download/87/129.

¹⁴²⁶ See, art. 1 para. 2 of Law no. 223 of 1990.

¹⁴²⁷ Art. 15 (1) of Law no. 223/1990, referring to restrictions of owning one television and printed press, the latter with not more than 16% of the national market; in case of owning more than one television station and printed press, the latter of not more than 18% of the national market and in case of owning more than two tv stations, then not more than 18% of the printed press, nationally. Para. 2 of art. 15 of the same Law refers to the restriction of owning not more than 20% of all the “mass communications” at national level. In case of television stations market, not more than 25% of this market and not more than 3 stations. See, art. 15 (4), *ibidem*.

horizontal and vertical integration, as well as for the cross-media ownership. However, their efficiency¹⁴²⁸ was gravely impaired by the fact that in reality they merely legitimized the existent market situation¹⁴²⁹.

The Law no. 223 of 1990 did not therefore signify much progress towards less concentration on the media market¹⁴³⁰. This was more the case since the application of the only courageous provision of the Law, which tried to limit to two years the transitory period until the companies exceeding the antitrust limits could reorganize themselves in order to comply with these limits, was constantly extended and postponed by subsequent laws¹⁴³¹. The broadcasting's legal regime's reform was precipitated by the Constitutional Court's opinion that the Law no. 223 of 1990 was clearly unconstitutional¹⁴³². Thus, the Law no. 249 of 1997 establishes that one entity cannot have more than 20 percent of the analogical television or radio at the national level and of the television or radio programmes in digital mode, transmitted terrestrially, according to the national plan of assigning frequencies¹⁴³³. While this Law decreased the national ownership cap to 20%, it was again just "sand in the eyes" of the ones arguing for a real reform of the broadcasting legal regime that would efficiently dismiss the oligopoly on the market.

So as not to "disturb" the positions acquired on the media market by the two main companies – Rai and Fininvest, the Law allowed for the entities that exceeded this national cap to be submitted to a transitory period when they could broadcast throughout

¹⁴²⁸ Note also, Bognetti, *ibidem*, at p.103, who argues that these norms were too inflexible to accommodate the demands of business expansion in a competitive market.

¹⁴²⁹ See, Roberto Zaccaria, ed., "Radiotelevisione," CEDAM, Padova, 1996, at p. 137.

¹⁴³⁰ See, Roberto Zaccaria, ed., "Radiotelevisione," CEDAM, Padova, 1996, at p. 137.

¹⁴³¹ See, Roberto Zaccaria, ed., "Radiotelevisione," CEDAM, Padova, 1996, at p. 138.

¹⁴³² See, Roberto Zaccaria, ed., "Radiotelevisione," CEDAM, Padova, 1996, at p. 137.

¹⁴³³ See, Roberto Zaccaria, ed., "Radiotelevisione," CEDAM, Padova, 1996, at p. 137 and 129. See, Law no. 249 of 31st of July 1997, on the creation of Agcom and on norms on telecommunications and radio-television systems, available in Italian at: <http://www.agcom.it/default.aspx?message=viewdocument&DocID=405>.

the additional channels only on the conditions that they broadcasted simultaneously on the terrestrial frequencies and satellite or through cable and afterwards only via satellite or via cable, ultimately indulging in a “permanently transitory” period¹⁴³⁴. As we have seen in the part of this chapter that focuses on the Italian Constitutional Court’s influence on broadcasting legislation, the Italian legal regime applied to broadcasting appears to be in a peculiar situation of “gray” constitutionality.

Also designed to promote pluralism in broadcasting is the provision referring to broadcasting time for independent third parties.¹⁴³⁵ In Germany, the third party is independent if it cannot be attributed to the main broadcaster that broadcasts its content.¹⁴³⁶ These provisions are almost like a “bonus scheme” that might reduce the market shares by two to additional three points if the channel broadcasts a sufficient amount of regional window programming and if it grants airtime to independent third party programming providers.¹⁴³⁷ The Italian law has a similar provision in relation to political pluralism, establishing precise rules for the access of political parties to the broadcasting time during electoral campaigns.¹⁴³⁸

¹⁴³⁴ Michele Abrescia, “Ex facto oritur ius: decoder digitali e sussidiarietà risolvono l’emergenza del pluralismo televisivo. Nota a C. cost. n. 151 del 2005” (The law arises from the fact: digital decoders and the subsidiarity solve the crisis of the television pluralism, Note to the Constitutional Council’s decision no. 151 of 2005), 2005. Available online at: <http://www.forumcostituzionale.it/site/index3.php?option=content&task=view&id=338>. The author observes the state of permanent transition of the antitrust law when applied to broadcasting. In spite of the Constitutional Court’s constant request for certainty and firmness, the legislator continuously prolonged the deadline when the entities that exceeded the 20% ownership limit were required to divest part of their assets. See, *Ibidem*.

¹⁴³⁵ Article 26 (5) and 31 of the RStV

¹⁴³⁶ see, art. 31 (3) of the German Interstate Broadcasting Agreement.

¹⁴³⁷ Andreas Grunwald, *ibidem*, p. 138.

¹⁴³⁸ See, Italian Law no. 313 of 6 November 2003 on the realization of the principle of pluralism in the programming of the local radio and television stations, available on Agcom’s website at: www.agcom.it/Default.aspx?message=downloaddocument&DocID=587. See, also, Law no. 515 of 10th of December 1993, Discipline on the electoral campaign for the elections for the Deputies Chamber and the Senate of the Republic, available at: http://www2.agcom.it/L_naz/L_515_93.htm.

The provision related to access to broadcasting by third parties is a mixed rule enhancing both structural and content diversity. Broadcasters found a way to circumvent their compliance with the statutory requirements by showing certain type of programming at the most undesirable time slots¹⁴³⁹. The time when a certain programming is broadcast is very important for the audience's possibility to have access to it as well as for the programmers' ability to reach the widest possible audience. Relegating some type of programming to times when people are much less likely to watch or listen is not a real contribution to media diversity and it does not stir a strong public debate over diverse types of issues.

Romanian legislation recognizes the importance of the must carry provisions for ensuring media diversity. Some channels may not be so attractive for advertisers and therefore for cable operators and the law must step in and oblige these distributors of content to carry them on their network. Under the must carry rules, the service plans of the cable providers must include a maximum 25% of the services that are distributed, including public and private channels¹⁴⁴⁰. In the regions where the national minorities represent more than 20% of the population they must include programmes with free access to minorities' language¹⁴⁴¹.

¹⁴³⁹ The KEK was involved in license proceedings concerning the reallocation of broadcasting time to independent third parties in the full channels RTL and SAT.1. The total viewing time which must be allocated to independent third parties can be reduced by the time devoted to regional window programmes as long as the regional windows reach at least 50 per cent of all national television households, among other conditions. The investigations revealed that the regional windows in the main channels RTL and SAT.1 reach more than 50 % of national television households. The regular licence period for third party programmes is three years and this can only be extended for an important reason (art. 31 (6) sentence 4 RStV). See, KEK Summary Report, 2003, at p. 21.

¹⁴⁴⁰ See, art. 82, para. 1 of the Romanian Audiovisual Law 504/2002. See, Guideline no. 1 of 9 October 2008 of Romanian National Audiovisual Council (NAC) on the application of the "must carry" principle (Instrucțiunea nr. 1 din 9 octombrie 2008 privind aplicarea principiului „must carry”) that abrogated Instruction no. 3/2004 regarding the application of the "must carry" principle. Available at: <http://www.cna.ro/Instruc-iunea-nr-1-din-9-octombrie.html>

¹⁴⁴¹ See, art. 82, para. 4 of the Romanian Audiovisual Law 504/2002.

One aspect that I want to emphasize in relation to structural regulation that enhances media diversity is the necessity for many broadcasters to have access to premium content¹⁴⁴². By premium content I mean extremely attractive programming that may sometimes make the object of exclusive agreements between broadcasters and content providers or events organizers (for instance in sports). The Italian broadcasting law prohibits the “acqui[sition] in any form or title, directly or indirectly, even through controlled or connected subjects, [of] more than 60% of the exclusive broadcasting rights in codified form of the sports events of the series A football championship or of whatever tournament or championship of major value that takes place or is organized in Italy.”¹⁴⁴³ Allowing that this type of content be broadcast by several channels will lead to an increase in these stations’ economic strength and will contribute to their survival on the market. Further, it will allow more people to have access to it, and it will ultimately increase the amount (and perhaps quality) of this type of premium, attractive content.

An important observation of the ownership restrictions is that they are easy to circumvent. Natural growth of media companies is not covered. Like in the United States, an emphasis on the various benefits – mostly regarded from an economic point of view – that a merger may bring allows these mergers to flourish. The solution would be including more sector specific rules in mergers review – an overall analysis of the media pluralism and how the market at the point in time when the merger is proposed fulfills that goal.

¹⁴⁴² See, section III.3.4.

¹⁴⁴³ See, article 2, paragraph 1 of Italian Law no. 78 of 29 March 1999. “Conversione in legge, con modificazioni, del decreto-legge 30 gennaio 1999, n. 15, recante disposizioni urgenti per lo sviluppo equilibrato dell'emittenza televisiva e per evitare la costituzione o il mantenimento di posizioni dominanti nel settore radiotelevisivo,” *Gazzetta Ufficiale* n. 75 del 31 marzo 1999. Available at: http://www.consiglio.regione.toscana.it/corecom/normativa/noramtiva_doc/leg_78_99.html.

The broadcasting law protects media pluralism mainly through ownership restrictions and through third parties' access to broadcasting time. The channels' attribution is an important tool that helps the regulator to better evaluate the real strength of media companies and their more subtle ways to influence each other. However, as seen above, the practical efficiency of the access rules is limited.

III. 3. 4. Regulatory review. Antitrust elements. Relevant markets

The degree to which the regulatory agencies incorporate antitrust in their review is slightly (not fundamentally) different in the jurisdictions analyzed here. The media market is the most important antitrust tool that found its way into regulatory review. Although proposals have been made to replace the economic product market with political/cultural market¹⁴⁴⁴, which would better suit the social/political/cultural implications of the media product, because of shortcomings related to criteria for defining the market, criteria for assessing the concentration on this political/cultural market and the probability that power/influence on this market is a variation and is closely linked to economic power¹⁴⁴⁵, the economic product market definition stands.

I focus on Germany and to some extent on Italy in order to illustrate the extent to which antitrust permeates regulatory review of structural norms designed to further media diversity. Several observations ensue. The relevant market is defined narrowly, which in turn allows for an easier finding of anticompetitive effects. There is a distinction between the content and the distribution markets, which is important since media diversity

¹⁴⁴⁴ Alexander Scheuer/Peter Strothmann, "Media Supervision on the Threshold of the 21st Century What are the Requirements of Broadcasting, Telecommunications and Concentration Regulation?," iRISplus Legal Observations of the European Audiovisual Observatory, 2002, European Audiovisual Observatory, Strasbourg (France), at p. 6.

¹⁴⁴⁵ See, Petros Iosifides, "Methods of Measuring Media Concentration," Media Culture & Society, vol. 19, 1997, at p. 647-648.

requires a multitude of both content and means of transmission. One important contribution is recognizing that the physical scarcity was replaced to a certain degree by economic scarcity, especially since premium content is still available to few broadcast distributors. Even more, the impact that the new technologies may have on the media diversity is doubtful, considering that they as well could become concentrated, as the Italian regulatory agency outlined.

In Germany, the KEK contributes to media diversity by defining, in line with the European Commission and the European Court of First Instance's approaches, narrow relevant product markets¹⁴⁴⁶. Thus, the review process is performed at a microscopic market level, preserving a higher level of competition. The general impression left from the KEK summary reports is that the complexities of dealing with concentration on the media markets arise mostly due to the increasing level of vertical integration of content distribution and production.

The KEK distinguished several markets in the media sector,¹⁴⁴⁷ divided according to content type - broadcasting rights for films, independent films and premium films, broadcasting rights for sports events, news and based on the dichotomy content production/ content distribution¹⁴⁴⁸. The most basic distinction is between the pay – TV market, dominated by Premiere,¹⁴⁴⁹ and the free TV market. This pay/free TV distinction allows the KEK to address the concern of public access to media. While some people

¹⁴⁴⁶ See, the discussion on the European Commission and the European Court of First Instance later in this paper.

¹⁴⁴⁷ The differentiation of these markets is documented in the KEK study reports from 2000 and 2003.

¹⁴⁴⁸ Ibidem.

¹⁴⁴⁹ In 2003 “about four fifths of digital recipients in Germany are customers of the pay-TV platform Premiere.” See, 2003 KEK Summary Report, at p. 11.

might be able to pay for getting their news on TV, some might still prefer or be financially compelled to rely on free TV.

The German media markets are also fairly consolidated markets. In the content market, ten large production companies account for nearly 50% of the whole volume of the commissioned production in the markets for broadcasting rights for films¹⁴⁵⁰. Further, a specific problem that affects the markets for broadcasting rights is the access to premium content. This problem is exacerbated in the case of vertical integration. For instance, “in the course of the cooperation between Kirch and Murdoch, the television rights to the European Champions League were resold to Premiere and RTL Television,”¹⁴⁵¹ highly problematic for competitive access to premium content. This issue makes the difference in which company wins and which loses in the market game¹⁴⁵². One may argue in this sense and in line with the course of events anticipated by the German Federal Constitutional Court that programmes’ scarcity replaced physical scarcity¹⁴⁵³. The following paradox emerges when analyzing the effect of access to premium content on the increasing market power of some media companies: while both the availability of the means of transmission and the geographical reach of networks’ infrastructure dramatically increased, economic implications of access to premium content undermine people’s access to a diverse range of opinions (including marginalized, non-mainstream viewpoints).

¹⁴⁵⁰ 2003 KEK Summary Report, at p.7.

¹⁴⁵¹ 2000 KEK Summary Report, at para. 39.

¹⁴⁵² 2000 KEK Summary Report, at para. 39.

¹⁴⁵³ Karl Heinz Ladeur, “Guaranteeing the Programming Mandate of Public Broadcasters and Restraints on Private Broadcasters’ Programmes in Multimedia Conditions” - Part I/II, 5 German Law Journal No. 8 (1 August 2004) - Public Law, <http://www.germanlawjournal.com/article.php?id=478>.

As hinted above, given that programming rights became prohibitively expensive, the scarcity of desirable programming replaced the frequencies' physical scarcity. The German scholars drawing upon the experiences of the German media market¹⁴⁵⁴ – though one could extrapolate their conclusions to any media market – show how the concentration of programming rights may undermine media pluralism. As such, the only way to return investment in such high priced programming is to sell it to the widest audience.

For media diversity purposes, the consequence is that the very common, dominant tastes will be satisfied, while the niche interests lag behind. “One always needs a relatively large public in order to profit from the broadcast of expensive programme rights¹⁴⁵⁵.” An additional and compounding issue is that the audience tastes are difficult to change once such tastes are already formed in a specific direction¹⁴⁵⁶. Such is the situation with the market for rights to children's programming where the audience developed “loyalty¹⁴⁵⁷” towards RTL Group's channels. Some authors offer two alternatives to the scarcity of programmes: an additional tax for highly attractive programs' suppliers or a fair use right of second reporting for public broadcasters¹⁴⁵⁸.

Another aspect of the concentration on the media market is the relation between various types of media, mainly cross-ownership of television and printed press and television and radio. These links offer opportunities “to increase influence on public opinion formation through multimedia power and cross-promotion¹⁴⁵⁹”. In this sense, the

¹⁴⁵⁴ See, Karl Heinz Ladeur, *ibidem*, at p. 916.

¹⁴⁵⁵ See, Karl Heinz Ladeur, *ibidem*, at p. 924.

¹⁴⁵⁶ See, 2007 KEK Report, at p. 11.

¹⁴⁵⁷ See, 2007 KEK Report, at p. 11.

¹⁴⁵⁸ K. H. Ladeur, *ibidem*, at p. 928.

¹⁴⁵⁹ See, 2003 KEK Report, p. 13.

2007 KEK Report¹⁴⁶⁰ mentions that there is cross-ownership between publishing groups with high readership and national private broadcasters¹⁴⁶¹. At national level, the German law does not restrict (neither in competition law nor in the specifically tailored regulation) cross-media ownership¹⁴⁶². The KEK Report is somehow vague in concluding whether cross-ownership is a threat to media diversity. Given the fact that cross-media ownership is not prohibited at national level, it is most likely that such aspect would be dismissed from KEK's consideration, an aspect which is ultimately an important shortcoming in the German broadcasting law.

In order to assess the level of competition on the market, and the potential existence of a significant market power the Italian Agcom takes into account the structural conditions of the market¹⁴⁶³. Based on considerations such as the market shares held (present level and trends), the market supply and demand' structural characteristics (among which the "barriers to entry and to expansion"¹⁴⁶⁴, the "vertical integration and the conditions to access to financial resources"), Agcom decided that RAI and RTI dominated the national analogue television market.¹⁴⁶⁵ While the analogue television market is highly concentrated, the digital television market, due to its dynamic, does not yet possess the characteristics of a concentrated market. However Agcom points out that

¹⁴⁶⁰ See, "Cross-Media Relations: A Challenge for Media Concentration Control, Summary of the Third Report on the Development of Media. Concentration and Measures to Secure Plurality of Opinion in the Private Broadcasting Sector," The German Commission on Concentration in the Media (Kommission zur Ermittlung der Konzentration im Medienbereich, KEK), KEK 2007 Report, <http://www.kek-online.de/Inhalte/summary2007.pdf>.

¹⁴⁶¹ See, KEK 2003 Report, at p. 13.

¹⁴⁶² See, Television Across Europe: regulation, policy and independence. Summary, Monitoring Reports, Open Society Institute, EU Monitoring and Advocacy Program, 2005, p. 241.

¹⁴⁶³ See, Agcom's Annual Report, 2006. Available in Italian at: <http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=2>. At p. 133.

¹⁴⁶⁴ See, Agcom's Annual Report, 2006, available in English at: <http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=2>. At p. 133.

¹⁴⁶⁵ See, Agcom's Annual Report, 2006 at p. 133 and 172. Note however that Agcom found no dominant position on the national market for radio broadcasting services on the analog terrestrial platform. See, Agcom's Annual Report, 2006, *ibidem*, at p. 80.

technological change might not make the dangers of media concentration insignificant¹⁴⁶⁶. This last observation puts into perspective the overly optimistic belief in how the new technologies would make the concentration in the media market an obsolete phenomenon.

As preliminary remarks to this section, I note that antitrust serves, as in the United States, as the proper tool in defining the media market using the substitutability criterion. Second, the market is defined narrowly, allowing thus for an evaluation of concentration on smaller markets of several types of content, and consequentially, for more media diversity.

Content and distribution are seen as separate markets. However, they are both concentrated and especially their vertical consolidation poses the greatest danger to media diversity. This vertical integration exacerbates the problem of access to premium content. The fact that, due to copyright concentration, attractive content becomes more and more expensive, the future ability of the smaller, less financially potent media companies to compete on the content market becomes doubtful. Unsurprisingly then, vertical integration is nevertheless a very desirable business trajectory for many media companies.

III. 3. 5. New rules for novel technologies

Slightly remote to the discussion of regulatory mechanisms designed to further media diversity is the extent to which these new technologies will impact the amount of diversity on the media market. The reason why I discuss them is in order to show how the legislation attempted to include them in the overall regulation of broadcasting. The

¹⁴⁶⁶ See, Agcom's Annual Report, 2006, *ibidem*, at p. 133.

direction that I note is towards more neutral regulatory norms that will keep a check on media concentration regardless of the means through which content is distributed. However, the body of broadcasting law still needs more adjustment in order to incorporate potential implications that these technologies will have for different policy goals pursued.

With slight variations in different countries¹⁴⁶⁷, transition to digital television is envisioned for all the European Community's Member States by 2012.¹⁴⁶⁸ Because the introduction of the digital television signifies that the number of channels will increase dramatically, the role of regulation in ensuring media pluralism might become obsolete. However, this statement should be taken with a grain of salt and several aspects should be considered before making it.

In France, the enactment of new laws for new technological times need to address the concern that "the measures tending to favor the development of digital television do

¹⁴⁶⁷ In France, 2011. See, art. 22, Loi n° 2007-309 du 5 mars 2007 relative à la modernisation de la diffusion audiovisuelle et à la télévision du futur (Law on future of television). This article modifies art. 29-1 of Loi Leotard. See, also, the schedule approved by the French Prime Minister on 23rd of July 2009: http://www.csa.fr/TV_numerique/calendrier_passage_tout_numerique.php. In order for the households to receive digital television, they should purchase a digital television adapter (listed for EUR 75 on Conseil de l'Audiovisuel website). http://ameli.senat.fr/publication_pl/2006-2007/227.html. The Conseil supérieur de l'audiovisuel gave its confirmation of the Loi. See, Avis n° 2006-4 du 11 juillet 2006 sur le projet de loi relatif à la modernisation de la diffusion audiovisuelle et à la télévision du futur, (Opinion on the project of the law related to the modernization of the audiovisual diffusion and the television of the future), J.O n° 180 du 5 août 2006texte n° 37. <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=CSAX0602004V>. In Italy by the end of 2008. See, Law no. 66 of 20 March 2001 set 2006 as deadline to stop the terrestrial analogue TV transmission; decree-law no. 273 of 22 December 2005 changed this deadline, indicating the date for the switch-off of analogue transmission by the year 2008 (cf. paragraph 1.2.6.). See, also, Delibera n. 200/08/CONS, Piani di assegnazione delle frequenze per la digitalizzazione delle reti televisive nelle aree all digital: avvio dei procedimenti ed istituzione dei tavoli tecnici (Plans for the assignment of frequencies for the digitalization of television networks in all digital areas: proceedings' start up and establishment of technical schedule). Published in the Official Gazette no 118 of 21/05/2008. See, also, Resolution no. 435/01/CONS and no. 109/07/CONS. In Germany by the end of 2010. See, http://europa.eu/legislation_summaries/audiovisual_and_media/l24223a_en.htm. In Romania, by the end of 2012. See, art. 6 of Governmental Decision no. 1213/2009, as modified and completed.

¹⁴⁶⁸ Communication of 24 May 2005 from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions on accelerating the transition from analogue to digital broadcasting [COM(2005) 204 final - Not published in the Official Journal].

not end up by enforcing the position of the most powerful operators.¹⁴⁶⁹ The Italian regulator expressed this concern as well.¹⁴⁷⁰

In order to encourage this market expansion, the French CSA provides authorizations to the editors of content and not to the distributors¹⁴⁷¹. The Loi came in front of the Conseil Constitutionnel that decided on its conformity with the Constitution on the 27th of February 2007¹⁴⁷². The Conseil Constitutionnel decided upon the constitutionality of articles in the new Loi related to the re-enforcement of the principle of respect of pluralism in the case of digital television¹⁴⁷³. It furthermore re-iterated the broadcasting companies' commitment to the French language and culture¹⁴⁷⁴. The companies that will operate only in digital mode and the personal mobile television companies will continue to submit themselves to the rules limiting concentration in the sector¹⁴⁷⁵. In Italy, one of the consequences of these new technologies is the drafting of

¹⁴⁶⁹ See, French Conseil de l'Audiovisuel's Avis n° 2006-4, *supra*.

¹⁴⁷⁰ "During the transition stage, the development of digital terrestrial networks can take place both through the acquisition of facilities and frequencies from third parties and by means of the conversion into digital technique of facilities and frequencies already owned by the broadcaster. Therefore, during 2005, the leading operators started a policy of acquisitions aimed at enhancing their transmission network. In parallel, new operators entered the market, such as L'Espresso Publishing Group, that bought the Rete A TV station." See, Communications Regulatory Authority (AGCOM) Annual Report on activities carried out and work programme, Rome, 30 June 2006, at p. 69. The Report documents the development of digital and satellite television.

¹⁴⁷¹ See, French Conseil de l'Audiovisuel's Avis n° 2006-4, *supra*. The industry calls however for provision of licenses also to distributors, given the fact that this approach would ensure a faster and permanent technological development (allowing for increasing investment). Furthermore, the new mode of transmission through personal mobile television necessitates new, diverse and adapted contents. See, Charles-Edouard Renault, "France: Television-Legislation, Entertainment Law Review," Ent. L.R. 2007, 18(2), N21-23, 2007.

¹⁴⁷² Décision n° 2007-550 DC du 27 février 2007, Loi relative à la modernisation de la diffusion audiovisuelle et à la télévision du futur. (Law on the modernization of the audiovisual diffusion and the future television). <http://www.conseil-constitutionnel.fr/decision/2007/2007550/2007550dc.htm>

¹⁴⁷³ See, para. 16, Décision n° 2007-550 DC, *supra*.

¹⁴⁷⁴ See, para. 8, Décision n° 2007-550 DC, *supra*. See, also, article 22 of the 2007 Law on future of television, *supra*.

¹⁴⁷⁵ See, para. 13. Décision n° 2007-550 DC. See, also, article 30 of the 2007 Law on future of television, *supra*.

one single broadcasting code¹⁴⁷⁶. Both the Italian¹⁴⁷⁷ and the Romanian¹⁴⁷⁸ regulators chose to apply the same principles applied previously to the analogue television to the digital medium¹⁴⁷⁹.

Several observations ensue. First, if not properly addressed, the introduction of this new technology might strengthen the position of companies already existing on the market, companies that have the necessary infrastructure, sufficient investment for know – how development and potent contractual ties and business relations with significant players especially in the content market.

Second, the new technologies' impact on the media market and especially the impact on media diversity are aspects that still need to be fully assessed. Related to this, legislation still needs to address the various issues that come with such technological progress and, from a legal technique point of view, new technologies demand the

¹⁴⁷⁶ See, Agcom's 2008 Annual Report, at p. 13. See, the "Consolidated radio and television broadcasting act, in 2006 Agcom Report, p. 109. See, also, the Italian legislative decree no. 177 of 31 July 2005, issued in pursuance of the delegation granted to the Government in compliance with article 16 of Law no. 112 of 3 May 2004 on "Regulations governing the structure of the radio and television broadcasting system and RAI." The deadline for the switch off of analogue transmissions was postponed from 31 December 2006, as it was at first provided by article 2-a, paragraph 5, of decree-law no. 5 of 23 January 2001, to 31 December 2008, as provided by 19 of decree-law no. 273 of 30 December 2005, converted in law no. 51 of 23 February 2006. See, decree – law no. 5 of 23rd of January 2001 and decree-law no. 273 of 2005, published in the Official Gazette no. 303 of 30th of December 2005.

¹⁴⁷⁷ See, Resolution No. 149/05/CONS of 9 March 2005 AGCOM. See, also, AGCOM Resolution no. 163/06/CONS, which provides for the implementation of an action plan aimed at encouraging a functional use of frequencies intended for radio and television services, in view of the changeover to the digital technique. And, also, Resolution no. 266/06/CONS setting forth regulations governing the starting phase of digital terrestrial broadcasting towards mobile handsets, in accordance with criteria and leading principles included in the Code of Electronic Communications and in the radio and television broadcasting Consolidation Act.

¹⁴⁷⁸ See, Strategy on the transition from the terrestrial analogue television to digital and the implementation of the digital multimedia services at national level, approved by Romanian Governmental Decision no.1213/2009, as modified and completed, Official Gazette 721 of 26 October 2009.

¹⁴⁷⁹ See, Resolution No. 149/05/CONS of 9 March 2005 AGCOM. See, also, AGCOM Resolution no. 163/06/CONS, which provides for the implementation of an action plan aimed at encouraging a functional use of frequencies intended for radio and television services, in view of the changeover to the digital technique. And, also, Resolution no. 266/06/CONS setting forth regulations governing the starting phase of digital terrestrial broadcasting towards mobile handsets, in accordance with criteria and leading principles included in the Code of Electronic Communications and in the radio and television broadcasting Consolidation Act.

introduction of technologically neutral terms in national legislation. Considering these aspects, the impact that new technologies have might not be dramatic and regulation should be still necessary to protect media diversity.

III. 4. Competition law

III. 4. 1. European Community Competition Law and electronic media pluralism

III. 4. 1. 1. Introductory Concepts

Although historically influenced by the United States' antitrust law,¹⁴⁸⁰ by now the European Community's competition law has a distinctive character¹⁴⁸¹. The goal of EC competition law is to protect consumers, through low prices, goods' diversification and technological innovation¹⁴⁸². Competition law, however, has its limits, which are evident in EC Member States (MSs)' choice to regulate some sectors of the economy, such as media. Sector regulation and competition law are not antagonistic; the two legal instruments complement and reinforce each other¹⁴⁸³.

In the following lines an overview of the basic competition law concepts, the main sources of EC competition law, the market situations with potential anticompetitive effects set the ground for evaluating the extent to which the European Commission (EC)

¹⁴⁸⁰ Alison Jones and Brenda Sufrin, "EC Competition law," Oxford University Press, 2004, p. 30.

¹⁴⁸¹ Gerber Daniel, "Law and Competition in Twentieth Century Europe: Protecting Prometheus," Clarendon Press, 1998, p. 6-8 on the history of the competition law in Europe.

¹⁴⁸² Extracts from a speech by Mario Monti European Commissioner for Competition matters, "The Future for Competition Policy in the European Union," Merchant Taylor's Hall London, 9 July 2001, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/340&format=HTML&aged=0&language=EN&guiLanguage=en>. See also para. 58 in Advocate General Jacobs' Opinion in case C-7/97, Oscar Bronner GmbH & CO KG v. Mediaprint [1998] ECR I-7791. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997C0007:EN:HTML>.

¹⁴⁸³ See, Prosser Tony, "Law and Regulators," Oxford University Press, 1997, p. 4-6.

and the European Court of First Instance (CFI)¹⁴⁸⁴ take into account media pluralism in their decisions. Against this background, these decisions have an important role in protecting media diversity. However, these decisions do not go beyond strict antitrust law analysis (and they are not supposed to). This is where and why regulatory instruments supplement the antitrust analysis by bringing to the regulator's attention the public interest/ democratic concerns attached to the media sector.

The competition law rules are designed to control the existence of monopoly or other market power and market power abuse, to control oligopolistic markets, to prevent mergers which lead to concentration of market power, to prevent restrictive agreements between competitors (horizontal agreements) and to prevent restrictive vertical agreements¹⁴⁸⁵. Market power is generally acquired by a firm, which can profitably raise prices above the marginal cost¹⁴⁸⁶ (which is the additional cost that the firm needs to invest in order to produce one more unit¹⁴⁸⁷). Central to the assessment of market power are the concepts of market definition and barriers to entry. Generally¹⁴⁸⁸ the relevant market is defined in terms of substitutability or interchangeability for the relevant product market¹⁴⁸⁹ and in terms of homogeneity for the relevant geographical market¹⁴⁹⁰. Further,

¹⁴⁸⁴ The European Commission decisions may be appealed in front of the European Court of First Instance. See, Christopher Bellamy, "An EU Competition Court: The Continuing Debate," in Ioannis Lianos, Ioannis Kokkoris, "The Reform of EC Competition Law," Wolters Kluwer, 2010, at p. 34. Article 168a of the EC Treaty, added by the Single European Act of 1987, gave the European Court of First Instance competence to decide certain actions brought by private parties against European Community institutions. See, *ibidem*. See, also, Council Decision 88/591. See, C. Bellamy, *ibidem*, at p. 35.

¹⁴⁸⁵ A. Jones and B. Sufrin, *ibidem*, p. 44.

¹⁴⁸⁶ See, for instance, <http://www.businessdictionary.com/definition/market-power.html>.

¹⁴⁸⁷ See, for instance, <http://www.businessdictionary.com/definition/marginal-cost.html>.

¹⁴⁸⁸ See, the European Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, 97/C 372/03, Published in the Official Journal: OJ C 372 on 9/12/1999.

¹⁴⁸⁹ These terms are used by the European Court of Justice. See for instance Case 85/76 Hoffmann-La Roche & Co. AG v Commission of the European Communities of 13 February 1979 and Case 322/81 NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities of 9 November 1983. See, the Commission Notice on the Definition of the Relevant Market, *supra*.

the barriers to entry¹⁴⁹¹ – especially in the case of network industries such as the media that requires extremely high sunk costs to enter the market¹⁴⁹² - are crucial when determining whether or not a firm is a monopolist or has significant market power¹⁴⁹³.

The EC Treaty contains competition law norms¹⁴⁹⁴ and the European Council Regulation 139/2004 provides for the control of mergers with a “Community dimension” by the European Commission¹⁴⁹⁵. Two types of merger might pose problems to the competition on the market: horizontal¹⁴⁹⁶ and vertical¹⁴⁹⁷ mergers¹⁴⁹⁸. The EC assesses the impact of the merger on the market and whether it “would significantly impede effective competition¹⁴⁹⁹,” based on certain criteria, among which the market share level

¹⁴⁹⁰ See case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*. - *Chiquita Bananas* of 14 February 1978, para. 11. See, Case 85/76, para 28; Case 322/81, para. 37; Judgment of the Court of 14 February 1978. See, Commission Notice on the Definition of the Relevant Market, *supra*.

¹⁴⁹¹ See, Valentine Korah and Denis O’Sullivan, “Distribution Agreements under the EC Competition Rules,” Hart Publishing, 2002, at p. 11-15.

¹⁴⁹² “Sunk costs are costs that cannot be recovered on exiting an industry.” See, Harbord D. and Hoehn T., “Barriers to Entry and Exit in European Competition Policy,” in *International Review of Law and Economics*, December, 1994, at p. 411, 14 *Int’l Rev. L. & Econ.* 503 (in Alison Jones and Brenda Sufrin, “EC Competition Law,” Oxford University Press, 2008, at p. 90).

¹⁴⁹³ See, Alison Jones and Brenda Sufrin, “EC Competition law,” Oxford University Press, 2004, at p. 71.

¹⁴⁹⁴ Articles 81-86; 87-89, see, in A. Jones and B. Sufrin, *ibidem*, p. 109. See, also, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings Official Journal C 31, 05.02.2004, pages 5-18 (hereinafter Horizontal Merger Guidelines), Commission Notice on restrictions directly related and necessary to concentrations, Official Journal C 56, 05.03.2005, pages 24-31, Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, Official Journal C 56, 05.03.2005, pages 32-35.

¹⁴⁹⁵ See, article 1 (2) of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22 (ECMR). See, also, Regulation 4064/89, which previously regulated the mergers. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [Official Journal L 395 of 30 December 1989].

¹⁴⁹⁶ See, H. Hovenkamp, “Federal Antitrust Policy: The Law of Competition and its Practice” (2nd ed., West Publishing, 1999), 494, cited in A. Jones and B. Sufrin, *ibidem*, 2004, p. 850.

¹⁴⁹⁷ See, S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2nd ed., Sweet & Maxwell, 2002), para. 7.61., cited in A. Jones and B. Sufrin, *ibidem*, 2004, p. 852.

¹⁴⁹⁸ See, H. Hovenkamp, “Federal Antitrust Policy: The Law of Competition and its Practice” (2nd ed., West Publishing, 1999), 494, cited in A. Jones and B. Sufrin, *ibidem*, 2004, p. 850.

¹⁴⁹⁹ See, article 2 (3) ECMR.

plays an important role¹⁵⁰⁰. The assessment is however complex and it takes into account other cumulative factors¹⁵⁰¹, which sometimes lead to a finding of compatibility with competition on the market¹⁵⁰² in spite of large market shares. The EC will also analyze the potential for tacit coordination¹⁵⁰³ or the coordinated effect of the merger¹⁵⁰⁴.

As mentioned above, the EC has jurisdiction only over mergers with Community dimension, the MSs' competition agencies approving mergers with national dimension. Further, the above overview shows that the EC will generally analyze the effect that mergers have on markets based on economic criteria.

Article 21(4) of the ECMR recognizes however that there are some matters that go beyond the powers of the Commission in that they protect the MSs' legitimate interests¹⁵⁰⁵. Among these interests that fall within the competence of the state and that the state is allowed to protect at the expense of restriction on Community competition is also media pluralism¹⁵⁰⁶. Based on this article, Member States may disapprove mergers with anticompetitive effects that would decrease media diversity. Also, the EC may, at

¹⁵⁰⁰ See the Horizontal Merger Guidelines, para. 17. The market share level are measured based on the Herfindahl – Hirschman index.

¹⁵⁰¹ See, article 2 (1) ECMR.

¹⁵⁰² See the Horizontal Merger Guidelines, para. 14-21 and para. 28-30. See, A. Jones and B. Sufrin, *ibidem*, 2004, p. 931. The finding of a collective dominance is generally based on the existence of structural and economic links between competitors on a market.

¹⁵⁰³ See, the Horizontal Merger Guidelines, at para. 5. See, for instance, Case IV/M.176 – Sunrise – of 13.01.1992, Walt Disney and The Guardian to acquire Sunrise Television Limited – incompatible because of potential coordination behavior; note that the case was decided in 1992 under the previous Merger Regulation.

¹⁵⁰⁴ See, the Horizontal Merger Guidelines, at para. 39.

¹⁵⁰⁵ “Public security, plurality of the media and prudential rules shall be regarded as legitimate interests [].” See, article 21 (4) ECMR.

¹⁵⁰⁶ Though print media is outside the scope of this paper, it is nevertheless worth to mention that the Commission cleared the proposed acquisition of Newspaper Publishing by Promotora de Informaciones and Mirror Group Newspapers as it was for the UK authorities to take steps to protect its legitimate interest in the plurality of the media. The Commission noted however that the UK authorities still needed to perform a merger review taking into account that the measures adopted to protect the legitimate interest must be “objectively the least restrictive to achieve the end pursued.” Case Newspaper Publishing IV/M.423, para. 23.

least in theory, deny to review a negative clearance brought by dissatisfied parties since it can rely on the Member States' margin of appreciation in protecting the media diversity.

III. 4. 1. 2. Mergers with anticompetitive consequences and ways to protect media diversity

As mentioned above, two types of concentration may occur - horizontal and vertical. Thus, the integration of companies involved in the distribution of the same type of service increases the chances that the newly formed company may be able to raise prices and to foreclose competitors' access to their networks¹⁵⁰⁷. Further, the integration of content/distribution in one single company may lead to other anti-competitive effects¹⁵⁰⁸. The following lines exemplify anticompetitive consequences of mergers in the media industry, which are discussed in cases in front of the European Court of First Instance (CFI), where the parties may bring challenges to European Commission's decisions.

Because of its potential beneficial effects, vertical integration is less harmful for market competition than horizontal concentration. However, if the parties to a merger are already vertically integrated themselves, this in turn increases the potential anticompetitive effect on the market.¹⁵⁰⁹ This is exemplified in the ARD case brought in front of the European Court of First Instance. In that case, the German public broadcaster ARD challenged a Commission's decision that approved the acquisition of

¹⁵⁰⁷ See, generally, "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings," (2004/C 31/03), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF>.

¹⁵⁰⁸ See, generally, "Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings," (2008/C 265/07). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF>.

¹⁵⁰⁹ Judgment of the Court of First Instance (Third Chamber) of 30 September 2003. *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v Commission of the European Communities*. Case T-158/00. ARD case. See, para. 12.

KirchPayTV¹⁵¹⁰ by BSkyB¹⁵¹¹ and Kirch. The merger would have strengthened KirchPayTV's position in the German market for pay-TV¹⁵¹² and it would have led to "the emergence of a dominant position in the market for digital interactive television services"¹⁵¹³.

Furthermore, the CFI noted the Kirch group's control over rights to major films and sport events, making it difficult for potential competitors to access that content¹⁵¹⁴. "Inasmuch as the merger strengthens the financial power of Kirch and its ties to BSkyB, another major purchaser of broadcasting rights, it cannot be excluded that it will affect the applicant in its capacity as a purchaser of those rights"¹⁵¹⁵. In the market for the acquisition of broadcasting rights, because these rights are mainly acquired on geographical basis for a targeted national audience, the CFI agreed with the Commission and found that Kirch and BSkyB would not have an incentive to buy joint rights¹⁵¹⁶.

The main anticompetitive concerns of the concentration reviewed in the ARD case were the barriers to entry on the German pay TV market and access to premium content¹⁵¹⁷. Although the operation was found incompatible with the common market, the

¹⁵¹⁰ "KirchPayTV, a German company, was, at the time of the notification, controlled exclusively by KVV, itself a wholly-owned subsidiary of the Kirch group, a media group active in the fields of commercial television, sports rights trade, rights trade (fiction), film and television production, business television, pay-TV and pay-TV-related technical services." See, para. 10 of ARD case.

¹⁵¹¹ "BSkyB is a British undertaking active in the media field, principally in analogue and digital television services transmitted in the United Kingdom and Ireland via satellite and cable, and also in the field of digital terrestrial television in the United Kingdom. BSkyB supplies its own pay-TV channels for retail and wholesale for cable and terrestrial operators. It also has an interest in British Interactive Broadcasting/Open, which provides digital interactive television services in the United Kingdom. In addition, BSkyB provides a whole range of television-related services." See, para. 8 ARD case.

¹⁵¹² "Pay-TV constitutes a distinct market from free television, that is, advertising-financed private television and public television financed through fees and advertising. According to the Commission, the pay-TV market is national in dimension." See para. 22, para. 81 para. 129, ARD case.

¹⁵¹³ See, para. 12, ARD case. See, para. 83, 85 and 87 of ARD case.

¹⁵¹⁴ See, para. 120, ARD case.

¹⁵¹⁵ See, para. 90 and 93, ARD case.

¹⁵¹⁶ See para. 33, ARD case.

¹⁵¹⁷ See, in general, ARD case.

parties agreed to commitments meant “to resolve the competition problems identified by lowering the barriers to access on the market of supply of subscription television services and to prevent KirchPayTV from using its alleged dominance in the subscription television services market to its advantage in its activities in the digital interactive television services market”¹⁵¹⁸. These commitments “essentially [focuses on] free market access for programme suppliers (commitments 1 to 5)”¹⁵¹⁹ and on “lowering the market entry thresholds for technical platform operators, thereby ensuring additional opportunities to broadcast programmes via competing platforms (commitments 6 to 10)”¹⁵²⁰. Since one party to the merger was already dominant on a relevant market and since the other party had a strong network infrastructure capable of transmitting and distributing the first party’s programming, these commitments tried to mitigate the main anticompetitive effect of this merger – the strengthening of a dominant position on a relevant market - and to promote access to content and access to means of distribution for other competitors.

While the parties’ commitments seem technical in nature and sufficiently detailed, what is more important from a media diversity perspective protection is whether they are enforced by the parties to the merger. The enforcement and monitoring mechanism of the compliance with these commitments is debatable. Furthermore, it would be easier (and

¹⁵¹⁸ See, para. 197 ARD case. The notified concentration was declared compatible with the common market. See para, 133, ARD case.

¹⁵¹⁹ See, para. 197 ARD case. See, also, Case IV/M.779 – Bertelsmann/CLT – compatible with the common market; Case Comp/M. 1889 – CLT-UFA/CANAL+/VOX – compatible; Case Comp/M.2996 – RTL/CNN/Time Warner/N-TV – compatible.

¹⁵²⁰ See, para. 197 and 349 ARD. On the other hand, the applicant in this case made proposals for more detailed commitments that would have taken into account the potential for indirect influence on third parties. The proposals “concerned the conditions for opening up the market in question, in particular non-discriminatory access for decoders other than the d-box to all televised programmes and to all interactive services, access for other operators to the rights to KirchPay TV’s programmes and a means of preventing the Kirch group from influencing indirectly the use of Deutsche Telekom AG’s cable broadband infrastructure.” See, para. 66 ARD case.

less costly from an administrative resources perspective) to deny a merger of this proportions altogether or require the parties to divest parts of their holdings before approving the merger. There is however always a balance that needs to be struck between the demands of the business oriented market and the demands of the diversity of opinions. In the case of commitments attached to the mergers, in order for them to be making a real contribution to media diversity protection, a proper enforcement mechanism needs to be implemented¹⁵²¹.

As identified above in this paper, access to premium content is an important part of the media diversity protection discussion. Only if they have access to premium content the media companies may be able to offer diverse and attractive content that satisfies the interests of various audiences. Further, only then a multitude of media companies will be able to deliver this type of content at prices that will both attract consumers and keep the companies afloat in today's competitive medium. Restriction on media diversity may come from making content, especially premium content, available only to certain members of media companies' associations and refusing access to others. This type of association gives a competitive advantage to certain media companies while disadvantaging others and reduces in the long run both sources and viewpoints diversity on the market.

The CFI addressed this issue in the European Broadcasting Union (EBU) judgment.¹⁵²² EBU is a professional association of mostly public broadcasters and it acts

¹⁵²¹ See below, on EBU cases.

¹⁵²² Judgment of the Court of First Instance (First Chamber, extended composition) of 11 July 1996. *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities*. Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 (the EBU cases). See, also, for a summary, Jose Luis Buendia Sierra, "Exclusive Rights and State Monopolies under EC Law. Article 86 (Formerly Article 90) of the EC Treaty," Oxford University Press, at p. 325-326.

as an intermediary or representative between its members and between its members and third parties.¹⁵²³ Membership in the group is conditioned by the fulfillment of certain requirements related to programme quantity and quality¹⁵²⁴.

This association has the following anticompetitive effects: it discriminates against private broadcasters,¹⁵²⁵ it increases the market power of its members¹⁵²⁶ and it effects trade within the European Community¹⁵²⁷. The combination of restrictive membership rules and market power in acquiring broadcasting rights allows this association to keep certain content available only to its members. The Court did not agree with the Commission's exemption of EBU from competition rules under art. 86 of the EC Treaty¹⁵²⁸. That is to say that the Commission considered (in the case brought before it and that was now challenged in Court) that since some of EBU members were public service broadcasters they qualified as "undertakings entrusted with the operation of services of general economic interest."¹⁵²⁹ The Commission referred to the public mission that these broadcasters fulfilled: the "obligation to provide varied programming including cultural, educational, scientific and minority programmes without any commercial appeal and to cover the entire national population irrespective of the costs."¹⁵³⁰ The CFI noted however that such public interest considerations would have exempted EBU from application of the competition rules only if the realization of their public mission required

¹⁵²³ See, para. 12 of Joined cases T-528/93, T-542/93, T-543/93 and T-546-93. See also, <http://www.ebu.ch/>.

¹⁵²⁴ See, para. 10 of the EBU decision. See, Article 3 of the EBU Statutes, in the version of 3rd of July 1992, available on EBU's website.

¹⁵²⁵ See, para. 94, Joined cases T-528/93, T-542/93, T-543/93 and T-546/93.

¹⁵²⁶ See para. 29, Joined cases T-528/93, T-542/93, T-543/93 and T-546-93.

¹⁵²⁷ See para. 29, Joined cases T-528/93, T-542/93, T-543/93 and T-546-93.

¹⁵²⁸ See, para. 93 of Joined cases T-528/93, T-542/93, T-543/93 and T-546-93. See, also, Commission Decision 93/403/EEC of 11 June 1993 relating a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.150 - EBU/Eurovision System).

¹⁵²⁹ Art. 86 para. 2 of the EC Treaty.

¹⁵³⁰ See para. 116, Joined cases T-528/93, T-542/93, T-543/93 and T-546-93.

these exclusive rights to transmit, among others, sports events and that such exclusivity was “indispensable in order to allow them a fair return on their investments”¹⁵³¹. The Court considered that a more appropriate standard of review was to assess whether EBU’s membership rules were “objective and sufficiently determinate so as to enable them to be applied uniformly and in a non – discriminatory manner vis-à-vis all potential active members”¹⁵³².

For the protection of media diversity, it is important that the law slows down the broadcasters’ natural (since it is arguably good for business) desire to associate to buy premium content. Public broadcasters may even use some of the rules created to protect the public at large in order to further their own, economic interests. However, the clear holding of this case is that a broadcasters’ association cannot evade competition rules simply by asserting the serving of a public mission.

The follow up from the EBU judgment discussed above should have allowed more media companies access either to this association or to content acquired by this association. However, Metropole Television (M6) applied for admission six times and was rejected because it did not fulfill the obligations imposed by EBU’s guidelines¹⁵³³. The Court annulled in 2001 the Commission’s decision that dismissed M6’s complaint¹⁵³⁴. In 2002 a number of European media companies challenged another EC decision that dismissed their complaints against the sub-license scheme put in place by EBU to make the association more open to non-members.¹⁵³⁵ The participation in EBU

¹⁵³¹ See para. 118, Joined cases T-528/93, T-542/93, T-546-93.

¹⁵³² See, para. 95 and, also, 97, Joined cases T-528/93, T-542/93, T-543/93 and T-546-93.

¹⁵³³ Judgment of the Court of First Instance (Fourth Chamber) of 21 March 2001. *Métropole télévision SA v Commission of the European Communities*. Case T-206/99, para. 11.

¹⁵³⁴ See, para. 66, case T-206/99.

¹⁵³⁵ Judgment of the Court of First Instance (Second Chamber, extended composition) of 8 October 2002. *Métropole Télévision SA (M6) (T-185/00), Antena 3 de Televisión, SA (T-216/00), Gestevisión Telecinco,*

strengthened members' position in the upstream market for acquisition of attractive content such as rights for sports events and in the downstream market for transmission of such content¹⁵³⁶.

In addition to this, there were other anticompetitive concerns. The vertical integration of EBU members active on both of these markets¹⁵³⁷ increased the potential for the association to deny access to such content to non-members¹⁵³⁸. The sub-license scheme mentioned above was extremely restrictive in that it offered non-members the possibility to purchase broadcasting rights to live events whose majority of competitions would not have had already been broadcasted by members¹⁵³⁹. What was left for non-members to acquire were the broadcasting rights for the events for which the members would broadcast less than the majority of competitions, and even for these ones, only the events that members did not transmit via their pay TV channels, for which non-members could have acquired rights for deferred transmission (an hour after the event took place and after a certain time in the evening)¹⁵⁴⁰.

Perhaps what is the most important lesson drawn from this follow-up is that the Commission has a weak system of monitoring and enforcing its decisions. The same applies to the commitments that the parties undertake to get a merger approved. This in turn has consequences for media diversity protection and one has to wonder whether, indeed, unless the Commission develops a strong system of monitoring compliance, a

SA (T-299/00) and SIC - Sociedade Independente de Comunicação, SA (T-300/00) v Commission of the European Communities. Joined cases T-185/00, T-216/00, T-299/00 and T-300/00.

¹⁵³⁶ See, para. 63 of Joined cases T-185/00, T-216/00, T-299/00 and T-300/00.

¹⁵³⁷ See, para. 67 of Joined cases T-185/00, T-216/00, T-299/00 and T-300/00.

¹⁵³⁸ See, para. 67 of Joined cases T-185/00, T-216/00, T-299/00 and T-300/00.

¹⁵³⁹ See, para. 71 of Joined cases T-185/00, T-216/00, T-299/00 and T-300/00.

¹⁵⁴⁰ See, para. 74 and 80 of Joined cases T-185/00, T-216/00, T-299/00 and T-300/00. See, para. 75, *ibidem*. It is in addition redundant, as it enables non-members of the EBU to purchase the rights to transmit news commentaries, this opportunity is always guaranteed for them in the countries where they operate, independently of the sub-licensing scheme. See, para. 81, *ibidem*.

clear cut denial of highly anticompetitive mergers would not be more efficient for protecting media diversity.

III. 4. 1. 3. An assessment of competition on a narrow product and geographical market better serves media diversity

From the outset, one should notice that, based on economic analysis of competition in the market alone, except for very few instances of combination of enormous market players, the Commission clears the mergers¹⁵⁴¹. The Court of First Instance, as well as the Commission, did not consider the concept of pluralism as defined from a democratic perspective – different cultural, political, social, economic and minority viewpoints and sources diversity¹⁵⁴². The goal of their reviews was to ensure a minimum competition on the market and they based their decisions solely on competition law, performing an economic analysis¹⁵⁴³.

In relation to our introductory discussion to this paper on the link between owners and content, business interests behind broadcasting companies outline the difference between profit versus public interest standard¹⁵⁴⁴. Further, technological convergence,

¹⁵⁴¹ The Commission prohibited mergers in few cases, such as: Asunto Comp/M. 2845 - SogeCable/CanalSatellite Digital/ViaDigital, where it found abuse of dominant position; Case IV/M.490 - Nordic Satellite Distribution, dominant position in satellite and pay TV markets, incompatible; Investigation of Time Warner/EMI merger that would have led to dominant position in three markets: recorded music, music publishing and digital delivery of music via Internet – the merger was withdrawn.

¹⁵⁴² My analysis included a relatively vast number of the Commission's decisions in cases related to mergers in the electronic media. For purposes of brevity I go into more details here in what I consider the most representative ones.

¹⁵⁴³ It is argued though sometimes that "our concern for the maintenance of effective competition extends beyond purely economic considerations. Competition is one of the foundations of an open society, it is therefore necessary to weigh against the gains from industrial concentration the socio-political consequences of concentrations of private power, which could discredit property owning democracy." See, A. Caincross, *Economic Policy for the European Community* (Macmillan, 1974), cited in A. Jones and B. Sufrin, *ibidem*, 2004, p. 853. Neither the Commission or the Court however embraced this view.

¹⁵⁴⁴ The Commission noted business interests involved in media companies, however it treated them as any other factor of the merger. See, for instance, Case Comp/M.3231 - Appolo/Soros/Goldman Sachs/Cablecom - broadcasting and business activities, compatible with the common market; Case Comp/M. 3426 - Advent/SportFive - broadcasting rights acquisition and business activities, compatible with the common market; Case Comp/M. 4230 - KPN/Heineken/ON - broadcasting (digital terrestrial

though it plays a role, still did not dramatically change the institutions' review process¹⁵⁴⁵. Although the concept of pluralism as used in this paper did not find place in their review, some decisions do employ useful tools that contribute to the preservation of the media diversity even within the restricted confines of competition law. Considering that this paper is not an antitrust law focused research, I limit myself to discuss only few cases that exemplify the manner in which antitrust analysis may help the media diversity protection.

First, the manner in which the Commission defines the media market influences the extent to which media diversity is protected through competition law instruments. The media product market is generally defined on grounds of attractiveness to consumers and advertisers, a variation and a more specific application of the more general substitutability criterion. This criterion varies for instance according to specific sports events and to specific countries¹⁵⁴⁶. The same criterion served indirectly to calculate the market shares of the various producers by reference to the value of programmes¹⁵⁴⁷.

television) and business activities, compatible; Case Comp/M. 3961 – Permira – KKR/SBS Broadcasting – free and pay TV, radio; business activities merged with broadcasting activities; compatible with the common market; Case Comp/M. 4121 – Allianz Group/ SOFINIM/ United Broadcast Facilities – free and pay TV, radio; business activities merged with broadcasting activities; compatible with the common market; Case Comp/M. 3652 – Charterhouse/TDF – business plus full range of broadcasting activities, compatible.

¹⁵⁴⁵ The Commission noted the aspect of technological convergence, though it did not elaborate more on the impact on the market: Case Comp/M. 2925 – Charterhouse/CDC/Telediffusion de France SA – site hosting for broadband over the air infrastructure, convergence issues, compatible; Assunto Comp/M. 3100 – MediaSet/Telecinco/Publiesan – broadcasting and telecommunications, compatible; Case Comp/M. 2572 – Time/IPC – electronic plus print media, compatible; Case Comp/M.1978 – Telecom Italia /News Television/ Stream – pay TV, broadcasting rights, telecommunications convergence, compatible; Case Comp/M. 4338 – Cinven – Warburg Pincus/ Casema – Multikabel – cable operators providing radio and television, Internet access and fixed telephony services.

¹⁵⁴⁶ See para. 51 and 52, Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00.

¹⁵⁴⁷ See, para. 130, Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 28 April 1999. Endemol Entertainment Holding BV v Commission of the European Communities. Case T-221/95 (Endemol case).

Employing different criteria, the Commission, making use of the discretion conferred to it by article 2 of the ECMR in performing assessments of economic nature, defined the market of “independent production of Dutch-language television programmes [as] separate from the market for in-house productions of the public broadcasters¹⁵⁴⁸.” This case is important for a discussion on media diversity protection because it involves issues such as consolidation in the content market, especially the market for attractive, or premium, content.

The Court of First Instance decided over a challenge to the European Commission’s decision on the incompatibility with the common market of transaction that led to the creation of the joint venture Holland Media Group (HMG)¹⁵⁴⁹. The object of the undertaking was the “packaging and supply of television and radio programmes broadcast by itself [and other companies] to the Netherlands and Luxembourg¹⁵⁵⁰.” The Court found that this economic concentration strengthened Endemol’s dominant position on the relevant market - the market for “independent production of Dutch-language television programmes”¹⁵⁵¹, which is separate from the market for in-house productions of the public broadcasters¹⁵⁵².

This conclusion was reached based on the following factors: high market shares – determined based on the value of the produced content and not on the number of the hours produced¹⁵⁵³, which “may in itself be evidence¹⁵⁵⁴” of a dominant position, in

¹⁵⁴⁸ See, para. 107, Case T-221/95. The different market were distinguished based on: hourly production costs, different programming profile, use and the impossibility for a public broadcaster to chose whether to produce a programme by itself or to commission it from an independent producer because it needs to chose among investing in one of the two options. See, para. 107 – 112, Case T-221/95.

¹⁵⁴⁹ See, para. 9 of the Endemol case.

¹⁵⁵⁰ See, para. 17, Endemol case.

¹⁵⁵¹ See, para. 107 and 99 of Endemol case.

¹⁵⁵² See, para. 169 of the Case T-221/95. See, also, para. 99, para. 107 of the Endemol case.

¹⁵⁵³ See, para. 130 of the Endemol case.

particular where the other operators on this content market hold only much smaller shares¹⁵⁵⁵, Endemol's "preferential access to foreign formats"¹⁵⁵⁶, especially its ability "to enter 'output deals',"¹⁵⁵⁷ "high number of the most popular Dutch television personalities under contract"¹⁵⁵⁸, production of a vast amount of the most popular non-sports entertainment¹⁵⁵⁹, "the applicant's large – scale activities outside the Netherlands, which may strengthen its position in the Netherlands market, given that its subsidiaries give it preferential access and to the international market, which increase the resources of the group as a whole"¹⁵⁶⁰ and high initial barriers to entry due to the fact that the new entrants needed an established partner in the relevant market.¹⁵⁶¹

This particular decision exemplifies the role that lack of concentration in the content market has in promoting media diversity. A content market with many producers is an important tool in advancing different viewpoints. Further, issues such as access to premium content, access to creators of valuable content and in general access to financial resources are factors that make the difference between which media company will dominate the content media market and will reach the widest audience.

Another important aspect of this decision is that it used the value of the programs to calculate the market shares of the content producers. This is an important tool that serves the purpose of promoting media diversity better than calculating the market shares

¹⁵⁵⁴ See, para. 5 of the Summary to Case T-221/95

¹⁵⁵⁵ See, para. 134 and 135 of the Endemol case: "The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used." See, para. 10 of the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (2001/C 368/07).

¹⁵⁵⁶ See, para. 140 of the Endemol case.

¹⁵⁵⁷ "It is easier for a producer to obtain the necessary formats when it has already signed a contract with a broadcaster for a specified volume of programmes." See, para. 137, Case T-221/95.

¹⁵⁵⁸ See, para. 23, also, 141 of the Endemol case.

¹⁵⁵⁹ See, para. 119, 138 of the Endemol case.

¹⁵⁶⁰ See, para. 142 of the Endemol case.

¹⁵⁶¹ See, para. 134 – 143, Case T-221/95.

on the basis of the volume of the content produced. This criterion outlines the importance of content attractiveness in determining the strength of one media company on the market. Both content producers and content distributors benefit from producing/distributing attractive content, and however self explanatory this assertion may be, from the point of view of media diversity protection, vertical integration of companies that produce/distribute attractive content may lead to important anticompetitive consequences on the media market. The Endemol case provides a good example of this latter situation as well.

For media diversity protection, control is important to be acknowledged and properly assessed in order to determine the real power that a media company has on the market and the extent of its influence on that market. Structural links between media companies in the form of subtle paths of influencing programming may lead to vertical integration even in the absence of a formal agreement. This is another aspect that contributed to the negative clearance of this merger, as shown below.

Under Article 3(3) of Regulation No 4064/89, control is “constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking”¹⁵⁶². For instance, the Endemol merger led to vertical integration of content and distribution. This was because of the structural link created between Endemol – content producer and the newly created entity – Holland

¹⁵⁶² See, art. 3(3) of European Council’s Regulation No 4064/89. See, para. 159 and 160, Case T-221/95: “In the light of the considerations of fact and law in this case, the Commission was correct in concluding that VMG – 49% (the vehicle created by Veronica – 53% and Endemol – 47% to create HMG) and RTL – 51% exercised joint control over HMG.” See, also, para. 149 of the Endemol case on the division of powers of the managing bodies.

Media Groep¹⁵⁶³. The structural link allowed Endemol to influence major programming related decisions of the newly formed entity and to ultimately increase its power on the defined content market¹⁵⁶⁴. The possibility for Endemol to influence programming decisions was a consequence of both the joint control that it would have exercised with RTL over the newly created entity (HMG) and the agreement that it concluded with HMG to supply 60% of HMG's content needs¹⁵⁶⁵. These two aspects combined – joint control and programming supply agreement – endangered the possibility for other content producers to supply content to HMG¹⁵⁶⁶.

Considering that HMG would have already taken 60% of its programming needs from Endemol and that it had the possibility to influence management's decisions it is not unlikely that it could have pushed HMG to take much more than 60% of its content from Endemol. Considering that HMG shareholders agreement permitted RTL to block major decisions in the second shareholders meeting¹⁵⁶⁷ one would be inclined to believe that HMG was under RTL's exclusive control. However, the Commission judiciously noticed a subtle mechanism that allowed Endemol to continue to exercise full control over HMG's programming decision¹⁵⁶⁸. Since HMG concluded an agreement with Endemol for programming supply, it was hard to imagine that RTL would want to reach a conflict with Endemol over decisions related to managing HMG. "Without this structural link between Endemol and HMG it would have been realistic to envisage the possibility of

¹⁵⁶³ See, para. 127, Endemol case.

¹⁵⁶⁴ See, para. 127, 154, Endemol case.

¹⁵⁶⁵ See, for instance, para. 18, and 167, 168, Endemol case.

¹⁵⁶⁶ See, para. 167, 168, Endemol case.

¹⁵⁶⁷ See, para. 151 of the Endemol case.

¹⁵⁶⁸ See, para. 127, 156, 157, Endemol case.

other producers providing a much larger proportion of HMG's additional programme requirements.”¹⁵⁶⁹

In spite of the fact that the pluralism as an independent criterion does not appear in competition review of a media merger – a lack of consideration that is surprising considering that the European Commission committed itself to respect media pluralism under the European Charter of Fundamental Rights,¹⁵⁷⁰ a pure antitrust analysis may provide useful tools that contribute to the advancement of media diversity. The Endemol decision helps to show how defining a small market (an approach that the Commission takes in other decisions as well)¹⁵⁷¹, using value content as criterion for calculating market shares and being particularly skeptical and cautious when it comes to integration of content and distribution help promoting media diversity. Additionally, the importance

¹⁵⁶⁹ See para. 167 of the Endemol case. See, also, para. 168 Endemol case.

¹⁵⁷⁰ See, art. 11 para. 2 of the European Charter of Fundamental Rights, signed in Nice on 7 December 2000, available online at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

¹⁵⁷¹ See, also, Case Comp/M. 3609 - Acquisition of France Telecom Cable and NC Numericable by Cinven – pay/ free TV, specialized/general channels; Case Comp/M. 3595 - Sony/MGM – pay/ free TV, TV exhibition windows, US/non-US motion pictures, TV channels and TV programs; Case Comp/M.2643 – Blackstone/CDPQ/DETEKS BW – cable market; Asunto Comp/M. 2845 - Sogecable/ CanalSatelite Digital /ViaDigital – pay TV and free TV market, where pay TV can furthermore divided into pay per view and interactive television; Case IV/M.878 – RTL 7 – free TV market; Case IV/M.779 – Bertelsmann/CLT – free access TV, pay TV, TV productions, TV rights and licenses, free access radio; Case Comp/M.3330 – RTL/M6 – free TV, commercialization and exploitation of special interest TV channels, acquisition of TV content, independent television program production, publishing of magazines, Internet services and music recording; Case IV/M.584 – Kirch/Richemont/Multichoice/Telepiu – pay TV distinct from free TV; Case IV/M.410 – Kirch/Richemont/Telepiu – TV distinct from free TV; Case IV/M.525 – VOX (II) – free TV; Case IV/M.110 – ABC/ Generale des Eaux / Canal+/ W.H.Smith TV – rights for sports events, programme production, advertising and broadcasting market – free TV versus pay TV, specialized channels versus general ones; Case Comp/M.2883 – Bertelsmann/Zomba – music market – recording and distributing, publishing, important market distinction according to the genre; Case IV/M.490 – Nordic Satellite Distribution – provision of satellite TV transponder capacity and related services to broadcasters, distribution of pay – TV and other encrypted TV channels to direct –to – home households, operation of cable TV networks; Case M.2876 – NewsCorp/Telepiu – free to air, channel suppliers, TV channels, especially DTH pay channels; Case Comp/M. 2050 – Vivendi/Canal+/Seagram – premium films, first – window films, pay – TV, emerging market for portals and online music; Case Comp/M.4204 – Cinven/UPC France – pay TV; Case Comp/M. 1943 – Telefonica/Endemol – production of TV programmes, free access and pay TV; Case IV/M. 1574 – Kirch/MediaSet – free access TV, TV production, TV rights and licensing; Case IV/M.1081 – Dow Jones/NBC – CNBC Europe – free TV; Case Comp/M. 3542 – SNY Pictures/ Walt Disney/ ODG/ MovieCo – the wholesale distribution of pay TV, pay per view, and video on demand film channels, retail market for video content.

of access to premium content in determining the market strength of a media company is recognized in that the market shares is calculated based on the value of that company's programming.

Another important observation derived from the European Court of First Instance's take on the media mergers' effect on media diversity refers to the fact that the relevant market is defined by taking into consideration the audience's preference for a certain programming (observation which should be seen in connection with the significance of access to premium content). Further language matters when defining the relevant geographical market. These observations may be transferred as lessons in other jurisdictions analyzed here. Although competition law is not fundamentally designed to further media diversity, it may still do so.

III. 4. 1. 4. Broadcasting Pluralism and Freedom to Provide Services

Besides the provisions related directly to competition law, the EC Treaty contains provisions that interact with the competition provisions, such as the provisions related to the free movement of services in articles 49-55. Broadcasting is a service within the European Union. The Court of Justice of the European Communities (the Court) decided on this issue in the *Sacchi* and the *Debauve* cases¹⁵⁷². In subsequent cases the Court

¹⁵⁷² Judgment of the Court of 30 April 1974. - *Giuseppe Sacchi*. - Reference for a preliminary ruling: Tribunale civile e penale di Biella - Italy. - Case 155-73, para. 6: "In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services". Judgment of the Court of 18 March 1980. *Procureur du Roi v Marc J.V.C. Debauve and others*. Reference for a preliminary ruling: Tribunal de première instance de Liège - Belgium. Case 52/79, para. 8: "There is no reason to treat the transmission of such signals by cable television any differently." The cases, related to advertisement transmitted from one member state within the territory of another, gave the European Court of Justice the occasion to affirm that the broadcasting of television signals comes within the rules of the Treaty relating to services.

treated the television signals as such and assessed the compliance with the Treaties' provision in this sector of the Community's market¹⁵⁷³.

In the *Elliniki Radiophonia* case the Court decided that a television monopoly, though lawful if it satisfies certain requirements,¹⁵⁷⁴ still must comply with the Treaty's provisions on free movement of services and the rules on competition¹⁵⁷⁵. Perhaps most importantly, in that case the Court also declared that any restriction on the freedom to provide services should be interpreted in light of "the general principles of law and in particular of fundamental rights."¹⁵⁷⁶ This manner of interpretation allowed the incorporation of the media pluralism into the review of the justifiable restrictions on the free movement of services.

Media pluralism is a legitimate state concern that may justify restrictions on this freedom. The European Court of Justice took into account the media pluralism in some of the cases related to the free movement of services within the Community. In the

¹⁵⁷³ Judgment of the Court of 9 July 1997. *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB* (C-34/95) and *TV-Shop i Sverige AB* (C-35/95 and C-36/95). Reference for a preliminary ruling: *Marknadsdomstolen - Sweden*. Joined cases C-34/95, C-35/95 and C-36/95. This case dealt with advertisement directed at children transmitted via television signals and it stated that former article 59 does not preclude a Member State from taking "measures such as prohibitions and injunctions against an advertiser in relation to television advertising broadcast from another Member State, provided that those measure do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State" – see para. 5, *ibidem*. See also, Judgment of the Court (Fifth Chamber) of 29 November 2001. *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*. Reference for a preliminary ruling: *Collège juridictionnel de la Région de Bruxelles-Capitale - Belgium*. Case C-17/00. The Court stated in this case that a municipal tax on satellite dishes is a restriction on the freedom to receive television programmes via satellite. The main ground for the decision was the discriminatory treatment applied to satellite as compared to cable – see, *ibidem*, para. 31.

¹⁵⁷⁴ Judgment of the Court of 18 June 1991. *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*. - Reference for a preliminary ruling: *Monomeles Protodikeio Thessalonikis - Greece*. Case C-260/89. (*Elliniki case*) - see para.8. The Court recalled also the *Sacchi* case where it "held that nothing in the Treaty prevents Member States, for considerations of a non-economic nature relating to the public interest, from removing radio and television broadcasts from the field of competition by conferring on one or more establishments an exclusive right to carry them out." See para. 10, *ibidem*.

¹⁵⁷⁵ See para. 12, *Elliniki case*.

¹⁵⁷⁶ See, *Elliniki case*, para. 6.

Commissariaat voor de Media cases, the Court stated that a Dutch broadcasting law¹⁵⁷⁷ was “intended to establish a pluralist and non-commercial radio and television broadcasting system and thus forms part of a cultural policy whose aim is to safeguard the freedom of expression in the audiovisual sector of the various components, in particular social, cultural, religious and philosophical ones, of the Netherlands.”¹⁵⁷⁸ In a previous case involving the Netherlands, *Commission v. Netherlands*, the Court linked media pluralism with “freedom of expression, which is precisely what the European Convention on Human Rights is designed to protect.”¹⁵⁷⁹ The Court referred to article 10 of the European Convention of Human Rights¹⁵⁸⁰ in another case as a background for considering the limits of the justifications for restriction on free movement of services allowed by the Treaty¹⁵⁸¹.

European Court of Justice’s reliance on article 10 ensues some observations. First, the Court has competence to protect fundamental rights. Beyond the scope of this paper, this aspect has been elaborated by the Court’s jurisprudence¹⁵⁸². Within the fundamental

¹⁵⁷⁷ See, para. 2, Judgment of the Court of 25 July 1991. *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*. Reference for a preliminary ruling: Raad van State - Netherlands. Case C-288/89 (1991 Commissariaat case).

¹⁵⁷⁸ Judgment of the Court (Fifth Chamber) of 5 October 1994. *TV10 SA v Commissariaat voor de Media*. - Reference for a preliminary ruling: Raad van State - Netherlands. Case C-23/93 (1994 Commissariaat case) para. 18. See also, Judgment of the Court of 3 February 1993. *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media*. Reference for a preliminary ruling: Raad van State - Netherlands. Case C-148/91; 1991 Commissariaat case; and Judgment of the Court of 25 July 1991. *Commission of the European Communities v Kingdom of the Netherlands*. Case C-353/89. (1991 Commission v. Netherlands case).

¹⁵⁷⁹ See, the 1994 Commissariaat case, citing the 1991 Commission v. Netherlands case at para. 25. See, also, *Commission v. Netherlands*, para. 2 and 1991 Commissariaat case, para. 25.

¹⁵⁸⁰ See, also, Piet Eeckhout, “The European Internal Market and International Trade. A Legal Analysis,” Clarendon Press, Oxford, 1994, at p. 123.

¹⁵⁸¹ *Elliniki* case, para. 45.

¹⁵⁸² See, for instance, a description of this jurisprudence, Keir Starmer QC Doughty Street Chambers June 2004, “Introduction to Fundamental Rights in EU Law and the Charter of Fundamental Rights,” available online at: <http://www.justice.org.uk/images/pdfs/Starmer.pdf>.

rights protected by the Court, the European Convention on Human Rights holds a primary place¹⁵⁸³.

Second, the Court's inclusion of the media pluralism may as well be an example of incorporating non-economic concerns into economic analysis. Media pluralism understood in the sense of "the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing []"¹⁵⁸⁴, is a decisive factor when deciding whether national legislation that restricts freedom to provide service within the European Community is nevertheless compatible with the Common Market. Even if the Court's jurisprudence on this issue is not large¹⁵⁸⁵, it could still be a model to follow in an effort to include media pluralism as a factor in media mergers' review.

Third, the Court allows MSs to restrict Community trade when they pursue media pluralism goals. Paradoxically, this turned against the goal of protecting media diversity at Community level. Both lack of provision in the sense of entrusting the EC with competence in the field of "harmoniz[ing] national rules on pluralism in the media"¹⁵⁸⁶, and the ECJ's stance on this issue lead to difficulties in adopting an European Directive on media concentration. However, continuing to allow the MSs to decide on media pluralism at the national level might better protect media diversity when one considers important

¹⁵⁸³ See, para. 41 of the *Elliniki* case (referring to Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986]). See, also, para. 24 of the the 1994 *Commissariaat* case.

¹⁵⁸⁴ See, 1991 *Commissariaat* case, para. 9.

¹⁵⁸⁵ See, also, *Eeckhout*, *ibidem*, at p. 124, citing Vincenzo Salvatore, "Quotas on TV Programmes and EEC Law," 29 *CML Rev* (1992) in reference to Salvatore's assertion that the "[European] Court [of Justice]'s approach towards these non-economic aspects is superficial" and Denis Waelbroeck, "La libre transmission des messages audiovisuels et la protection des interets culturels" in *L' Espace audiovisuel europeen*, Brussels, Editions de l'ULB, 1991, supporting *Eeckhout*'s observation on the "tension between the economic and non-economic (often broadly termed cultural) aspects of television broadcasting." See, *Eeckhout*, *ibidem*, at p. 124. See, also, *Katsirea*, *ibidem*, at p. 271, on how the ECJ is reluctant to "take cultural policy considerations seriously" since they may in fact try to mask economic purposes such as the protection of national broadcasting from competition. *Ibidem*.

¹⁵⁸⁶ See, Françoise Blum, Anne Logue, "State Monopolies under EC Law," John Wiley & Sons, 1998, at p. 299. For a discussion on the European Community's competence in the field of cultural policy and the promotion of European languages, culture and heritage, see, *Katsirea*, *ibidem*, at p. 173-187.

issues such as national and cultural identity,¹⁵⁸⁷ which MSs are in better position to protect.

III. 4. 1. 5. The cultural exception and state aid

Media pluralism in Europe is both about national media pluralism – that is media pluralism ensured at the national level – as well as about European media pluralism – that is media pluralism guaranteed at the supranational level. European media becomes a *sui generis* value. The cultural exception is almost a form of protectionism in that it allows national governments to exempt regulation that provides funding for production of European content from the application of the free international trade rules. In this sense, the cultural exception is smoothly and naturally justified in the majority of the European national jurisdictions. I briefly discuss this doctrine because it adds to the media diversity by helping the production and promotion of European content.

At the European Union level, another interesting addition to media diversity protection is the existence of the legal institution of state aid for public broadcasters. This legal institution will be only extremely summarily discussed¹⁵⁸⁸. It is a particular aspect of the European competition law, in the sense that it in fact excludes the application of the EC Treaty to public broadcasters.¹⁵⁸⁹

State aid is an aspect of the competition law that is however distinct from merger control, perhaps the most important market phenomenon that leads to media concentration. Thus, this thesis chose to focus on media concentration, considering that

¹⁵⁸⁷ See, Irini Katsirea, *ibidem*, at p. 173, quoting A.J. Liehm, “*Aider la creation pour sauver les identites: La culture, mail-aimee de l’Europe*,” *Le Monde Diplomatique*, September, 1999, at p.27.

¹⁵⁸⁸ For an in depth discussion of public broadcasting in Europe, see, Katsirea, “Public Broadcasting and European Law: a Comparative Examination of Public Service Obligations in Six Member States.”

¹⁵⁸⁹ Article 86 deals with the application of the competition rules to public undertakings and to those given special or exclusive rights by Member States. It contains an exemption from the Treaty rules for such undertakings, if certain conditions are satisfied. See, art. 86 para. 2 of the EC Treaty.

the many facets of the legal regulation of public broadcasting deserve an analysis of their own. This exemption from general competition law contributes to the strengthening of the public broadcasters' possibility to compete on the market. However, the downside of this provision is that it may open the road to governmental influence into the public broadcaster's affairs. Ultimately, the impact of this doctrine on media diversity cuts both ways: public broadcasters may become stronger, however, what if their strength inhibits the development of private broadcasters and the competition on the market? This question remains to be answered (or attempted to be answered) by potential future research.

The peculiar nature of the media industry is recognized internationally in that this industry and its products are kept outside of the scope of the international trade rules – the so called “cultural exception”. Thus, audiovisual services are exempted from the “Most Favored Nation”¹⁵⁹⁰ rule, although at the time of the GATT Uruguay Rounds, it was envisioned that this exemption will not be indefinite¹⁵⁹¹. The General Agreement on Trade in Services (GATS) was adopted by the World Trade Organization in the 1994 Uruguay Round, and covers all internationally traded services¹⁵⁹². The cultural exception doctrine does not have any legal basis, however it is implicitly understood from the

¹⁵⁹⁰ See, the General Agreement on Trade and Tariffs, which prohibits discriminatory treatment among countries in international trade. http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

¹⁵⁹¹ See, Cristopher B. Graber, “Audiovisual Media and the Law of the WTO,” in *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services*, Christoph Beat Graber, Michael Girsberger, Mira Nenova, eds., pp. 15-64, Zurich: Schulthess, 2004, at p. 15 and 16. However, as relatively recently as 2003, some of the states party to the Agreement did not seem to want to change things. See, in this sense, Statement by H.E. Mr. Jean-Claude Roche, Minister of Commerce and Industry, WTO, Ministerial Conference, Fifth Session, Cancún, 10 - 14 September 2003, WT/MIN(03)/ST/122, 13 September 2003 (03-4897): “We also attach particular importance to the cultural exception and thus support special treatment for cultural and intellectual goods.”

¹⁵⁹² The full text of the Agreement and its interpretation is available on WTO's website.

countries' decision not to insist on applying in particular the most favored nation rule to audiovisual and film industries¹⁵⁹³.

The "cultural exception" is based on the principle that "culture is not like any other merchandise because it goes beyond the commercial: cultural goods and services convey ideas, values and ways of life which reflect the plural identities of a country and the creative diversity of its citizens"¹⁵⁹⁴. The cultural exception is still an extremely controversial aspect in international trade. Excepting the European quotas from international trade rules is based on their qualification as services and not goods¹⁵⁹⁵, and precisely this qualification is debatable¹⁵⁹⁶.

Some authors enumerate France's international struggle against Anglo-American language and mass mediated culture in the post World War II era as one of the historical phenomena that contributed to the crystallization of the contemporary communication regime¹⁵⁹⁷. After fighting for its recognition¹⁵⁹⁸, France embraced the cultural exception

¹⁵⁹³ This lack of certain legal basis made the exception prone to criticism, though not only on legalistic grounds. This "paternalistic" doctrine was said to unreasonably disregard any economic understanding of the market by "disadvantaging consumer's choice and creating a deadweight loss in the audiovisual markets." See, Frederick Scott Galt, "The Life, Death, and Rebirth of the "Cultural Exception" in the Multilateral Trading System: an Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture's Hegemony," Washington University Global Studies Law Review, 3 Wash. U. Global Stud. L. Rev. 909, 2004. They are however some other authors that argue that "A country's cultural heritage is necessarily its own and is unique. It is not a mere commercial product. See, Thomas Bishop, "France and the Need for Cultural Exception," New York University Journal of International Law and Politics, 29 N.Y.U. J. Int'l L. & Pol. 187, Fall 1996-Winter 1997. Thomas Bishop documents the huge disequilibrium among the profit from foreign films sales in the United States and the return profit of American movies. He calls for cooperation between the two countries.

¹⁵⁹⁴ See, United Nations Educational, Scientific and Cultural Organization' web-site. http://portal.unesco.org/culture/en/ev.php-URL_ID=18683&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁵⁹⁵ If broadcasting qualifies as service, then it is outside of the GATT.

¹⁵⁹⁶ See, Eckhout, *ibidem*, at p. 133. Eckhout opposes the Sacchi judgment of the ECJ, which both decided that broadcasting is service, but also that: "trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to the freedom of movement for goods." See, the Sacchi case (1974), at para.7.

¹⁵⁹⁷ Lyombe Eko, "New Medium, Old Free Speech Regimes: The historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet," Loyola of Los Angeles International and Comparative Law Review, Winter 2006, 28 Loy. L.A. Int'l &

with much enthusiasm. It was helped in the process also by the adoption of Television without Frontiers Directive (TWF)¹⁵⁹⁹. The Member States initially resisted the adoption of this Directive, considering that matters of cultural policy are under their competence¹⁶⁰⁰.

Even after the adoption of this Directive, the European Community's competence to enforce the quotas (described below) "may become questionable"¹⁶⁰¹. The way to get out of this conundrum is by admitting that the Directive's aim is to promote European audiovisual production,¹⁶⁰² an economic goal that falls under EC's legislative competence¹⁶⁰³.

While the new AMSD mandates a majority of 10% of the broadcast time to be reserved for European films "where practicable" and "by appropriate means,"¹⁶⁰⁴ France has imposed a very rigid and restrictive system of minimum European and French content requirements, outlined in the following. The programming of the private terrestrial broadcasting channels must contain a minimum of 60% of European origin

Comp. L. Rev. 69).

¹⁵⁹⁸ For a history of the rounds and France' role in the process, visit WTO web-page, and especially, http://www.wto.org/English/tratop_e/serv_e/gsintr_e.doc.

¹⁵⁹⁹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. The TWF Directive was replaced by the Audiovisual Media Services Directive (AMSD), Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 "on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services." This new Directive, broadens the scope of TWF application – to both traditional television services and on demand services. See, Preamble of the AMSD, para. 11. See, also, chapter III of the AMSD.

¹⁶⁰⁰ See, Eeckhout, *ibidem*, at p. 124.

¹⁶⁰¹ Although the EC has competence in the cultural field, according to art. 167 para. 5 (ex art. 151 (5), ex art. 128 (5)) of the EC Treaty, "harmonization of laws is not possible in the framework of the Community's cultural policy." See, Eeckhout, *ibidem*, at p. 130 (and at p. 130 at FN 58).

¹⁶⁰² See, Preamble of the TWF. See, also, para. 34 and 66 of AMSD.

¹⁶⁰³ See, Eeckhout, *ibidem*, at p. 130-131.

¹⁶⁰⁴ See, art. 17 of the AMSD. Art. 4 of the TWF mandated a majority 50%.

production, 40% of which must be of original French production¹⁶⁰⁵. Each public broadcasting channel - France 2, France 3 and France 5 - has further obligations including broadcasting 70% of their prime time European works, out of which 50% of French original production, out of which a minimum of 120 hours annually must be “*en premiere*”¹⁶⁰⁶. They must invest an important percentage of their turnover in the product of European cinema¹⁶⁰⁷ and European/original French audiovisual works¹⁶⁰⁸.

An interesting aspect of the cultural exception extension to real, practical application appears in the case where a French movie, though significantly French in content, is produced by an American company. Such was the situation with *Un Long Dimanche de Fiançailles/ A Very Long Engagement*¹⁶⁰⁹. The movie was produced by 2003 Productions, a French company owned by Warner France and by its French employees¹⁶¹⁰. The Conseil de la Concurrence granted the movies subsidies, based on an agreement that the company will produce only French movies¹⁶¹¹. However, according to Decree no. 99-130 of February 24, 1999 relating to financial support to the movie industry¹⁶¹², Conseil de la Concurrence’ approval and public subsidies may be granted

¹⁶⁰⁵ Loi Leotard, consolidated version, art. 27. See, art. 28 (2bis) on specific percentages aimed at promoting French songs on radio.

¹⁶⁰⁶ See, art. 9 of Décret n° 2009-796 du 23 juin 2009 fixant le cahier des charges de la société nationale de programme France Télévisions, version in force as of 22th of June 2010. Available at : <http://www.csa.fr/upload/dossier/cahier%20des%20charges.pdf>

¹⁶⁰⁷ At least 3, 4 % in 2009 and 3, 5 % starting with 2010. See, art. 9 of Décret n° 2009-796, supra.

¹⁶⁰⁸ At least 8, 5 % in 2009, 19 % in 2010, 19, 5 % in 2011 and 20 % starting with 2012. See, art. 9 of Décret n° 2009-796, supra.

¹⁶⁰⁹ Jonathan Buchsbaum, “The Exception Culturelle Is Dead.” Long Live Cultural Diversity: French Cinema and the New Resistance,” Framework: The Journal of Cinema and Media, Volume 47, Number 1, Spring 2006, pp. 5-21 (Article). Published by Wayne State University Press, at p. 16, available on: Project Muse.

¹⁶¹⁰ Julie Massaloux, “Defining “Control” of Motion Picture and Television Companies under French Law, Case Comment, Entertainment Law Review, 2005, Ent. L.R. 2005, 16(4), 94-95).

¹⁶¹¹ J. Massaloux, ibidem.

¹⁶¹² See, art. 7 of Décret n°99-130 du 24 février 1999 relatif au soutien financier de l'industrie cinématographique. Version consolidated in 4 October 2008, available on legifrance.gouv.fr.

only to production companies controlled by European Union persons¹⁶¹³. While deciding that Warner France had control over the company, the Paris Administrative Court's decision pointed out that French subsidies do not necessarily lead to the creation of more French content¹⁶¹⁴. In spite of its controversies however, the Conseil d'Etat¹⁶¹⁵ made it clear¹⁶¹⁶ that the French preference for French audiovisual works is not discriminatory¹⁶¹⁷. The French cultural exception is still in force¹⁶¹⁸.

The Italian cultural exception¹⁶¹⁹ is established by the Law no. 122 of 1998¹⁶²⁰, continued by the Law no. 112 of 2004, as well as by its similarly worded follower, the Law of 2005.¹⁶²¹ The Italian cultural exception finds its basis in the constitutional fiction

¹⁶¹³ Art.L.233-3 of the French Commercial Code provides that a company will be deemed to control another if it "directly or indirectly holds a fraction of capital conferring on it a majority of the voting rights in that company". A company will also be deemed to control another if, "de facto, it determines that other company's decision-making process". Two or more persons or companies may be deemed to act in concert and to exercise joint control over a company if they in fact determine decisions made at shareholders meetings. Control is presumed under Art.L.233-3 if a company directly or indirectly holds more than 40 per cent of the voting rights and no other single shareholder holds a bigger interest. See, the French Commercial Code, on legifrance.gouv.fr website.

¹⁶¹⁴ J. Massaloux, *ibidem*.

¹⁶¹⁵ As the French court of final administrative instance, the Conseil d'Etat judges on the legality of administrative acts of the regulatory agencies, as well as on the decisions rendered by the inferior administrative courts. The Conseil d'Etat has competence in administrative and legislative matters (Article L112-1 and Article L112-2 of the French Code of Administrative Justice) or after referral by ordinary administrative courts on "serious" matters (L113-1). Article L553-1, Code de Justice Administrative. See, Loi n° 2000-597 of 30 June 2000 art. 1 and 13 Journal Officiel of 1st July 2000 in force from 1st January 2001 and Loi n° 2004-669 of 9 July 2004 art. 82 Journal Officiel of 10 July 2004. Furthermore it decides the "recours en cassation" referred by interested parties (article L111-1 of the Administrative Code).

¹⁶¹⁶ Ordonnance du Président de la Section du Contentieux, Conseil d'Etat statuant au contentieux, N° 97234, Publié au Recueil Lebon. Available at: <http://www.easydroit.fr/jurisprudence/Conseil-d-Etat-Ordonnance-du-President-de-la-Section-du-Contentieux-du-21-juin-1988-97234-publi/J29722/>

¹⁶¹⁷ Reference made in Ordonnance N° 97234, *supra*, to article 7 of the European Treaty of Rome.

¹⁶¹⁸ See, Katsirea, *ibidem*, at p. 310, on how the European Commission admitted deficiencies in monitoring the enforcement of the European quotas (in European Commission, Issues Paper for the Liverpool Audiovisual Conference. Cultural Diversity and the Promotion of European and Independent Audiovisual Production, July, 2005).

¹⁶¹⁹ At least 20 minutes weekly dedicated to the promotion and advertising of Italian and European Union audiovisual programs. See, Article 14 on promotion of audiovisual programs, AGCOM, Resolution no. 127/00/CONS. Approval of the regulation for satellite television broadcasting. Official Journal of the Italian Republic no. 86 of 12/04/2000.

¹⁶²⁰ Law 122/1998 (See http://www.AGCOM.it/provv/D9_99.htm for the text in Italian) adopts TWF.

¹⁶²¹ Article 14 of the Law of 112 of 2004 provides for a certain amount of time to be dedicated to both the Italian and the European audiovisual programs. See, also, Law of 2005, article 6, art. 44 (3) 10% of the private and 20 of the public national television companies' broadcasting time is to be dedicated to

of the “controlimiti.”¹⁶²² The Italian Constitutional Court invented this concept to protect the essential nucleus of the fundamental rights and of the “supreme principles” of the Constitution. However, it has been argued¹⁶²³ that, given the economic necessities of the Italian broadcasting industry, this doctrine should be abandoned.

The cultural exception proved however of little help to the European media industry. For instance, the American movies make an important part of the European cinema market,¹⁶²⁴ although the French movies are the runners up to the European box office¹⁶²⁵ and they are the most in numbers at European level¹⁶²⁶. In light of its inefficiency, its future should have been doubtful. However, the European Community’s Member States are keen on preserving this provision. Perhaps in the long run a more thorough implementation of this provision and monitoring of compliance with it will increase the available European content. Whether the audience will make the switch, remains to be seen.

independent producers’ works. 40% of the profit of all the television companies is to go annually towards the acquisition and production of European works, including films, among which works at least 10% for independent producers. Part of the contract of service for the public service broadcaster will be the obligation to dedicate at least 15% of its annual profit to the production of European works, including independent ones and works dedicated to children. See, also, article 11 and art. 14 of Law 112 of 2004. See, also, Resolution no. 127/00/CONS, *supra*.

¹⁶²² Corte Costituzionale, sentenze n. 183/1973; n. 170/1984; n. 223/1989, in G. Boggetti, at p. 26 - p. 29.

¹⁶²³ See, Boggetti, at p. 26 - 29.

¹⁶²⁴ See, IMCA Pour la DG EAC, Unité C1 Etude n° DG EAC/34/01 Identification et évaluation des flux économiques et financiers du cinéma en Europe et comparaison avec le modèle américain, 2002, available online at: http://ec.europa.eu/avpolicy/docs/library/studies/finalised/film_rating/finalrep_fr.pdf (IMCA Study), at p. 81.

¹⁶²⁵ See, IMCA Study, at p. 44.

¹⁶²⁶ See, IMCA Study, at p. 45.

III. 4. 2. National competition law and pluralism

III. 4. 2. 1. The Agency

In the national jurisdictions discussed here the competition law agencies decide on the approval of media mergers. I first introduce the reader to their competence and to the manner in which they cooperate with the regulatory agencies in this field.

In a pertinent observation, Philie Marcangelo Leos argues: “the criterion of evaluating concentration in the French law resides in any competition infringement, which criterion does not necessarily coincide with the exigency of pluralism.”¹⁶²⁷ No matter how much truth his affirmation carries, the French legislator still entrusted the Conseil de la Concurrence (CC¹⁶²⁸), now the Autorité de la Concurrence (AC) with the competence in reviewing mergers in the audiovisual sector.

Any economic concentration¹⁶²⁹ is submitted to the *a priori* control of the AC¹⁶³⁰. In matters related to the audiovisual sector the AC must require the avis of the Conseil Supérieur de l’Audiovisuel¹⁶³¹. Given the specificity of the requirements for broadcasting companies, the Conseil de l’Audiovisuel decides on the quotas for the French or European audiovisual works, and leaves the purely market competition concerns for the AC. The Conseil de l’Audiovisuel does not contribute in the process of merger review more than providing information, especially on the compliance with quotas

¹⁶²⁷ See, P. Marcangelo-Leos, *ibidem*, at p.329.

¹⁶²⁸ Since the decisions analyzed herein were taken by the former CC, this denomination shall be used when discussing the concrete cases.

¹⁶²⁹ The procedure of control of economic concentration is relatively recent in France, established by Loi no. 77 of 19 July 1977, which was replaced by Ordinance no. 86 – 1243 of 1st of December 1986 related to the freedom of prices and competition. Now the Code de Commerce is the new legal framework applicable, in its version last modified on the 17th of June 2010.

¹⁶³⁰ Art. 96 of Loi no 2008-776 du 4 août 2008 de modernisation de l’économie modified L.430-3. Art. 95 of the same Loi replaced the Conseil de la Concurrence with the Autorité de la Concurrence. See, also, art. L. 461-1 of the Code de Commerce. Articles L.420-1, L.420-2 and L. 420-5 of the Code de Commerce prohibit the anti-competitive practices.

¹⁶³¹ Article 41-4 of the Loi Leotard.

requirements¹⁶³². Nor does the AC consider the constitutional imperative for broadcasting pluralism when assessing the impact on the market.¹⁶³³

Competition law in Germany is a matter of federal law¹⁶³⁴, while broadcasting regulation is a matter of Lander competence¹⁶³⁵. The German competition law might benefit from a single competition law act – cutting down the two acts that now deal with competition¹⁶³⁶ and thus ensuring legal preciseness and coherence. It is further to be noted that media diversity appears nowhere as an antitrust concern. On its website the Federal Cartel Office (FCO), the German competition authority (*Bundeskartellamt*) simply states that it is not its responsibility to protect non-economic goals that might be incidentally fostered by competition¹⁶³⁷.

In Italy, Law No. 287 of 1990¹⁶³⁸ is the main statutory source of competition law¹⁶³⁹. Article 20 of this Law extends the applicability of the general competition law to

¹⁶³² Article 41-4 of the Loi Leotard.

¹⁶³³ For the purposes of my paper, I chose to give the details of the mergers review in a single decision. However, my conclusion is based also on the analysis of other decisions of the Competition Council in the broadcasting sector. See, Avis no. 06-A-13 du 13 juillet 2006 relatif à l'acquisition des sociétés TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus, www.autoritedelaconcurrence.fr/pdf/avis/06a13.pdf; Avis no. 06-A-02 du 24 février 2006 relatif à l'acquisition de la société Clemval, holding de la société Alsatia, par la société Bertelsmann, via sa filiale Media Communication SAS, http://www.dgcrf.bercy.gouv.fr/boccrf/2006/06_06bis/c2005_105_avis_bertelsmann_alsatia.pdf; Decision 03-MC-03 du 1^{er} décembre 2003 relative à une demande de mesures conservatoires présentée par la société Towercast à l'encontre de pratiques mises en œuvre par la société TéléDiffusion de France (TDF), available at: <http://www.arcep.fr/fileadmin/reprise/textes/juris/03-mc-03.pdf>.

¹⁶³⁴ See, article 74, paragraph 11 of the Basic Law.

¹⁶³⁵ See, article 70 and article 30 (on Kulturhoheit) of the Basic Law.

¹⁶³⁶ Cartel law and merger control are governed by the German Act Against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB). See, sections 19 (1) and 20 GWB, in, Wolfgang Schulz, Thorsten Held and Arne Laudien, "Search Engines as Gatekeepers of Public Communication: Analysis of the German Framework Applicable to Internet Search Engines Including Media Law and Anti-trust Law," 6 German Law Journal No. 10 (1 October 2005). The Federal Unfair Competition statute (*Gesetz gegen unlauteren Wettbewerb*, UWG) prohibits unfair practices. See, sections 1 and 3 of *Gesetz gegen den unlauteren Wettbewerb* vom 3. Juli 2004 (BGBl. I 2004 32/1414), available in English at: <http://www.iuscomp.org/gla/literature/heidenreich.htm>.

¹⁶³⁷ From the booklet on Bundeskartellamt, March, 2009, available on its official website, at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/0905_Infobroschuere_e_web.pdf.

¹⁶³⁸ See, Italian Law no. 287 of October 10th, 1990. Competition and Fair Trading Act, available in English at: <http://www.agcm.it/eng/E1.htm>. See, Sections 2, 3, 4, 5, 7, 8 20 of this Law.

the television sector¹⁶⁴⁰. *Autorita Garante della Concorrenza e del Mercato*¹⁶⁴¹ is the competition law authority. The regulatory agency that we discussed above has an advisory role in mergers decisions that come in front of the competition law authority¹⁶⁴². However, the competence of the general competition law authority in the field of media mergers' approval seems to be reduced by the AGCOM's competence in the field¹⁶⁴³.

In Romania, competition on the electronic media market falls under the jurisdiction of the Competition Council¹⁶⁴⁴. The Romanian legislator transplanted the European Union's legislation, with minor amendments that mainly resulted from improper translation of the English language.¹⁶⁴⁵ The EC Merger Regulation is

¹⁶³⁹ See, in Bognetti, *ibidem*, at p. 97 et seq. Article 2 prohibits the practices restricting competition, article 3 prohibits the abuse of a dominant position and article 6 prohibits anticompetitive mergers. The Law contains both examples of prohibited practices, such as in article 2 and article 3, as well as criteria to assess prohibited behavior, such as in article 6. The definition of concentration in the Italian law does not differ from other jurisdictions already analyzed, therefore concentration refers mainly reorganization in commercial sense.

¹⁶⁴⁰ See articles 2, 3 and 6 of the Italian Law no. 287 of 1990, *supra*.

¹⁶⁴¹ See, <http://www.agcm.it/eng/index.htm>.

¹⁶⁴² Giorgio Alù, Giovanni M Pallone, "Italy: Merger Control," *The European Antitrust Review* 2010, <http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/766/italy-merger-control/>.

¹⁶⁴³ See, Italian Law no. 249 of 31 July 1997, the articles on "divieto di posizioni dominanti," which require the parties to a merger to notify AGCOM, and which allow AGCOM to demand the parties to alleviate (including by divesting some of their business) within a certain period of time (not more than 12 months) the effects of the media merger that would endanger media diversity.

¹⁶⁴⁴ The Romanian Law 21/ 1996 on Competition, Official Gazette 88, 30 April 1996 (hereinafter the "Romanian Competition Law"). The Council's members are appointed by the Romanian president pursuant to the Government's proposal, for five years with the possibility of reappointment not more than once. The Competition Law expressly states incompatibilities with other positions that may impede the competition inspectors in performing their mission. The decisions taken by the Council are subject to review by the Bucharest Court of Appeal. See, art. 48 of the Competition Law.

¹⁶⁴⁵ See, art. 5 and art. 6 of the Romanian Competition Law, which correspond to art. 81 and art. 82 of the EC Treaty on antitrust matters (i.e., anticompetitive practices and abuse of dominant position, respectively). See, Romanian Regulation for the application of the provisions of art. 5 and 6 of the Competition Law no. 21/1996 regarding anticompetitive practice, in English unofficial translation. See, also, Regulation for the application of articles 5 and 6 of the Competition Law no. 21/1996 regarding anticompetitive practice, in cases of complaints. See, also, Instructions regarding the application of art. 5 of the Competition Law no. 21/1996 as further amended and completed to the horizontal cooperation agreements, published in the Romanian Official Gazette no. 437 of 17 May 2004; Instructions of 4 May 2005 on the application of art. 5 para. 2 of the Competition Law no. 21/1996 published in the Romanian Official Gazette no. 598 of 11 July 2005. See, also, art. 6 of the EC Regulation no. 1/2003 according to which the national instances are competent to directly apply art. 81 and 82 of the EC Treaty. See, further, art. 15 of the same Regulation which sets forth the possibility for the national bodies to cooperate with the European Commission in the application of art. 81 and 82 of the EC Treaty.

transposed into a Regulation concerning the authorization of economic concentrations¹⁶⁴⁶.

According to this Regulation as well as to the Competition Law, the Competition Council is competent to decide upon any concentration notified¹⁶⁴⁷ that does not have European dimension according to EC Merger Regulation thresholds¹⁶⁴⁸.

III. 4. 2. 2. The competition law review and media pluralism

Though the competition law authority's decisions in the broadcasting sector¹⁶⁴⁹ include generally purely economic concerns,¹⁶⁵⁰ the competitive assessment is performed on extremely divided markets, which might lead to the conclusion that it does decide within a "pluralism" framework. This pluralism is understood as multitude of operators on multitude of markets and the competition review is performed at a micro level. In the following lines I point out to the different markets that the competition authority finds through its fine evaluation of various links at the horizontal and vertical level as well as through its multifold understanding of media content. I briefly describe the review process and provide examples when it efficiently recognizes the potential anticompetitive

¹⁶⁴⁶ See, Regulation regarding the authorization of economic concentrations, published in the Romanian Official Gazette, no. 280 of 31 March 2004. See, also, Regulation of 3 June 2004 for amending the Annex to the Regulation regarding the authorization of economic concentrations, published in the Romanian Official Gazette, no. 601 of 5 July 2004. Please note that not all the Romanian competition related legislation is translated into English and that sometimes the translated legislation includes minor errors of translation into English of legal terms.

¹⁶⁴⁷ See, art. 15 of the Romanian Competition Law.

¹⁶⁴⁸ See, also, the "National bodies competences in the field of competition after the Romanian accession to the EU," on the Romanian Competition Council's official website. The EU competition rules for supply and distribution agreements are reflected in the guidelines for vertical agreements. See, for a succinct presentation of these rules, the booklet prepared by the European Commission, "Competition policy in Europe. The competition rules for supply and distribution agreements," available on the European Commission's official website. State aid in Romania was previously regulated by Law no. 143 of 27 July 1999 on state aid, republished in the Romanian Official Gazette, no. 744 of 16 August 2005.

¹⁶⁴⁹ See, for example, Romanian Competition Council's decisions: Decision no. 205 of 01.07.2004, no. 77 of 25.04.2005, no. 71 of 18.04.2005 or no. 48 of 21.03.2005.

¹⁶⁵⁰ Note however that purely economic concerns though might help media pluralism, do not necessarily guarantee it and might even endanger it. See, Bertrand Mathieu and Michel Verpeaux, "Contentieux constitutionnel des droits fondamentaux," ("Constitutional Adjudication of Fundamental Rights"), Paris: Librairie Générale de droit et de Jurisprudence, 2002, at p. 558.

impact that exclusive broadcast rights agreements or mergers may have on the media market.

As to the product market definition, the competition law authorities narrow it down according to several (and diverse) types of content and means of transmission. The French Competition Council identifies the upstream and downstream markets first. It secondly distinguishes within these two markets subsequent ones, such as: the market for audio-visual production¹⁶⁵¹, edition¹⁶⁵², distribution of Pay TV¹⁶⁵³ and diffusion/distribution¹⁶⁵⁴. The upstream market includes acquisition of cinematographical rights, sports rights and rights to other audio-visual content¹⁶⁵⁵. The cinematographic rights are distinguished according to the type of diffusion and according to the nature of the films¹⁶⁵⁶. The rights to sports are distinguished at their turn based on the type of diffusion and on their nature, with a special category for rights to football events¹⁶⁵⁷. The Competition Council distinguishes also the intermediary markets.¹⁶⁵⁸ Part of the intermediary markets is the distribution¹⁶⁵⁹, furthermore distinguished based on the manner of transmission¹⁶⁶⁰.

Other criteria for market definition are based on the type of content: the theme of the channels – generic or specific,¹⁶⁶¹ the market for premium channels¹⁶⁶², the market for

¹⁶⁵¹ Avis n° 06-A-13 of 13 July 2006, *supra*, para. 43.

¹⁶⁵² Avis n° 06-A-13, para. 45.

¹⁶⁵³ Avis n° 06-A-13, para. 47.

¹⁶⁵⁴ Avis n° 06-A-13, para. 48.

¹⁶⁵⁵ Avis n° 06-A-13, para. 68.

¹⁶⁵⁶ Avis n° 06-A-13, para. 69.

¹⁶⁵⁷ Avis n° 06-A-13, para. 81.

¹⁶⁵⁸ See, para. 99, Avis n° 06-A-13.

¹⁶⁵⁹ See, para. 103, Avis n° 06-A-13.

¹⁶⁶⁰ See, para. 109, Avis n° 06-A-13.

¹⁶⁶¹ See, para. 117, Avis n° 06-A-13.

¹⁶⁶² See, para. 125 of Avis n° 06-A-13, referring to decisions of European Commission Comp/M.2876 of 2 April 2003, *Newscorp/Telepiù*; n° Comp/JV.37 of 21 March 2000, *BskyB / Kirch Pay TV*, n°

channels dealing with cinema, sports, youth and information,¹⁶⁶³ and the market for other types of content¹⁶⁶⁴. The American films, as well as the French films of recent success, the so-called blockbusters are part of different markets,¹⁶⁶⁵ whereas the “catalogue” films make up at their turn a separate category¹⁶⁶⁶.

Other markets are distinguished based on the type of service provided by the company, and consequently they are packages and channels sold *en detail*¹⁶⁶⁷, interactive television¹⁶⁶⁸, and, even mobile television¹⁶⁶⁹. The market for pay TV is differentiated from the free TV market¹⁶⁷⁰. Furthermore, the French Competition Council recognized a market for pay TV on demand¹⁶⁷¹. The geographical market is limited to the national territory¹⁶⁷².

When evaluating the impact on the market¹⁶⁷³, the Competition Council looks into both the actual and the potential competition on the market, barriers to entry and potential for foreclosure resulting from discriminatory agreements among broadcasting companies,

Comp/M.2050 of 13 October 2000, Vivendi/Canal + / Seagram, n° Comp/M.3595 of 30 March 2005, Sony/MGM).

¹⁶⁶³ See, para. 136, Avis n° 06-A-13.

¹⁶⁶⁴ See, para. 142, Avis n° 06-A-13.

¹⁶⁶⁵ See, para. 252 and para. 281, Avis n° 06-A-13.

¹⁶⁶⁶ See, para. 313, Avis n° 06-A-13.

¹⁶⁶⁷ See, para. 194 and 195, Avis n° 06-A-13.

¹⁶⁶⁸ See, para.196 and 197, Avis n° 06-A-13, citing decision of European Commission Comp/JV.48, Vivendi/Vodafone/Canal + of 20/7/2000.

¹⁶⁶⁹ Avis n° 06-A-13. The decision observes that the European jurisprudence does not recognize this market. See, para. 202. In para. 203 and 204 a market for mobile television would be distinguished. Furthermore, the character of mobile television is particularly personal, and not collective as it is the case with fix television. The Conseil de la Concurrence admitted the existence of such a market. See, para. 205 and 206, Avis n° 06-A-13.

¹⁶⁷⁰ See, para. 171, 172, 181 and 186, Avis n° 06-A-13 du 13.

¹⁶⁷¹ See, para. 144 and 145, Avis n° 06-A-13 du 13. This type of programming has as distinguishing factors the interactivity and the potential offered to the consumer to play an active role in the choice of channels to watch, as well as the specific mode of distribution, separately from the ordinary television package. See, para. 146, Avis n° 06-A-13.

¹⁶⁷² Based on linguistic, cultural, and regulatory regime factors. See, para. 67, Avis n° 06-A-13.

¹⁶⁷³ *Le billan concurrentiel*.

on the horizontal and vertical markets¹⁶⁷⁴. In case the beneficial effects of the concentration outweigh the potential negative impact, the operation is saved¹⁶⁷⁵. This was not however the case in the majority of the Competition Council's decisions,¹⁶⁷⁶ where the Competition Council did not save the mergers on benefit for consumers grounds, however it approved the mergers on the condition that certain commitments be made¹⁶⁷⁷.

I showed above how the French competition authority's review of media mergers helps the protection of media diversity by first narrowly defining the relevant market, then assessing the level of competition on this market, with particular regard to access to premium content. Even if the French competition authority is "guilty" of the same practice employed by the FCC in the United States – resort to commitments to alleviate anticompetitive concerns – the French competition law authority still plays its part in the protection of media pluralism. This role is threefold.

First, the product market definition offers an array of different types of content that each form a different product market – recognizing thus the variety of content types and formats as well as the degree of their attractiveness to the public. Second, the narrower the product market where the anticompetitive effects are assessed, the less likely for concentration to occur. This has been observed in the other European jurisdictions discussed here. Third, invalidating exclusive agreements that have as object

¹⁶⁷⁴ See, para. 308 and 309, Avis n° 06-A-13. The Conseil appreciated that the concentration will lead to the imposition of the vision in programming of a single entity on the market and to a diminishing diversity in television offer. Ibidem. See, para. 29, Avis n° 06-A-13, noting leveraging effects. See, also, para. 430, 433 Avis n° 06-A-13. Note that priority and exclusivity clauses in broadcasting rights assignments also involve anticompetitive issues. See, Yann Utzschneider, "France: Abuse of a Dominant Position – Pay Television – Exclusive Rights to French Films – Abuse of Dominant Position," *European Competition Law Review*, 2000, Case Comment, E.C.L.R. 2000, 21(10), N119-120.

¹⁶⁷⁵ See, para. 568 referring to article L. 430-6 of the Code de Commerce, mentioning the international competition that the new entity might face and the creation or the maintenance of employment.

¹⁶⁷⁶ See, para. 588. Avis n° 06-A-13.

¹⁶⁷⁷ "*Les remèdes nécessaires*," Avis n° 06-A-13. These commitments refer in general to access to rights for movies, sports events and other contents on a non-discriminatory basis.

premium content ensures that more audience will have access to this type of content. This is an aspect that the European Court of First Instance considered in the Endemol case¹⁶⁷⁸.

The next jurisdiction that I discuss is Germany. Even if the German competition authority shares with its French counterpart the same lack of interest for exogenous considerations, it still protects media diversity by denying (or approving with commitments) media mergers in certain cases. The merger of Axel Springer and ProSiebenSat 1¹⁶⁷⁹ “would have strengthened Springer’s dominant position in the over the counter newspapers market¹⁶⁸⁰.” The Federal Cartel Office (FCO) noted that the merger involved ProSiebenSat 1 Group, which owned 45% of the TV advertising market and Axel Springer that owned 50% of the newspapers market, including *Build-Zeitung*¹⁶⁸¹. It is worth pointing out here that these caps should not be confused with the national caps in the German Interstate Broadcasting Agreement¹⁶⁸². The German Interstate Broadcasting Agreement does not contain restrictions on the percentage of shares a company may own on the advertising market. And, the German FCO addressed the effects on the market of this merger within the competition law framework.

However, this case may offer some insight into the role that antitrust may play in media diversity protection. First, this merger is interesting for the purposes of my paper because it discusses the potentially anticompetitive consequences of vertical integration. Second, this merger brings into discussion the relationship between the advertising market and the market for content dedicated to the audience. Although I did not have

¹⁶⁷⁸ See, above.

¹⁶⁷⁹ O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁸⁰ See, http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_11_21.php. See, also, Article 36 GWB.

¹⁶⁸¹ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁸² Art. 26, para. 2 of the German Interstate Broadcasting Agreement.

access to the version of the merger in the German language, the scholarly article that discusses this merger¹⁶⁸³ offered me the opportunity to gain more insight into the extent to which both of these aspects may have an impact on media diversity.

From a pure competition law perspective, in the case of companies with free TV holdings, such as ProSiebenSat 1 above, the relevant product market is not the audience market, but the advertising market, since the only direct relationship is created between advertisers and media companies.¹⁶⁸⁴ The merger would have nevertheless contributed to the synergetic action of the newly formed entity on the two markets identified by the Cartel Office as interdependent: content and advertising¹⁶⁸⁵.

Some authors (in the article mentioned above¹⁶⁸⁶) have criticized the FCO's decision of negative clearance. They addressed the Cartel Office's evaluation of the competition on the market and they concluded that there was competition on the television advertising markets¹⁶⁸⁷. Further, according to these authors, the Office was wrong in appreciating the existence of high barriers to entry on this market, in light of the increase in the availability of digital technologies and in light of the potential for trans national media companies that own the financial resources necessary for acquiring broadcasting rights for attractive content to enter the German market.

The authors point out that, considering the approach of the European Commission's and the United States' antitrust agencies' merger control, according to which "the net effect of a merger in consumer welfare represents the adequate criterion to

¹⁶⁸³ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁸⁴ See, on these, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁸⁵ See, on these, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁸⁶ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁸⁷ See, O. Budzinski, K. Wacker, *ibidem*.

distinguish between anti and pro competitive mergers,¹⁶⁸⁸ this type of cross mergers¹⁶⁸⁹, unless occurring in neighboring markets with similar products, do not pose anticompetitive concerns¹⁶⁹⁰. However, “conglomerate mergers” are less likely to raise competition concerns only in already strong competitive markets¹⁶⁹¹.

In criticizing the merger decision the above authors argue that the two media companies were not involved in symmetrical operations so they could not have enough incentive to coordinate their behavior on the market. In this sense they point out that the Office’s argument that Build-Zeitung’s very large national readership reach may lead to advertisers considering advertising in this newspaper as a substitute for advertising on television contradicts the findings of the same Office regarding the symmetrical nature of the two media companies’ operations, since P7S1 Group did not own a newspaper of Build Zeitung’s reach¹⁶⁹².

However, I consider that, if advertising in Build and advertising on TV are substitutes, then the merger does create the incentive for the merger’s parties to coordinate their advertising prices. Further, both P7S1 and Springer may engage in cross-media advertising¹⁶⁹³. Even more, they could have engaged in cross-promotion of their content. It is arguable also that the large shares that both P7S1 Group and Springer had on the markets for television and, respectively newspapers advertising, would qualify these markets as strong. Even though, as pointed out by these authors¹⁶⁹⁴, the reaction of

¹⁶⁸⁸ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁸⁹ Also referred to as conglomerate mergers. See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁹⁰ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁹¹ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁹² See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁹³ Although the authors doubt that readers would switch to reading Build only after watching its advertising on TV. See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁹⁴ See, O. Budzinski, K. Wacker, *ibidem*.

other competitors on the market to this merger (if it had been approved) is uncertain¹⁶⁹⁵, perhaps more analysis by the Federal Office would have provided more insight into its effects on the competition on this market¹⁶⁹⁶. I nevertheless consider that the negative clearance of this merger is a positive step in protecting media diversity.

We now turn to Romania. In a country in which the literature and jurisprudence on media concentration is not very developed, the Competition Council's decisions are quite a few. The Council was called more than once to decide on the concentration in the media sector, having allowed up to now electronic media concentrations if the concentration, although incompatible with market competition brings forth certain benefits and if the parties agree to certain commitments¹⁶⁹⁷. In the field of Romanian competition law, I briefly discuss four aspects significant to media diversity protection: market definition, cross media ownership and related mandatory access as well as concrete mergers' review.

As has been observed in other European jurisdictions discussed here, a technologically neutral market definition is desirable in order to keep pace with progress in the field. However, by defining the market in neutral terms, the fact that some transmission mediums – for instance television – are not seen by the consumers as interchangeable, should be taken into account. As a consequence, more media diversity is accomplished by narrow product market definitions. Technologically neutral product markets imply a competition assessment on a larger scale, which is not necessarily beneficial to media diversity.

¹⁶⁹⁵ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁹⁶ See, O. Budzinski, K. Wacker, *ibidem*.

¹⁶⁹⁷ See, in this sense, Art. 5 para. 2 of the Romanian Competition Law exempting the application of art. 5 para 1 of the Competition Law.

Thus, one of the most important tools of antitrust analysis that contributes, albeit indirectly, to the protection of the media diversity, is the definition of the relevant media market. Generally, at a macro level, the electronic communications market includes services of retransmission of TV programming through cable and access to the Internet.¹⁶⁹⁸ The relevant market is defined by applying the criterion of the substitutability of a product from the consumer's perspective¹⁶⁹⁹. The product market is determined by looking into consumers' behavioral patterns.

In terms of products substitutability on the market, it is worth pointing out, especially in regard to the impact that technological progress and convergence has on the increase of available media outlets and thus on the media diversity, that from the consumers' point of view, the most important source of the media product - the political news - is still the television.¹⁷⁰⁰ Until recently in Romania, the most-watched television channel was the public service broadcaster TVR1, which covers most of the Romanian territory.¹⁷⁰¹ However, in 2008 the channel that led the ratings was Pro TV¹⁷⁰². The availability of media content in the Romanian market is relatively scarce in remote regions in the country.¹⁷⁰³ Further, in terms of Internet/traditional media substitutability, the Internet usage is relatively low¹⁷⁰⁴.

¹⁶⁹⁸ See, para. 8 of the Romanian Competition Council's Decision no. 48 of 21 March 2005.

¹⁶⁹⁹ See, the Romanian Competition Council's "Guidelines of 26/03/2004 on the definition of the relevant market for the purposes of establishing a substantial part of the market," published in the Official Gazette Part I, no. 288 of 01/04/2004 ("Instrucțiuni din 26/03/2004 cu privire la definirea pieței relevante, în scopul stabilirii părții substanțiale de piață" Publicat în Monitorul Oficial, Partea I nr. 288 din 01/04/2004), point 1 letter a) for the definition of the product market and point 1 letter b) for the definition of the geographical market. Ibidem.

¹⁷⁰⁰ "Mass media influence on the civic and electoral behavior. Electoral behavior," April 2004, CURS (CURS Study), at p. 49, available in Romanian on National Audiovisual Council's website.

¹⁷⁰¹ Ibidem.

¹⁷⁰² See, EUMAP Report, at p. 23.

¹⁷⁰³ Almost 80 percent of the population has access to television. However, only half of the households with a TV set has access to cable. Due to this situation, the public television reaches 99 percent of the population, whereas the private television from 50 to 78 percent. CURS Study, at p. 49. However, with the

The Romanian Competition Council underlines that due to technological convergence, a specific and abstract relevant market definition may become obsolete. For instance, while considering in one case that the relevant market was the retransmission of cable TV, the Competition Council anticipated in the same time a broader definition of this relevant market as encompassing retransmission of TV programming, regardless of technology¹⁷⁰⁵. In reference to the future technological development, the Competition Council points to the development of new TV packages that shall include other channels than the ones that the Romanian Audiovisual Council considered as “must carry” or that the operators define as basic and that this will in turn allow consumers to choose among various packages depending on their possibilities¹⁷⁰⁶. These are some aspects that might lead to the conclusion that the Competition Council envisions the relevant market redefined in technologically neutral terms¹⁷⁰⁷.

The clearance decisions mentioned above were based on pure economic grounds:

i) either no dominant position was found¹⁷⁰⁸, ii) the concentration did not meet the

increase in cable penetration, the situation changes because private channels now reach rural areas at an increasing rate. See, EUMAP Report, at p. 23.

¹⁷⁰⁴ 14% of the people older than 14 years have Internet access, from which only half are heavy users. See, Oana Vasilescu, “Media in Romania,” in Silvia Huber, “Media Markets in Central and Eastern Europe,” LIT Verlag, 2006, at p. 115.

¹⁷⁰⁵ Consiliul Concurenței, “Decizia nr. 48 din 21.03.2005 referitoare la autorizarea concentrării economice realizate de către SC ASTRAL TELECOM SA prin preluarea controlului asupra SC Cable Vision of Romania SA” (Romanian Competition Council, “Decision no. 48 of 21.03.2005 on the authorization of the economic concentration realized by SC Astral Telecom SA through the acquisition of control over SC Cable Vision of Romania SA”). Astral Telecom bought shares in Cable Vision from Romtelecom. Generally, Astral has holdings in companies involved in Internet, radio and television. As Cable Vision operates only on the market for the retransmission of cable TV, the competition assessment was made only on this relevant market – see, *ibidem*, at para. 8-9 (see also, the Decision of the General Session of the Romanian Competition Council, no. 135 of 1998).

¹⁷⁰⁶ See, for instance, Romanian Competition Council, Decision no. 48 of 21 March 2005, *infra*.

¹⁷⁰⁷ See, also, Romanian Competition Council, Decision no. 135 of 21 December 1998.

¹⁷⁰⁸ The Romanian Competition Council assessed under art. 5, para. 1, let. c and art. 6 let. a, of the Competition Law a concentration of various companies holding a monopoly position on local markets in providing TV retransmission through cable. See, Decision no. 237 of 12 December 2006 regarding the sanctioning of UPC Romania, RCS&RDS and Cable Vision of Romania. The Competition Council also imposed a fine that the Romanian *Inalta Curte de Casatie si Justitie* annulled in Decision

Romanian Competition Law's criteria¹⁷⁰⁹, iii) there was a competition on the market vigorous enough to counter any anticompetitive concerns¹⁷¹⁰ and no barriers to entry were found¹⁷¹¹, iv) the companies committed to divest some of their businesses and to pursue technological investment for the benefit of the consumers¹⁷¹² or v) where the

no.1762/26.03.2009. See, at p. 71 of the Romanian Competition Council's 2009 Yearly Report, available in English on the Council's website.

¹⁷⁰⁹ See, Romanian Competition Council, Decision no. 105 of 26 March 2004 regarding the notification of the Public Finances Ministry regarding the guarantee that is to be granted to the Radio-communications National Society; Decision no. 60 of 12 February 2004 regarding the economic concentration realized by Astral Telecom through acquisition of parts of the FX Communications and FX Internet patrimonies; Decision no. 59 of 12 February 2004 regarding the economic concentration realized by Romania Cable Systems through acquisition of parts of the FX Communications and FX Internet patrimonies. The proposed economic concentration did not meet the EUR 4,000,000 threshold (each company's turnover, EUR 10,000,000 combined turnover) implicating a competitive assessment.

¹⁷¹⁰ See, Romanian Competition Council, Decision no. 229 of 22 December 2005 regarding the authorization of the economic concentration operation realized by Pro Video through acquiring unique control over Hollywood Multiplex Operation. Although Pro Video would, following this transaction, hold a dominant position on the Bucharest cinema market, however, the market is characterized by a vigorous competition. See, also, Decision no. 71 of 18 April 2005 regarding the authorization of the economic concentration realized by SBS Broadcasting from Luxembourg through acquiring control over European Radio Investment Limited company from Great Britain. The threat for competition in this case derived from an auxiliary restriction attached to the economic concentration – the noncompetition clause. The relevant market was the radio market of Kiss FM and Star FM. The vigorous competition on the market preempted the existence of a threat to competition.

¹⁷¹¹ See, Romanian Competition Council, Decision no. 77 of 25 April 2005 regarding the complaint of Atlas Telecom Network Romania against Romanian Data Systems and Romania Cable Systems. The case alleged a cross-subsidization – as RCS had a dominant position on the Romanian cable market that allowed the company to cross-subsidize the price of RDS, member of the RCS Group, for its telephony services. The Competition Council underlines that given a dominant position, any cross subsidization is an abuse of dominant position. However, RCS did not hold above 40-50% of the market shares. Further, RCS, though the prime leader on the market and closely followed by Astral, was in fact a leader of a dynamic market, where a clear assessment was difficult to predict, and the entry barriers were nonexistent, at least from a legal point of view. The Competition Council noted in this sense that there were many local operators with a 1% market share. No technological advantage was found in favor of RCS given that coaxial cable and optical fiber were both held by its competitors. RDS strategy of offering free telephony was in response to the need to penetrate the fixed telephone market formerly monopolized by Romtelecom. Decision no. 77 of 25 April 2005.

¹⁷¹² See, Romanian Competition Council, Decision no. 187 of 05 October 2005 regarding the authorization of the economic concentration realized by UGC Europe BV through acquiring control over Astral Telecom. Even though this transaction took place among the three market leaders, however the Competition Council considered it as being compensated by the flexible, dynamic and vigorous competition on the market. Further, UGC (which owns UPC) committed to the following: infrastructure improvement, widespread technology in areas difficult to reach, increase in available TV channels. In this Decision the Competition Council noted that while no regulatory entry barriers existed, the only existing barrier was the high investment requiring for entry into the market. UPC undertook not to correlate its pricing strategy with Astral prices and not to raise prices unless such is the result of normal market mechanism functioning. See, also, Romanian Competition Council, Decision no. 48 of 21 March 2005, where Astral committed to improve access to Internet technology.

geographical markets were overlapping, no overlapping was found as to the product/content markets¹⁷¹³.

Another issue analyzed in the Romanian legal system only from an economic/competition law perspective is the cross-ownership. Cross-ownership between telecommunications and cable networks may highly impact market power and open the path to abuse of dominant position. In this sense, where an operator provides both access and services, the legislation requires revenues' separation¹⁷¹⁴.

Naturally, all the mergers that the Council reviewed were cleared. What I found peculiar about my country's jurisdiction in this field was that the competition authority seemed to be the most active in reviewing media mergers. Unfortunately, because the competition law authority could not do more than apply economic rules, the result was that these mergers went through.

Under the Competition Law¹⁷¹⁵, the Competition Council receives both post merger complaints and may be directly notified about a future operation¹⁷¹⁶. Though relatively recently created, the Romanian Competition Council proved to be a dynamic institution and it issued several decisions related to competition in the electronic media. All the assessments led to clearance and the Competition Council never took into account

¹⁷¹³ See, Romanian Competition Council, Decision no. 221 of 20 November 2006 regarding the economic concentration realized by Realitatea Media through unique control acquisition over Catavencu companies Group. Realitatea Media is controlled by Sorin Vantu and it performs activities in the field of television and radio programming, as well as Internet design for news diffusion. Catavencu Group includes companies involved in radio and printed press. The geographical radio market is the local market. The two companies overlap geographically in two local markets, however even there they do not overlap in terms of content – one radio channel broadcasts only music, while the other broadcasts music, entertainment and news. Decision no. 221/2006.

¹⁷¹⁴ Article 11(1) of the Romanian Government Ordinance no. 34 of 2002 requires separate accounting for activities related to interconnection - covering both interconnection services provided internally and interconnection services provided to others - and other activities.

¹⁷¹⁵ See, article 6, Romanian Competition Law.

¹⁷¹⁶ See, article 5 of the Competition Law and the Regulation for the application of the provisions of art. 5 and 6 of the Competition Law regarding the anticompetitive practices.

the concept of media pluralism in deciding these cases. The manner in which the Competition Council chose to solve these decisions is nevertheless important in assessing whether competition law alone may or may not accomplish the goal of promoting and protecting media pluralism.

As mentioned throughout this paper, the most important antitrust tool that benefits media diversity protection is the product market definition. In addition, the Romanian media landscape may benefit from a more dynamic perspective over the legal protection of media diversity. Issues such as media ownership and media concentration are relatively novel. Slowly, with the development of scholarly work in this field that will help raise civic awareness over this issue, the competition law (as well as the regulatory) authority may construct a jurisprudence that hopefully will take into account the peculiarity of the media product.

The next jurisdiction to be discussed for the potential of its competition law to contribute to the protection of media diversity is Italy. The Italian general competition law¹⁷¹⁷ applies to the television sector¹⁷¹⁸. The European Union's competition norms supplement the Italian competition law¹⁷¹⁹.

I focus here however on the peculiarity of the Italian competition law, which rests in its constitutional origins. This is an aspect of the Italian legal regime that does not appear in the other jurisdictions discussed here, perhaps because of the structure of the Italian Constitution and its emphasis on the social and economic rights and aspects of

¹⁷¹⁷ The relevant provisions of Italian Law no. 287 of 10 October 1990 - the Competition and Fair Trading Act contains both examples of prohibited practices, such as in article 2 and article 3, as well as criteria to assess prohibited behavior, such as in article 6. The definition of concentration in the Italian law does not differ from other jurisdictions already analyzed, therefore concentration refers mainly to reorganization in commercial sense. See, also, Law No. 57 of March 5th, 2001, art. 11.

¹⁷¹⁸ See, Section 20 of the Italian Law no. 287/1990.

¹⁷¹⁹ As discussed in the European Union Chapter in this paper.

life.¹⁷²⁰ A combined reading of these constitutional provisions together with the finding, albeit indirectly, of a constitutional basis for antitrust laws, may strengthen the argument in favor of the competition law's role in protecting a constitutional value such as media pluralism.

The legal doctrine interpreted the Italian Constitution¹⁷²¹ as consecrating the principle of competition against the restrictive practices of the private companies¹⁷²². This “evolutionary¹⁷²³” interpretation permits the insertion into the Constitution of an enunciation in favor of competition/antitrust rules. While competition law alludes to the practicalities of the market in general, in the broadcasting sector it needs to keep account of the “social¹⁷²⁴” nature of the television service and it must therefore suffer a process of adaptation¹⁷²⁵. The particular nature of television recommends it for additional constitutional protection under articles 21 and 33 of the Constitution,¹⁷²⁶ supplementing antitrust law.

Finding a constitutional basis for Italian competition law is not without controversy. The controversy lays in the appropriate understanding of the extent to which the market should be regulated. In this sense too enthusiastic arguments should be dismissed. While the antitrust norms may find an indirect basis in the Italian Constitution, however they might not be “constitutionalized.”¹⁷²⁷ Instead, they should be implemented through legislation and governmental agency's action. Accordingly, one should not go so

¹⁷²⁰ See, for instance, articles 4, 31, 32 and Title III of the Italian Constitution.

¹⁷²¹ See, Bognetti, *ibidem*, at p. 84.

¹⁷²² See, Bognetti, *ibidem*, at p. 84, arguing that the same principles allowing the state to protect the press from state censorship permits the state to protect the press from private interests acting in the same manner and with the same effects as state censorship.

¹⁷²³ See, Bognetti, *ibidem*, at p. 85.

¹⁷²⁴ Bognetti, *ibidem*, p. 88.

¹⁷²⁵ Bognetti, *ibidem*, p. 88.

¹⁷²⁶ *Specilia derogant generalia*.

¹⁷²⁷ Bognetti, *ibidem*, p. 86.

far as to find in article 21 of the Constitution a right to access to the broadcasting forum for all the Italians¹⁷²⁸. This is because, though the Constitution does protect “everyone to freely express thoughts in speech, writing, and by other communication,” the precondition for such a protection is that the people own the means of communication¹⁷²⁹. While competition law might achieve “pluralism of entities,” it is not sure that it does achieve “pluralism of messages¹⁷³⁰.” Sometimes, even the presence of many media companies may lead to uniform messages¹⁷³¹. Even more, another shortcoming of the competition law is that it does not prohibit dominant positions acquired through a company’s natural growth. In the case of broadcasting, competition law should be adjusted to prohibit this cause of dominant position as well¹⁷³².

These arguments of the doctrine are extremely important since they contribute to the statement that the best legal regime that would ensure media pluralism is a system that combines competition law with regulation. Where competition law fails, as it may be the case where despite its best efforts to allow the existence and the activity of a high number of media companies on the market these companies still air programming that is not pluralistic or diverse, the regulatory instruments step in to ensure, mainly through internal pluralism related obligations, that media pluralism is, to a certain extent, protected.

The purpose of the above section was to inquire into the extent to which the application of competition law may help the protection of media diversity. The role that

¹⁷²⁸ This would be the outcome of a literal interpretation of article 21 of the Italian Constitution: “tutti” (all). See, Bognetti, *ibidem*, at p. 90.

¹⁷²⁹ See, Bognetti, *ibidem*, at p. 91.

¹⁷³⁰ See, Bognetti, *ibidem*, at p. 93.

¹⁷³¹ See, Bognetti, *ibidem*, at p. 93.

¹⁷³² See, Bognetti, *ibidem*, at p. 89.

competition law has in the protection of media diversity is limited. Nevertheless, several antitrust instruments are useful. Such is the case with the narrow definition of the media market. The most important market differentiation that both the competition law and the regulatory agencies may make in the process of protecting media diversity is between content and distribution. As mentioned elsewhere in this paper, full realization of media diversity requires the existence of a multitude of both content providers and content distributors. Another consequence that stems from this narrow product market definition is that the competition law authorities in the countries analyzed above offer a plethora of content types, corresponding to these markets. The evaluation of competition and whether a certain merger would increase a media company's market power keeps in check media concentration and contributes to media diversity. Although the competition law is not equipped to consider media diversity, the indirect effect of these competition law reviews is that they do in fact contribute, to a certain, limited of course, extent to the protection of media diversity.

III. 5. Preliminary conclusion on the European Chapter

This chapter analyzed the tools employed by different legal actors in Europe to protect media diversity. It started with the recognition by the European Court of Human Rights that the media diversity is a fundamental right. It continued with the incorporation of this value in the national constitutions of France, Germany and Italy.

Here I showed how all the courts were involved in the legitimating of private broadcasting, the existence of which contributes to media diversity. This is of course in stark contrast with the United States, where considering the initial history of

broadcasting, there was no need for the country's highest court to intervene in this regard. The European constitutional courts also played a role in the maintenance and strengthening of public broadcasting, which contributes to a high extent to media diversity. The strong European public broadcaster contrasts with its United States' counterpart.

The most important aspect that is emphasized in this section on the European constitutional courts' contribution to media pluralism is their influence on broadcasting law, especially the type of law that furthers media diversity. In this sense, all the courts are active in their commitment to this constitutional principle or value. However, while in France and Germany, the legislature has been responsive to constitutional decisions, in Italy, the legislature practically ignores the constitutional commandments. Ultimately, the effects of these decisions on the media market are similar in all the jurisdictions that I covered¹⁷³³, since media concentration increases.

The next section discussed the role that the regulatory agencies and the regulatory norms have in protecting media diversity. This section distinguished between structural norms and content related provisions that enhance media diversity. The public broadcasters are under more content related obligations that they need to abide by in order to comply with their public interest mission. Structural regulations in the form of licensing, must carry and ownership restrictions are designed to tackle the behavior on the market of private broadcasters.

The last section details the role that competition law has in protecting media diversity. The European Commission, European Court of First Instance and the Court of

¹⁷³³ Except for Romania, where the Constitutional Court's involvement in the protection of media diversity is limited. See, *infra*.

Justice of the European Communities, together with the national competition law authorities are all involved in reviewing some aspects of the competition law that might protect media diversity.

The two national agencies that are active in the media law field in the jurisdictions discussed here – competition and administrative/regulatory - complement each other's attributions, while in the same time pursuing common goals. Although the competition law authorities limited themselves to purely economic aspects in their decisions, the competition law plays a role, albeit indirectly, in the protection of media diversity. This role is exemplified by reference to case law.

Constitutional law, competition law and regulation are all legal instruments needed to protect media diversity. This part of my chapter discussed the competition law's role in protecting media pluralism. Considering that the main goal of competition law is to encourage a higher number of companies on the market, with alleged benefits for consumers through lower prices, increased potential for innovation and so on, it may further media pluralism understood in the sense of structural pluralism. To some extent, the anti-concentration rules of broadcasting law and those of competition law complement each other. However, in pursuing different aims – plurality of opinion on the one hand, maintenance of economic competition on the other – they have different starting points.¹⁷³⁴

This thesis' observation is that competition law and regulatory mechanisms are both needed to protect media diversity. Competition law contributes by providing the precise criteria for defining the market and by analyzing the market initially, through economic lenses. Regulation puts forward both content and structural norms. Content

¹⁷³⁴ See, KEK's Second Report, 2003.

related norms provide what the media should broadcast; structural norms provide who should broadcast. They ultimately complement each other.

Conclusion

The following lines contain a brief conclusion to the analysis above. This paper proved to be thick in detail, and the author found it hard at times to avoid becoming descriptive. The descriptive part however was done with a purpose. The richness of the regulatory mechanisms, the antitrust rules and the constitutional principles might give the impression that media diversity has a great place in the legal systems of the countries analyzed here. While this might be true on the paper, it is unfortunate how the implementation of these legal norms turned out to be. Below I briefly synthesize this paper and discuss some of its major aspects. The unfolding of the story of the effects of the media concentration on the market and the various legal provisions enacted to manage this issue gave this author the opportunity to draw some conclusions which accompany the discussion.

Chapter One is a broader, theoretical introduction to the themes of my paper. Media concentration happens both horizontally and vertically. On the one hand, the decrease in the number of media companies exposes the audience to potential increase in prices and uniformity of content. Even if prices would fall, the impact that advertisers have on the type of content that these companies will produce or distribute may increase. On the other hand, the combination of content and distribution endangers the supply and the diversity of content on the market because it increases the media companies' incentive to pursue economies of scale and to outcast competitors, to the detriment of public interest. The chapter also briefly depicts the current state of the media industry globally, showing this aspect of concentration.

The concept of media diversity is defined as structural and internal (or source and viewpoint) diversity. This first chapter outlines the role that the media has in a democratic society and shows why media diversity is an important aspect of the freedom of speech as a constitutional, and fundamental, right. A proper assessment of the media's importance for the individual and for the society depends on aspects that are generally exogenous to the legal field, however, they are briefly mentioned and discussed.

I further showed how, in light of the media concentration phenomenon, free speech theories should be reframed to include the private threat that in turn calls for positive state action. Historically, regulation was used (especially through licensing, but also through a more lenient approach to mergers) to create the structure of the current broadcasting ownership. Thus, if companies benefited from regulatory help, continuing to regulate this ownership so as to ensure that media diversity flourishes on the market seems an acceptable compromise. Seen from this perspective, governmental action in the form of regulation that would level the playing field by maintaining ownership restrictions, access provisions, internal pluralism related obligations, encouraging minorities and women ownership and increasing the strength of public broadcasters would become constitutionally defensible. The introductory chapter also outlines the need for more European scholarly work on the subject of media concentration, especially in emerging democracies, such as Romania. This thesis helped to fill the void by analyzing some of the Romanian legal provisions and decisions related to media concentration's effects on media diversity.

The issue whether the market can on its own provide the much needed media diversity or whether regulatory mechanisms must step in and correct market failures is

still unsolved. The media regulation/deregulation debate is seen within the broader market models. Importantly, the argument in favor of a regulatory come back proves more valid today, when laissez faire approaches failed to deliver long term results. Central to the pro regulation argument is that media is a special product. Issues such as the relationship between owners/advertisers and content as well as the regulatory (or deregulatory) implications of technological progress and convergence are difficult to assess with preciseness and are left open. Because of the uncertainty with which these issues will be solved by science, the path to deregulation should be seen with extreme caution.

In Chapter Two I discuss how the United States' courts solved the constitutionality of the FCC's policies on minority and women media ownership on grounds of the (in)existence of a strong evidentiary support to back them up. The same holds true in relationship with the other structural norms that protect media diversity discussed in this paper, such as the must carry provisions for cable and the ownership restrictions. It is argued here however that deference should be given to the regulatory agency's assessment of the opportunity and the necessity to enact regulatory measures designed to further media diversity. Some deregulatory approaches (doctrinal, jurisprudential or statutory) rely on the alleged disappearance of the scarcity in the field of broadcasting. However, this paper argues that the scarcity rationale may continue to justify media regulation designed to protect media diversity if it is conceptualized not only as physical scarcity, but also as economic.

The structural norms that I discuss in this paper are mainly ownership restrictions and must carry provisions, although licensing is also mentioned. They all contribute to

the protection of media diversity. Ownership restrictions are ownership caps and cross ownership limits. Their statutory and jurisprudential development shows the deregulatory trend that might endanger the media diversity goal. I outlined the courts' role in perpetuating this trend, by not giving any deference to the FCC in relation to evidentiary support for the agency's rules, in spite of the fact that the courts review the agency's rules under the constitutional intermediate scrutiny and the administrative arbitrary and capricious (which would be in constitutional review closer to the rational basis) standards. At its turn the FCC seems to dramatically fail to provide this necessary empirical background

Companies' drive to merge as well as the alleged changes in technology and increased market competition are behind this deregulatory trend as this short description of the structural norms (as reflected in statutes and case law) pinpoints. My analysis of these rules' development also purports to outline that deregulation invites more deregulation. Looking back at why these norms were enacted and having a skeptical outlook over the arguments that now the media market is competitive enough to address on its own, without any regulatory intervention, the goal of protecting media diversity, are two elements that I stress out in this section. For instance, the subsection on cable shows the role that regulation and courts' interpretation of this regulation had and has on cable's development both as technology and as contributor to media diversity. Furthermore, ownership restrictions appeared first in licensing proceedings where the regulatory agency looked first to see whether the newly licensed company would be an addition to media diversity in a certain community. The cases that I discuss also show how Internet and traditional media are not to be yet seen as substitutes – because the two

means of transmission differ in originality of content as well as in impact on audience, among other things¹⁷³⁵.

The second big section of the United States chapter focuses on antitrust and regulation, two branches of law that intertwine in mergers' review. It is divided along two main lines: theoretical and case law oriented. A mentioning of antitrust's unsurprising lack of consideration for media diversity is followed by a short depiction of the development of FCC's role in broadcasting's regulation, especially the formation of the public interest standard through statutory norms and jurisprudential clarification.

Antitrust permeates regulation, both in statute and in review. In the procedure of mergers' review by the FCC, the public comments ensure that the democratic decision-making takes into account the media product as an important addition to the full realization of democracy in our societies. The more concrete part of the section discusses how although the public interest standard is broader than the antitrust review, media diversity has little impact in the FCC's treatment of mergers. As in the European Union jurisdictions, narrow definition of relevant market both in geographic and product scopes leads to a better and more careful evaluation of the market competition on that specific market and arguably less concentration. However, it was unfortunate that this narrowing down the market approach was not adopted in the review of the merger that consolidated the minorities language market.

Acknowledging the existence of and the correlation between the markets for content and means of transmission is important because media diversity needs to be

¹⁷³⁵ See, for instance, how the Internet will become a close medium, considering that websites will have to charge users for access, as well as on the importance of who owns the internet for a proper evaluation of the creativity, diversity and corporate free nature of its content, Michael Hirschorn, "The Closing of The Digital Frontier," in *The Atlantic*, The Ideas Issue, July/August 2010, at p. 76 et seq.

assessed as both diversity of content and diversity of means of transmission (or as the German internal and external pluralism). Further, this differentiation makes it easier to spot the dangers for media diversity of vertical integration of content and distribution as well as the dangers of soft control of one company over another that is sometimes the consequence of these mergers. Heavy application of several antitrust tools used by the FCC – mainly commitments, important benefits for consumers and waivers - to counteract the potential anticompetitive effects of a merger or the violation of ownership restrictions leads however, ultimately, to the clearance of the majority of the mergers. I make the following observations: antitrust has its limits, regulation has to mix in antitrust and it is helpful especially in defining the relevant market, cooperation between the antitrust and regulatory agencies is beneficial to media diversity protection as long as their review does not overlap, and ultimately, and most importantly, too much reliance on antitrust in the FCC's review undermines the goals of media diversity.

The main point here is that mergers are cleared (approved) because the review relies more on economic analysis than public interest considerations, including media diversity. It would be an important proposition the inclusion in FCC's review, besides numerous antitrust elements, of an attentive analysis and research into how many viewpoints and how many sources of information are left on these markets following these mergers. A carefully drafted legal measure that takes into account a multitude of interests represented by a multitude of media operators would not be content discriminatory because it would advance the neutral goal of diversity. Must carry rules were upheld although they are based implicitly on the assumption that certain type of content, although less attractive and not really what the audience wants, is still what the

audience needs and it must be present on the market. Further, the strong and thorough empirical research demanded by the US courts should include a study into the role that this type of criteria – diversity of viewpoints and sources of information - might have into the FCC's regulatory review.

The rest of my paper was focused on several European legal institutions and courts. Chapter Three on the European jurisdictions included an analysis of the media diversity in the case law of the European Court of Human Rights, several national courts and of the European Court of First Instance and the Court of Justice of the European Communities. This chapter also tried to show how the European jurisdictions, by emphasizing the public interest related obligations (the content related obligations found in the cahiers des charges, the private conventions or in the management structures of the German broadcasters or the general Romanian code on content) are fundamentally different from their United States counterparts. Another aspect that differentiates the two is the attention paid in Europe to the cultural aspects of media pluralism. The European cultural exception and the controversies surrounding it as well as its efficiency in promoting European and national media production are discussed.

The European Court of Human Rights considered media pluralism in different analytical contexts such as licensing, public monopoly, defining the scope of art.10, as well as general access to broadcasting issues including whether the state may take affirmative action in the guise of denying access to some to protect others. The European constitutional courts are strong in their commitment to protect media diversity (and the Romanian Constitutional Court will hopefully pick up on this trend), although with little

efficiency both in inspiring the legislator (especially in Italy) or the regulatory agencies in de-concentrating the media market.

An important contribution that the European regulators bring is the existence of a very detailed picture of internal pluralism – both public and private broadcasters need to abide by certain rules. Content related obligations are described and their role is considered significant if at least at a theoretical level. Competition law aids media diversity by providing, as in the United States the tools for defining the market as well as by differentiating the content market from the delivery market.

The historical background to broadcasting laws offers an insight into the political and historical forces that shaped them. Decisions related to the fate of public broadcasting, privatization, different approaches towards regulation – laissez faire versus state intervention – were all taken by political actors of the time with regard to the recognized role that the media plays in molding national values and identity. In spite of voiced concerns over media concentration, law, however, abided, paradoxically, more concentration. And this, regardless of the courts' recognition of the media pluralism as a constitutional value.

Media diversity is at the core of the freedom of speech theories. This paper argues that regulatory measures specifically tailored for the broadcasting industry should be preserved along with antitrust measures in order to counteract the effects that media concentration has on media diversity. In order for this system to continue to exist however, several adjustments, both theoretical and on the more practical side, need to be made.

First and most importantly, the freedom of speech theories need to be extended to incorporate the private threat to freedom of speech. This slight shift would in turn make stronger the argument for positive state action to ensure that many voices are heard on the media market.

Second, the review performed by the regulatory agencies must push the limits of antitrust and focus on the public interest factors that all media mergers bring into equation. Constitutional jurisprudential discourse discusses the issue of media diversity generally in the context of the constitutionality of the various structural and content related measures that are designed to enhance it. In the United States, the main aspect that will make or break the future of these measures will be the regulatory agency's capability to raise to the challenge of thoroughly proving their *raison d'être*. The European Court of Human Rights did place the media pluralism at the forefront of its free speech protection. And, the national constitutional courts' case law should inspire the legislators to keep in check the media concentration.

At the end of this analysis, several patterns are observed. In the United States, structural media regulation may be saved by strengthening the evidence required to back it up and by increasing the public awareness for the impact that the media concentration may have on media diversity. In the European countries discussed here, the normative framework that protects media diversity is relatively strong. This strength stems from two aspects: first the existence of audiovisual codes (in one form or another) that include prescriptions on what media diversity should be and second the strong position of the public broadcaster in the media market. Generally, one observes that media diversity may be considered an indirect result of the application of competition law in media mergers'

review. However, when it comes to the regulatory review, too much antitrust leads to many mergers being cleared and to less diversity on the market.

In spite of the current deregulatory trend, the market will not provide media diversity. Because of the fact that the media diversity is an economic and democratic product, the competition law/antitrust and the regulation may both contribute to its protection. Although this paper embarked on a courageous trip, it showed that the media diversity still needs to be protected through various legal norms, regulatory and antitrust, infused by the constitutional recognition of this value.

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