



# Evolving regulation for media freedom and pluralism in the European Union<sup>☆</sup>



Elda Brogi<sup>a</sup>, Pier Luigi Parcu<sup>b,\*</sup>

<sup>a</sup> Centre for Media Pluralism and Media Freedom, Robert Schuman Centre for Advanced Studies, European University Institute, Italy

<sup>b</sup> Centre for Media Pluralism and Media Freedom, and Florence School of Regulation – Communications & Media, Robert Schuman Centre for Advanced Studies, European University Institute, Italy

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## ABSTRACT

European regulation of the media is limited to audio–visual media services and is influenced by the economic regulation of electronic communications, and of e-commerce, that have a close scope of application. However, media regulation has one peculiar differentiating characteristic: it cannot concentrate only on market competition, as the rest of modern economic regulation does, but has to pursue other fundamental values. In particular, media pluralism and media freedom emerge as policy goals that are essential for democracy and human rights in Europe. In this paper, we discuss the EU's search for a point of equilibrium within resistance from member states to relinquishing power in the sector; we describe the current debate, and suggest some possible directions for development.

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## 1. Introduction

Today, the EU plays a significant role in the “media sector” in general. The focus on the media industry is a significant part of the EU's comprehensive effort to liberalize and harmonize markets throughout Europe, by adopting a modern and pro-competitive form of regulation.

The EU regulates electronic communications (Parcu and Silvestri, 2014) aspects of the audio–visual sector (Directive 2010/13/EU),<sup>1</sup> technical aspects of information services and electronic commerce (Directive 2000/31/EC), as well as specific relevant rights, such as those related to data protection and copyright.<sup>2</sup>

Nonetheless, the media differs from other contiguous economic activities, as communications media, and mass media in particular, represent an extremely sensitive topic for political and democratic debate. A consistent stream in theoretical and empirical research

on political economy, which has mostly been developed during the last 15 years, has concluded that media scrutiny is important for political accountability, while media pluralism is important to avoid media capture and, most importantly, voting outcomes are significantly affected by the media.<sup>3</sup> Media health therefore counts for the health of our democracies.

In this article, we examine how European intervention in the media sector has evolved to employ consolidated instruments for market harmonization and liberalization, but also faces resistance to the strengthening of the EU's control over a politically delicate and controversial issue – but one that is essential for democracy and human rights: the regulation of media pluralism and media freedom.

The article is organized as follows: following this introduction, Section 2 describes regulatory media intervention based on competition and specific regulatory choices that have previously been developed in Europe. Section 3 reports the present policy debate on media pluralism and media freedom, and illustrates approaches to interventions recently put forward by the European Commission (EC). Section 4 proposes some ideas and institutional features through which the efforts to ensure a greater presence of the European voice in the evolution of media pluralism and

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\* Corresponding author.

E-mail address: [Pierluigi.parcu@eui.eu](mailto:Pierluigi.parcu@eui.eu) (P.L. Parcu).

<sup>1</sup> See also Valcke and Lefever (2012).

<sup>2</sup> Besides regulation, the EC carries out many other interventions to foster the sector (such as media programs; see also the “New creative Europe programme 2014–2020,” online content and media literacy initiatives, the protection of European cultural interests at the World Trade Organization, etc.).

<sup>3</sup> See Pratt and Stromberg (2011) for a thorough review of this literature.

freedom in member states may be pursued in the future. A brief conclusion follows.

## 2. Media in Europe between competition and specific regulation: a brief overview

In recent decades, the EU has begun to intervene in the media sector, driven mainly by the aim of fostering a single market for media services (Mastroianni, 2011). The opening of the television market to different operators (with the consequential end of national monopolies), the need to face international competition and to protect consumers throughout Europe in a similar manner, as well as the extraordinary evolution of audio–visual and communication services caused by the spread of the Internet, have laid the foundation for strong European intervention in this field, which was traditionally managed only through national policies.

With respect to the specific characteristics, and to the content delivery, of the media industry, the EC has had a say in the application of rules regarding the financing of public service media broadcasting. Only recently did it try to reopen a new policy-perspective on media pluralism and media freedom. These interventions so far have mainly consisted of “soft law” interventions, since national governments remain reluctant to fully expand the EU competences on these issues (see *infra*, and CMPF (2013)).

More generally, the EU’s legislative action in the media sector can be read as a three-layered intervention: into network and network services, into content, and, on a complementary basis, into services that are neither electronic communication services nor audio–visual services. This distinction is a regulatory answer to the development of the technology, and is a way to govern and exploit the potentials of the abundance of new communication networks and network services. Finally, it is also a way to cope with the so-called “media convergence” that allows different networks to distribute the same content.

The first layer, and certainly the most developed, relates to electronic communication networks. As the “Framework Directive” on electronic communications, Directive 2002/21/EC<sup>4</sup> explicitly states, one of the rationales of the liberalization, privatization and harmonization of the electronic communication sector is the network’s regulatory neutrality: a concept that can be interpreted as the separation of the regulation of transmission from the regulation of content of any nature.<sup>5</sup> In this regulatory framework, the “electronic communications package” of 2002, which aimed to realize a competitive market in the telecommunications sector, did not cover content regulation in services delivered over electronic communication networks, such as broadcasting content, financial services, and some information society services that are covered by other EU “legislation,” *in specie* the Audio–visual Media Service Directive (2010/13/EU) and the Electronic Commerce Directive (2000/31/EC).<sup>6</sup>

Nonetheless, as mentioned by the “Framework Directive,” “[t]he separation between the regulation of transmission and the

regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection” (Directive 2002/21/EC). However, it is clear in the intention of the Commission, and in the agreement with member states, that the electronic communications package is not the instrument by which to pursue these other goals.

The second layer, and the main “ingredient” of the overall European media policy, lies in specific audio–visual media services regulation. Broadcasting has been falling – at least in certain aspects – under the EC Treaty umbrella since a 1974 European Court of Justice (ECJ) judgment (the *Sacchi* case).<sup>7</sup> In fact, according to ECJ case-law, broadcasting must be interpreted as a “service” covered by the Treaties’ discipline: “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. [...] It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.”<sup>8</sup>

The Television without Frontiers Directive (TVWF of 1989)<sup>9</sup> relied on this definition, and aimed to create a common market in broadcasting, a sector that was (and still is) crucial for national political equilibria, and was therefore reluctantly delegated by the member states to European regulation. The Directive intervened in many aspects of broadcasting services regulation at member-state level, and introduced the important country-of-origin principle – namely, that broadcasters can only be regulated in the country of transmission, and not in the country or countries of reception. It also introduced a minimum standard of harmonization by imposing some obligations on broadcasters, such as the promotion of production and distribution of European works, quantitative and qualitative limits on the transmission of advertising and sponsoring, the protection of minors and public order, and the establishment of a right of reply. The Directive did not regulate media pluralism as such, and this is a competence that the member states still prefer to maintain at the national level (CMPF, 2013).

To date, after two revisions of the TVWF Directive (in 1997, Directive no. 36, and, in 2007, Directive no. 65) that aimed to tailor new rules for novel forms of technology for video services, the EU has developed a new specific regulatory policy on “television and television-like contents”: Directive 2010/13/EU, the so-called Audio–Visual Media Service Directive (AVMSD).

However, this Directive is a straightforward evolution of the previous regulation on broadcasting services, and tries to take into account the different and new ways in which audio–visual content is available to the general public, thereby harmonizing some aspects of the regulation of both traditional (linear) and on-demand (non linear) audio–visual services.

The path that led to the approval of this Directive has not been smooth, as the distinction between linear and non-linear audio–visual service was (and still is) quite debatable. It was difficult to assess common criteria to define when a service is similar to broadcasting and when it is, for instance, closer to an information society service. An ECJ case from 2005, *Mediakabel*, provides an example of the subtle difference between broadcasting and general information society services’ regulation, and clarifies the terms of the debate that led to the second revision of the TVWF Directive. When asked whether near video-on-demand was a broadcasting or an information society service, the Court held that “a service comes

<sup>4</sup> Last amended by Directive 2009/140/EC.

<sup>5</sup> Item 5 of Directive 2000/21/EC states: “The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework” p. 34 (Directive, 2002b).

<sup>6</sup> See 9 and 10 of Directive 2002/21/EC. Information society services are covered by Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce in the internal market. Most of the information society services are not covered under the scope of the “framework” directive, because “they do not consist wholly or mainly in the conveyance of signals on electronic communications networks [...] The same undertaking, for example, an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.” pag. 34.

<sup>7</sup> European Court of Justice, Case 155-73, Giuseppe Sacchi, 30 April 1974.

<sup>8</sup> See European Court of Justice, Case 155-73 and, for a more detailed analysis, CMPF (2013).

<sup>9</sup> See Directive 89/552/EEC.

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