
Media supervision on the threshold of the 21st century - structure and powers of regulatory authorities in the era of convergence

In this edition of *IRIS plus*, the Observatory addresses current concerns surrounding the adaptation of regulatory mechanisms to the emergence of new media.

Following the previous edition of *IRIS plus*, which considered the extent to which the existing regulatory framework for television should be adapted to new developments, this report explains the role that media supervision might play in the era of convergence. Descriptions of the current and possible future regulatory frameworks are followed by an explanation of existing and potential future models for media supervision.

The report also serves as a working document for the organisation of an international workshop by the Institute of European Media Law (EMR).

Strasbourg, September 2001

Wolfgang Closs
Executive Director
European Audiovisual Observatory

IRIS plus is a supplement to **IRIS**, *Legal Observations of the European Audiovisual Observatory*, **Issue 2001-8**



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

76 ALLEE DE LA ROBERTSAU • F-67000 STRASBOURG
TEL. +33 (0)3 88 14 44 00 • FAX +33 (0)3 88 14 44 19
<http://www.obs.coe.int>
e-mail: obs@obs.coe.int



Media supervision on the threshold of the 21st century - structure and powers of regulatory authorities in the era of convergence

A. INTRODUCTION

Media convergence has been the subject of numerous discussions in the media sector for some time now¹. In order to meet the challenges of the digital age, efforts are already being made at European level to create a media supervision structure capable of satisfying future needs. In particular, the European Commission is conducting a comprehensive reform of communications regulations, including a complete overhaul of the EC "Television Without Frontiers" Directive.

This report is designed firstly to explain the structure and functions of the supervisory authorities in relation to recent developments and, secondly, to look in more detail at concentration regulation. We will begin by describing the current regulatory framework, before discussing what impact convergence is likely to have on concentration supervision and the various ways in which the structure of control bodies and related instruments may be improved.

B. SUPERVISION OF COMPETITION, PARTICULARLY IN THE TELECOMMUNICATIONS AND MEDIA SECTORS

I. Structure and functions of supervisory bodies set up under European law

From a Community law point of view, media supervision in its broadest sense can be divided into three different areas: telecommunications supervision, media supervision and general competition and concentration supervision. However, there are no specific European bodies with responsibility for supervising the telecommunications and media sectors. Article 85.1.1 of the EC Treaty entrusts the European Commission with the task of supervising competition within the EU. Community law provides the Member States with a legislative framework that embraces all sectors, mainly by laying down specific regulatory objectives. In doing so, however, it also influences the structure of supervisory bodies in the individual States.

1. Legislative framework in the telecommunications sector

a) Regulatory objectives

The current situation with regard to regulation of the telecommunications sector is essentially the result of the complete deregulation of all telecommunications services, a process that was completed by the end of 2000².

A fundamental element of the legislative framework for telecommunications is known as Open Network Provision (ONP). This principle aims to create common conditions for access to and use of public networks and services. These con-

ditions should be transparent, objective, reasonable and, above all, non-discriminatory. Regulation of the telecommunications sector should therefore ensure a minimum range of services, access and interconnection, as well as guaranteeing a universal service. Most EC legal provisions related to regulation take the form of directives. Under Article 249 of the EC Treaty, directives are binding on the Member States as far as the end result is concerned, although national authorities are free to choose the form and methods necessary to achieve that result. In the telecommunications sector, national regulatory bodies are responsible for ensuring their country's adherence to EC law. As a result of deregulation, the EU requires these regulatory authorities to be independent bodies. This means that regulatory measures may no longer be taken by the operators themselves.

The first two deregulation directives³ obliged the Member States to set up an independent control body⁴. This requirement is confirmed in the Leased Line Directive⁵, article 2 of which contains the first legal definition of the concept "national regulatory authority", referring once again to the principle that supervisory authorities should be separate from telecommunications organisations. The ONP Framework Directive⁶ also mentions the conditions that must be satisfied in order to guarantee the independence of national regulatory authorities. These include (i) a legal distinction between regulatory authorities and telecommunications organisations and (ii) the structural separation of a State's regulatory function from activities associated with its ownership of such organisations⁷. In order that the aforementioned regulatory objectives might be met, virtually all of these directives contain numerous provisions allocating specific tasks to the regulatory authorities.

These tasks include, in particular, setting up approval procedures, interconnection, monitoring leased line provision, guaranteeing universal service, controlling tariff requirements and allocating frequencies, numbers and transmission rights.

b) Important legislative instruments

The aforementioned functions of national regulatory authorities are based on various provisions of EC law. A distinction must be drawn between deregulation provisions⁸ and harmonisation measures.

The deregulation directives⁹ opened up the market for telecommunications service providers and are therefore very important where regulation is concerned. These directives are supported by numerous harmonisation measures¹⁰, which are designed to ensure that the objectives and principles associated with the opening up of the market are met. In addition, a number of legislative instruments deal



with the theme of limited resources. Various European Parliament and Council Decisions and Commission Recommendations and Communications are also relevant to the telecommunications sector, although these merely expand on existing provisions where regulatory objectives are concerned.

Not least because of the multitude of current provisions, reforms are already being drawn up. These are discussed in greater detail below¹¹.

2. Legislative framework in the broadcasting and new media sectors

a) Regulatory objectives

Community law also contains certain regulatory principles which help to define the supervisory role of national control bodies in the new media/information society and audiovisual sectors.

As far as transmission technologies and methods are concerned, the regulatory objectives of the telecommunications sector also apply in these areas, which are governed for the most part by the same legislative provisions. However, additional regulations specific to media and broadcasting are clearly needed.

In the new media sector, regulation is particularly necessary in the areas of consumer and data protection, since data transmission and exchange are so prominent.

The Community has also, however, assumed the task of combating illegal and dangerous Internet content (known as cybercrime).

Audiovisual policy must reflect not only on the economic significance of the market, but also the special cultural and social role of the media. The role of television in the formation of opinions is a particularly important reason why the European Community decided at an early stage to draw up some common principles. These were set out in a Commission Communication¹² in 1999 with the backing of the Council and Parliament. Accordingly, regulation in the audiovisual sector is designed to protect common values such as freedom of opinion, pluralism, promotion of cultural and linguistic diversity, the right of reply and the protection of authors and their works, minors, human dignity, and consumers.

Another important objective, already enshrined in the EC "Television Without Frontiers" Directive¹³ in relation to TV programmes, is the guarantee of free retransmission of audiovisual media within the European Community. However, such protection of the free movement of services only applies to television programmes that are compatible with Community law and with the domestic law of the broadcasting State. Only the broadcasting State is authorised to make this assessment¹⁴. Receiving States must guarantee freedom of reception and retransmission of TV programmes broadcast from other Member States, without requiring prior approval or imposing their own controls¹⁵. If this system is to func-

tion properly, the principle of mutual recognition¹⁶, achieved through the (partial) harmonisation of domestic law, is vital.

Although under Article 6.2 of the EU Treaty, Article 10 of the European Convention on Human Rights (ECHR) is valid under Community law and although freedom of opinion and information must therefore be protected by the Member States, this cannot be used as the basis for demands that certain regulatory measures be taken¹⁷.

To sum up, since under Article 5.1 of the EC Treaty the Community may only act within the limits of the powers conferred upon it, there are no binding provisions concerning the structure and organisation of supervisory authorities in the Member States. On the contrary, the Member States are relatively free in this respect. The legislative framework developed by the Community for the media sector is much more concerned with regulatory tasks linked to the protection of the freedom to provide services.

b) Important legislative instruments

This is particularly true of the EC "Television Without Frontiers" Directive¹⁸, which was adopted in order to remove obstacles to the free movement of services between Member States. According to the recitals to the first version of 1989¹⁹, it expressly "does not affect the responsibility of the Member States and their authorities with regard to the organization - including the systems of licensing, administrative authorization or taxation - financing and the content of programmes...the independence of cultural developments in the Member States and the preservation of cultural diversity in the Community therefore remain unaffected."

The "Television Without Frontiers" Directive merely sets out minimum standards for harmonisation in certain areas, such as quotas, TV advertising, sponsorship, teleshopping and the protection of minors. It does not mention the structure of corresponding supervisory bodies. It is also worth mentioning the Council of Europe's 1989 European Convention on Transfrontier Television²⁰, which at least assumes the existence of a State authority with responsibility for defining broadcasters' obligations either by means of licences or contracts²¹.

In the new media sector, the E-Commerce Directive²², which regulates electronic commerce - together with the Electronic Signatures Directive²³ does not make any particular demands regarding the structure of regulatory bodies. The main purpose of these Directives is to develop the internal market in the new media sector, with a particular focus on consumer protection issues.

The same is true of the so-called "Transparency Directive"²⁴, which deals with information society services. It can therefore be concluded that the EC's binding secondary legislation does not contain any provisions on the structure of supervisory bodies.

The same cannot be said of non-binding Community



instruments, however. In its aforementioned Communication²⁵, for example, the Commission laid down guidelines for the further development of regulatory authorities in view of convergence. It suggested that these authorities should be independent of governments and operators alike and that sector-specific regulators should co-operate more closely. Moreover, the Commission is considering "establishing a specific forum for European-level co-operation between regulators, operators and consumers in the audiovisual sector"²⁶. These ideas were taken up by the Committee of the Regions in an Opinion on the Communication²⁷: "The Committee of the Regions notes with interest the arguments on regulatory authorities, but stresses in this context that it sees their activities as a national and regional task and therefore resolutely opposes any discussion of forms of organisation at Community level".

The functional and structural organisation of supervisory authorities in the broadcasting sector is particularly mentioned in a Council of Europe Recommendation²⁸ adopted in December 2000. The document stresses the importance of supervisory bodies being independent of political forces and economic interests. An Appendix to the Recommendation contains detailed guidelines on how such independence may be achieved. These are subdivided into sections on a "general legislative framework", "appointment, composition and functioning", "financial independence", "powers and competence" and "accountability". They state that supervisory authorities should be independent of broadcasters, as well as politically and financially independent. It is particularly important to ensure that the regulatory authorities are able to pursue their activities independently and are protected from all outside interference. Clear rules should be laid down for the appointment and dismissal of authority members in such a way as to prevent any interference from political bodies or other interested parties.

The Council of Europe therefore has some very practical ideas about the future structure and organisation of regulatory authorities, although they are only recommendations to the Member States, which are not obliged to implement them.

This relative freedom which the EU Member States currently enjoy with regard to the structure of regulatory bodies in the new media and audiovisual sectors could, however, come to an end if in future the Community decides it needs to take harmonising measures - a move which, in view of recent discussions, does not seem unlikely. It could be argued that a minimum amount of harmonisation is essential if the freedom to provide services is to be preserved.

3. Competition legislation²⁹

a) Regulatory objectives

The objectives of general competition law and its relevance to the whole area of regulation can be summarised as follows.

EC competition rules are meant to support and safeguard the internal market. According to Article 3 (c) of the EC

Treaty, this should be characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital, and by competition which is protected from distortion through State or private measures³⁰. Corresponding provisions are meant to guarantee the unity of the internal market and to prevent the monopolisation of certain markets by commercial concentrations. It is particularly important that undertakings should not be allowed to agree to share a common market (see Article 81 of the EC Treaty). Furthermore, abuses of dominant market positions must be prevented (see Article 82). Finally, competition must not be distorted by the State, eg through discrimination in favour of public companies or subsidies to private undertakings.

All of these objectives clearly apply to market players in the telecommunications and media sectors. Articles 81 to 97 of the EC Treaty stipulate how they should be achieved and implemented. As mentioned at the outset, the Commission is the supreme supervisory and cartels authority under competition law.

b) Important legislative instruments

Numerous regulations have been issued in order to enforce the competition rules laid down in the EC Treaty. The most important of these are the Cartels Regulation³¹ and, concerning concentrations supervision, the Concentrations Control Regulation³². Another important instrument, however, is the Transparency Directive³³, adopted on the basis of Article 86.3. This Directive makes provision for the financial dealings between governments and public undertakings to be checked for hidden subsidies. The Commission has also made a series of decisions concerning mergers between companies in the media sector³⁴. Since the Commission is solely responsible for competition matters, there is little opportunity for individual States to introduce their own regulatory mechanisms³⁵.

Community law therefore does not make any specific demands regarding the structure or organisation of national regulatory authorities in the fields of competition and concentrations.

II. Effects of convergence

The debate concerning the regulatory reaction to convergence in the media sector was launched by a Commission Green Paper published in 1997³⁶. It was through this document that the term "convergence" became officially synonymous with the merging together of various media sectors on account of technological developments. In the debate which ensued, and which is still going on today, the term "convergence" has, however, been further broken down so that a number of different types of convergence are now distinguished.

Convergence is now essentially seen from two different angles³⁷: technical convergence and the convergence of services.

The term "technical convergence" refers to the merging of



infrastructures and networks as well as terminal equipment and technical services. This trend is the result of technological progress and particularly involves the digitisation of network platforms and electronic data. Through digitisation using multiplexing techniques, data can be compressed, with the result that data transfer rates can be significantly increased and distribution channels optimised. At the same time, however, digitisation means that these channels are no longer separate entities. Broadband and ADSL technology, for example, will be used in future to transmit feature films via the traditional telecommunications network to PCs, while conversely, telephone calls and Internet applications will be carried on the broadband cable network. Technical convergence is already well advanced. For instance, web-TV already exists, whereby Internet content can be accessed via a normal television set using set-top box technology. The trend is likely to accelerate even further, since some States have already decided to switch off the analogue system in the fairly near future³⁸. It remains to be seen, however, whether these plans will actually be implemented within the anticipated time scale.

The convergence of services and content, meanwhile, refers to the merging of different services and service content. It is anticipated that, in future, as a result of technical convergence, single providers will be able to offer different services and that sectors and markets will consequently begin to merge together. The Internet sector provides several examples of this phenomenon, since portals already exist where users can access a variety of different services³⁹. However, new types of content are also expected to become available in the broadcasting sector. Using broadband technology and the related possibility of installing a return channel, it will be possible to target viewers and potential clients by offering them services and showing them advertisements on demand.

1. European reforms in the telecommunications sector proposed in the light of convergence

Following its 1997 Green Paper on convergence⁴⁰, the Commission carried out a wide-ranging public consultation, which lasted two years and led to the so-called "Communications Review"⁴¹ in 1999.

The Commission used the results of the various consultations to propose a new series of five directives⁴² and a new regulation⁴³ designed to replace and simplify the existing legislative framework in the telecommunications sector⁴⁴. Most importantly, however, the new legislative framework should be adapted to technological and market developments and be capable of embracing future, as now unforeseeable, changes. The scope of the new regulatory framework should encompass the whole communications infrastructure, ie all transmission methods and networks, irrespective of the technology they use, and associated services⁴⁵. However, the Commission is also adamant that broadcasting and information society services should not be included⁴⁶. Concerning the communications infrastructure and associated services, the Commission concluded, on the basis of the Convergence Green Paper consultation process, that:

- with regard to the role of regulation, there remains a need to meet a range of public interest objectives;
- there is a need for an appropriate and stable regulatory framework so as to stimulate competition, innovation and investment by enterprises, notably in new services, and to encourage development of electronic commerce;
- regulation of communications channels and access to them should be separate from content regulation⁴⁷.

The Communications Review also dealt with institutional questions. The Commission began by investigating the advantages of setting up a European regulator, concluding that it would be more efficient to standardize the measures taken by national regulatory authorities and to improve the effectiveness of corrective mechanisms currently available⁴⁸. On the other hand, it noted that improved coordination was required between the decisions of the national regulatory authorities and those taken at EU level. To this end, the Commission proposed that the two existing communications authorities, the CEPT⁴⁹ and ECTRA⁵⁰, be replaced by a new Communications Committee (COCOM), which would call upon the expertise of a new High Level Communications Group (HLCG), composed of the national regulatory authorities and the Commission⁵¹.

It is considered vital that the national regulatory authorities, which the Commission believes would play a more important role within the new regulatory regime, are given greater independence and that co-operation between sector-specific and general competition regulators should be improved. The Commission also expressly recognizes that the functions of a national regulatory authority may be allocated to more than one institution. However, it also calls for guarantees that such a division of responsibilities should not lead to delays and duplication of decision-making and that decision-making procedures should be transparent⁵².

The draft Framework Directive⁵³, for example, contains various provisions on consultation, co-operation and transparency. According to the Directive, the Member States should publish and inform the Commission of the tasks to be undertaken by the national regulatory authorities as well as the procedures for consultation and co-operation between those authorities⁵⁴. Furthermore, a national regulatory authority would be obliged to consult the Commission and the other Member States if it wished to take particular regulatory measures. The Commission would also be authorised to demand the amendment or withdrawal of a proposed measure if it were not justified under the regulatory framework⁵⁵. Thus the final decision on the admissibility of such measures lies with the Commission.

2. Proposed reforms in the audiovisual media sector

In the audiovisual sector, the EU is currently preparing to reform the EC "Television Without Frontiers" Directive, due in part to the digitisation of electronic data and the associated phenomenon of convergence. Reforms are needed because new technologies are changing the television landscape⁵⁶. The legislative and regulatory framework will particularly



need updating in the areas of pluralism and cultural diversity, advertising and the protection of minors. In relation to the "Television Without Frontiers" Directive, the Commission has commissioned three major studies⁵⁷, the results of which are expected in early 2002. One aim of the new regulatory framework is the separate treatment of transmission methods and content. It is therefore important that the standards set for the various technical transmission platforms should be included in the revised legislative framework for electronic communications.

C. CONTROLLING MEDIA CONCENTRATION

Having described the existing regulatory framework for telecommunications and media supervision, we shall now examine one particular task incumbent on media regulators: controlling media concentration.

The concept of media concentration is similar to that of commercial concentration. The latter term describes the formation of commercial and economic conglomerates⁵⁸. A concentration, which requires a relevant market, must be regulated if it has negative consequences for that market. While the harmful effects of commercial concentrations in other sectors are mainly economic, journalistic aspects are also involved where media concentrations are concerned. Unlike other companies, media undertakings do not operate simply as businesses aiming to maximise their profits. They also serve to support one of the most fundamental human rights - freedom of opinion, information, the press and broadcasting⁵⁹, an indispensable part of any democracy. Therefore, a concentration of media undertakings may not only harm competition by creating dominant market positions, but may also restrict journalistic competition by producing dominant sources of opinion. This can become an obstacle to pluralism and restrict freedom of opinion, information, the press and broadcasting.

The control of media concentrations is therefore a special case, reaching beyond pure competition law, and is extremely difficult to implement both at national and European levels.

I. Current regulatory framework at European level

Just as in the area of general media supervision, current concentration regulations can be split into three groups: competition law, telecommunications concentration law and specific media concentration law. Although regulating competition was one of the EU's original tasks (see Article 3 (g) of the EC Treaty) and, under Article 83 of the Treaty, may be achieved through directly-applicable regulations as well as directives, and whereas, under Article 86, the EU is also competent in the field of telecommunications, which according to Article 86.3 it can regulate indirectly by means of directives, the question of whether the EU is also competent to take measures to safeguard media pluralism is a matter of some controversy⁶⁰.

1. Competition-related EU concentration law

As mentioned previously, general concentration supervision

is regulated under primary legislation by Articles 81 ff. of the EC Treaty and, under secondary law, mainly by Cartels Regulation 17/62⁶¹ and Concentrations Control Regulation 4064/89/EEC⁶². Whilst Cartels Regulation 17/62 deals with any contractual agreement that does not create an independent commercial structure, the Concentrations Control Regulation (CCR) only applies to concentrations with a Community dimension (Articles 1.1, 22.1 CCR). A concentration (see Article 3.1 (a)(b) CCR) is deemed to have a Community dimension if it passes the thresholds laid down in Article 1.2 and 1.3 of the CCR.

According to Article 21.2 of the CCR, the Commission has exclusive competence to investigate concentrations within the meaning of the Regulation; the Member States therefore do not apply their domestic competition law in such cases (principle of exclusive competence). One exception to this rule is found in Article 21.3 of the CCR, under which Member States may, notwithstanding paragraphs 1 and 2 and under certain conditions, take appropriate measures to protect other legitimate interests. Article 21.3.2 expressly stipulates that, *inter alia*, plurality of the media counts as a legitimate interest⁶³.

Another exception to the principle of exclusive competence is contained in Article 9 of the CCR, which states that the Commission may, under certain conditions (see Article 9.2 (a)(b) CCR), refer concentrations back to the competent authorities of the Member State concerned. If a Member State informs the Commission that a concentration within its territory is threatening a distinct market which is not a substantial part of the common market and if the Commission agrees, the latter shall refer the part of the case that concerns the distinct market to the competent authorities of the Member State concerned (Article 9.3.3 CCR). These rules correspond with the principle of subsidiarity enshrined in Article 5 of the EC Treaty.

The general rules of concentration control also apply to media undertakings and media markets⁶⁴. However, in accordance with the EU's fundamental task of safeguarding and maintaining economic competition, economic rather than media considerations are at the forefront. General competition rules are designed to prevent dominant market positions in the economic sense and thus to maintain competition. Under general concentration control regulations, a merger cannot be prevented on the basis of media-related considerations alone.

The instruments of general competition supervision are also used to preserve the competitiveness of the EU economy at global level (see also Article 2.1 (b) CCR). In the media sector, for example, certain commercial concentrations have been approved in order to guarantee the development of technical innovations and to support the entry of European companies into the world market⁶⁵. Concentrations created under similar conditions, even where the companies involved promised not to exploit their market position, were prohibited until relatively recently⁶⁶; the fact that they are now permitted is due not so much to the Commission loosening its grip⁶⁷ as to the adoption of new objectives.



2. Telecommunications law

There is no sector-specific European legislation for the control of concentrations in the telecommunications sector. Instead, with the aim of deregulating and harmonising the telecommunications market, the Commission has passed numerous directives as the basis for the growth and development of new services. The Member States are obliged to implement these directives⁶⁸. The primary task of the national regulatory authorities is or was to bring free competition to the previously State-controlled telecommunications market. Since the end of 2000, the directives have been incorporated into national laws throughout the EU; even so, the market cannot yet be considered fully deregulated to the extent that it could be governed under general competition law and left to free market forces with no regulatory supervision. The companies which emerged from the previous monopolies still enjoy such a strong market position that further instruments are needed to help their competitors and create a genuinely free market, for example by guaranteeing free access to networks and to transmission technologies⁶⁹. Such regulatory measures are the only means of ensuring equal opportunities, a prerequisite of a fully competitive market.

In addition to specific regulations in the telecommunications sector, general competition rules are applicable. This is particularly true for concentration controls, which are evaluated in accordance with those rules. Since telecommunications law has so many peculiarities, the Commission has published numerous guidelines on the application of EU competition law in the telecommunications sector⁷⁰.

3. Media concentration law

Maintaining a pluralistic media landscape is not the aim either of general concentration controls or of telecommunications regulations designed to promote competition. It was clear when the Concentrations Control Regulation was adopted that general Community concentration law with its economic focus was not sufficient to guarantee pluralism. Article 21.3 of the CCR clearly stipulates that additional measures may be taken by the Member States in order to safeguard media plurality⁷¹. At Community level, however, there are no binding media-specific regulations designed to protect diversity of opinion⁷².

In 1992, following two European Parliament Resolutions adopted on 15 February 1990 and 16 September 1992⁷³, in which it was asked to present proposals for Community regulations on restricting media concentrations in order to maintain pluralism of information, the Commission published a Green Paper on "Pluralism and Media Concentration in the Internal Market - An assessment of the need for Community action"⁷⁴. In the document, it stated that, on the one hand, the Community could not act simply in order to safeguard media pluralism because this was neither a Community objective nor part of the Community's remit. On the other hand, it recognised that the different national regulatory frameworks were an obstacle to the functioning of the internal market, since they restricted the freedom of establishment of media undertakings, impeded the provision of media services

and caused distortion and restriction of competition⁷⁵. Furthermore, national regulators could not deal with all media concentrations because they were only empowered to investigate mergers taking place on their own territory. Domestic law was only applicable if a service was provided to another country both subjectively and objectively in an attempt to circumvent the law⁷⁶. Even competition law could not deal satisfactorily with the specific problems of media concentration because the objective of media diversity was hard to comprehend in the light of the need for market specificity⁷⁷. In short, the Commission concluded that action was needed at Community level, but that this was not possible due to a lack of competence.

After the Economic and Social Committee⁷⁸ and the European Parliament⁷⁹ had expressed their views on the EU's competence in this area, and following the Parliament's request that it prepare a draft Directive⁸⁰, in autumn 1996 the Commission tabled a draft EC Directive on Media Pluralism. Having subsequently withdrawn this proposal, in March 1997 the Commission tabled a draft Directive on Media Ownership in the Internal Market. However, since both of these drafts were fiercely opposed, particularly on account of the Commission's disputed regulatory powers⁸¹, the Commission also withdrew the second proposal before it could be officially adopted⁸².

There is therefore no binding European law on media concentration and the Commission has no specific instruments with which to combat the threat to pluralism posed by the development of dominant sources of opinion. It can only take action against such phenomena if they are accompanied by a dominant market position and are thus subject to the provisions of competition law concerning concentration controls.

The Council of Europe shares the Commission's fear that the increasing concentrations in the media sector are dangerous. The Council of Europe expressed concern about freedom of opinion and communication back in 1982⁸³. In its Recommendation No. R(99)1 of 19 January 1999⁸⁴, it reiterated the importance for democracy of freedom of opinion and pluralism⁸⁵. It suggested, for example, that Member States introduce legislation designed to prevent or counteract concentrations that might endanger media pluralism at the national, regional or local levels. As far as supervisory bodies were concerned, it recommended that Member States either create specific media authorities invested with powers to act against mergers or other concentration operations that threaten media pluralism or invest existing regulatory bodies for the broadcasting sector with such powers⁸⁶.

Concentration controls in the media sector can therefore be divided into the following categories:

- general commercial competition controls, exercised at European level by the Commission, acting as the supervisory body, and nationally by the national competition authorities;
- temporary competition controls aimed at deregulation in the telecommunications sector, in place during the transition from a State monopoly to a free market and exercised by independent regulatory authorities within the Member States;

- media-specific concentration controls, aimed at guaranteeing diversity of opinion and also enforced by the Member States' own authorities.

II. Effects of convergence in relation to media concentration

Technical convergence, ie the possibility of receiving a specific service via different technical transmission methods⁸⁷, will give providers of access⁸⁸ to transmission networks the power to decide who is entitled to such access and under what conditions (the so-called "gate-keeper" scenario). This problem will be exacerbated by the digitisation of the networks⁸⁹. As a result, regulation of the telecommunications sector will be vital to the protection of media pluralism, since diversity of opinion and information is only possible if those wishing to transmit or receive information also enjoy unrestricted access to transmission channels⁹⁰. In this context, unrestricted access means access to all services which, especially after digitisation, become necessary for the transmission and reception of telecommunications services, eg conditional access systems, navigation systems, terminal equipment, particularly software interfaces, etc.⁹¹ The technology needed for each service must remain open, ie proprietary standards should be prohibited. A company with a dominant market position with regard to one of these interfaces would be in a position to decide who could use the interface (bottleneck) - and who could not - unless there were some form of regulatory control. The task of guaranteeing free access is currently the responsibility of specific bodies, eg national telecommunications and/or broadcasting authorities⁹².

Digitisation will also greatly increase transmission capacities, which are currently restricted, for every type of transmission method⁹³. Transmission channels will thus, to some extent, no longer be considered limited goods⁹⁴; correspondingly, their sale will bring in less income to network operators. Faced with this threat to their income, the telecommunications companies, as network operators, are keen to exploit other parts of the media chain, such as production or marketing. On the other hand, in view of the "gate-keeper" phenomenon, it is also in the interests of content producers to merge with network operators and other owners of bottleneck technologies. The theory is that owning shares in the network operator should remove obstacles to network access and thus guarantee access to the consumer.

Furthermore, as already mentioned in section B.II, the convergence of services means that, in future, services which were previously categorised into different media sectors - eg press, Internet, broadcasting - will be provided by a single operator or group of operators. This intermedia or multimedia concentration⁹⁵, covering several media markets, can severely restrict diversity of opinion, since the owner of a TV station, for example, may also disseminate information via the press and Internet⁹⁶. Intermedia concentrations are financially beneficial for producers because a media product can be exploited several times if it is sold to different markets, thus cutting overall production costs⁹⁷. Controlling these multimedia mergers is an extremely difficult task for the supervisory authorities, which

have to define the relevant markets and fix the decisive thresholds.

As a result of this situation, an increasing number of major company mergers have taken place in recent times, whereby content providers have merged with network operators or owners of digitisation technologies to form every possible kind of concentration⁹⁸. Consequently, more and more new media undertakings, particularly those formed through vertical and intermedia (diagonal) concentrations, are so large that they exceed the thresholds set out in Article 1.2 of the CCR. This means that the European Commission is solely responsible for investigating these mergers. As mentioned above, national cartel authorities are forbidden from taking any action in such cases under the principle of exclusive competence (Article 21.2.1 CCR).

The fact that the Commission bears sole responsibility is, on the one hand, to be welcomed because the national cartel authorities' powers are generally restricted to their own sovereign territory. On the other hand, the Commission only has competence to act if there is a dominant market position, which is certainly not always the case when there is a dominant source of opinion. Moreover, the Commission is obliged not only to protect competition within the Community, but also to promote the competitiveness of European industry on the global market, particularly in the information technology sector. It may therefore approve certain dominant market positions within Europe if that is the only way of safeguarding the EU's competitiveness at global level. Since not all individual States that are particularly affected by dominant sources of opinion agree with this policy, acceptance of the Commission's decisions appears to be dwindling.

Under Article 9 of the CCR, concentrations affecting a distinct market in a Member State that are reported to the Commission may be referred to the competent authorities of the Member State concerned. However, the Commission and the Member States are not in agreement about when such cases should be referred to the Member States. The Commission, for example, has refused three German applications for permission to rule on mergers in the media sector⁹⁹. The cases of Bertelsmann/Kirch/Premiere and Deutsche Telekom/Beta Research were particularly unusual, since the German Cartels Office, insistent that the conditions set out in Article 9.3 of the CCR were satisfied and that the Commission should refer the cases back, continued with its own proceedings and delivered a ruling. These cases were therefore investigated at two levels - national and European. Both authorities ultimately decided not to allow these mergers, albeit on different grounds. The principle of exclusive competence is meant to prevent such "double rulings", which can create legal uncertainty if differing verdicts are reached.

Quite unrelated to the problems that arise when media-related mergers are investigated under competition law, national media concentration authorities are responsible, alongside the competition bodies, for monitoring concentrations with a Community dimension (see Article 21.3 CCR).



However, the European aspect of such mergers can be a handicap for these national authorities, which only examine the effects of the merger on their respective national media markets. If they conclude from their investigation that a dominant source of opinion would be created, they can prevent the concentration from going ahead.

In the worst case scenario, therefore, companies wishing to merge must await three separate decisions on whether the concentration is admissible, but because of the different monitoring standards and criteria that are applied, these decisions need not have the same grounds or end result.

III. Summary and conclusions regarding future concentration controls

In the interests of legal certainty, the situation we have described, with competences so widely spread, is barely tenable. There is a European concentration control body, but it has no authority to protect competition in the media, which is a condition of pluralism, and therefore has no specific competence to act in order to maintain and safeguard diversity of opinion. National competition authorities, on the other hand, are in principle only responsible for their own sovereign territory. Moreover, the European authorities and the Member States' own competition regulators disagree over the scope of their respective competences, as a result of which certain borderline cases may be ruled on at two different levels. The third group of bodies responsible for controlling media concentration comprises the national media concentration authorities, which again are only responsible for mergers that take place on their own territory. As convergence accelerates, particularly in view of digitisation, the regulatory instruments of the national telecommunications authorities are becoming increasingly important means of safeguarding diversity of opinion. National broadcasting regulators are also involved, as they seek to guarantee free access to the interfaces (bottlenecks) that have resulted from digitisation.

As if this situation were not capable of creating enough conflict, there is also disagreement over whether the European Union is actually competent to act to safeguard and maintain competition in the media sector. For most Member States, maintaining diversity of opinion is part of their own cultural policy and is therefore outside the EU's scope of activity. On the other hand, mergers in the media sector are now so huge, often crossing national boundaries, that the Member States' own authorities can barely control them.

The purpose of this article is not to find a solution to these conflicts. All we can do is make suggestions based on the notion that, in order to remedy the deficiencies we have highlighted, a single authority needs to be given the broadest possible powers to control media concentration. In this connection, particular thought must be given to whether the separation of network and content¹⁰⁰ required by the Commission can be achieved in view of the effects of conver-

gence, or whether exceptions need to be made. As we have seen, access to technical know-how in areas such as networks, digitisation and transmission is becoming increasingly vital for content dissemination. We should therefore not be afraid of combining the "technical" competences needed to maintain diversity of opinion with "content-related" competences. This would mean that all competences, which have thus far been divided between separate media concentration, broadcasting and telecommunications authorities, would be held by a single "media authority". Alternatively, potential conflicts might be better held in check if procedures were more effectively dovetailed at horizontal (within and between Member States) and vertical (between Member States and the Commission) levels.

Irrespective of which competences could be grouped together in this way, solutions at European and national levels are conceivable. At European level, consideration could be given to transferring responsibility for protecting diversity of opinion to the European competition authority or to a future European media concentration body¹⁰¹. However, Europe-wide solutions such as this will break down because of the competence problem, quite apart from other potential conflicts that these proposals might create.

More realistic - although still not easy - solutions may be found at national level, where responsibility for controlling media concentrations, including transnational media-related mergers, could be transferred to national cartel or broadcasting authorities or to existing or future national media concentration authorities¹⁰². At European level also, the latest discussions on supervisory structures, both in competition law¹⁰³ and telecommunications law¹⁰⁴, are tending to advocate the decentralisation of competences, in tandem with the establishment of a new co-operation and consultation system¹⁰⁵. The intended strengthening of the Member States' powers is particularly striking in competition law, since the competence to apply Article 81.3 of the EC Treaty - which will then be directly applicable¹⁰⁶ - will be transferred from the Commission to the national competition authorities¹⁰⁷. This has always been the Commission's exclusive responsibility. The Commission and the national authorities will form a network and co-operate closely in applying Articles 81 and 82 of the EC Treaty¹⁰⁸.

If these solutions are to be implemented at national level, comprehensive regulations will be required in order to avoid discrepancies. One area which may need regulating concerns whether a single Member State should be responsible for investigating a merger affecting markets in several Member States, and if so, which State should have that responsibility¹⁰⁹. Another is whether and how a decision by a national authority should be recognised in the other Member States¹¹⁰. In any case, the introduction of an intensive co-operation, consultation and information system both between the Member States themselves, and between the Member States and the Commission will be indispensable¹¹¹.

Dr Carmen Palzer and Caroline Hilger,
Institute of European Media Law (EMR)

- 1) See in particular the work of the conference on “New Digital Platforms for Audiovisual Services and their Impact on the Licensing of Broadcasters”, organised by the Council of Europe’s Media Division, available at: <http://www.humanrights.coe.int/media>
- 2) Although deregulation took effect in most Member States on 1 January 1998, certain States were granted an extension to the deadline for opening up their markets. The final deadline (in regard to Greece) was 31 December 2000.
- 3) Commission Directive 88/301/EEC of 16 May 1988 on Competition in the Markets in Telecommunications Terminal Equipment (OJ L 131, 27 May 1988, p.73). The purpose of this Directive was the abolition of exclusive rights to import, market, connect, bring into service and maintain terminal equipment; Commission Directive 90/388/EEC of 28 June 1990 on Competition in the Markets for Telecommunications Services (OJ L 192, 24 July 1990, p.10).
- 4) See Article 6 of Directive 88/301/EEC and Article 7 of Directive 90/388/EEC.
- 5) Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ L 165, 19 June 1992, p.27).
- 6) Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications (OJ L 295, 29 October 1997, p.23).
- 7) See Article 1.6; see also ECJ case-law concerning independence, eg case C-69/91, ECR I-5337, 5380 f. (Decoster); case C-92/91, ECR I-5383, 5402 f. (Taillandier).
- 8) These mainly served to complete the deregulation process in the telecommunications sector, paving the way for the current situation. Deregulation was a gradual process, achieved through the enactment of seven directives in all. In issuing these directives, the Commission exercised its right under Article 86 of the EC Treaty to demand the revocation of any rights granted to undertakings by the Member States that contravened other rules contained in the EC Treaty. The Commission thought that the situation in the telecommunications sector, which was characterised by individual State monopolies and the associated granting of exclusive and special rights to public undertakings, breached the competition and internal market provisions contained in the EC Treaty. However, deregulation was not meant to force the privatisation of the telecommunications companies, but rather to open up and promote competition in this sector.
- 9) Terminal Equipment Deregulation Directive (see endnote 3), followed in 1990 by the Services Directive (see endnote 3). This Directive was amended and supplemented by five further directives over the years: the Satellite Directive (Directive 94/46/EC of 13 October 1994, OJ L 268, 19 October 1994, p.15), the Cable Television Directive (Directive 95/51/EC of 18 October 1995, OJ L 256, 26 October 1995, p.49), the Mobile Communications Directive (Directive 96/2/EC of 16 January 1996, OJ L 20, 26 January 1996, p.59), the Competition Directive (Directive 96/19/EC of 13 March 1996, OJ L 74, 22 March 1996, p.13), and the Cable Network Directive (Directive 99/64/EC of 23 July 1999, OJ L 175, 10 July 1999, p.36).
- 10) The most important of these are the Leased Line Directive (see endnote 5), the Authorisations Directive (Directive 97/13/EC of 10 April 1997, OJ L 117, 7 May 1997, p.15), the Interconnection Directive (Directive 97/33/EC of 30 June 1997, OJ L 199, 26 July 1997, p.32, as amended by Directive 98/61/EC of 24 September 1998); the ONP Framework Directive (see endnote 6); the Data Protection Directive (Directive 97/66/EC of 15 December 1997, OJ L 24, 30 January 1998, p.1), and the Voice Telephony Directive (Directive 98/10/EC of 26 February 1998, OJ L 101, 1 April 1998, p.41).
- 11) See II.1.
- 12) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, 14 December 1999, “Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age”, COM(1999)657, available at http://europa.eu.int/comm/avpolicy/intro/intro_en.htm
- 13) 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, as amended by Directive 97/36/EC of the European Parliament and of the Council of 19 June 1997 (OJ L 202/60, 30 June 1997).
- 14) The so-called “broadcasting State principle”, see Article 2.1 of the EC “Television Without Frontiers” Directive.
- 15) See Article 2a para.1 of the EC “Television Without Frontiers” Directive.
- 16) See ECJ case C-11/95 Commission v. Belgium, judgment of 10 September 1996, ECR 1996 I-4115 ff., para.88.
- 17) See judgment of the ECHR of 24 November 1993, 36/1992/381/455-459 (*Informationsverein Lentia and others v. Austria*), para.32 ff. and judgment of 28 March 1990, Series A No.173, p.24, para.61 (*Groppera Radio AG and others v. Switzerland*).
- 18) See endnote 13.
- 19) Published in OJ L 298/23, 17 October 1989.
- 20) European Convention on Transfrontier Television, 5 May 1989, amended on 9 September 1998.
- 21) See Article 6.1 of the Convention.
- 22) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services (OJ L 178, 17 July 2000, pp.1-16).
- 23) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L 13/12, 19 January 2000).
- 24) Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 24 July 1998, pp.37-48), as amended by Directive 98/48/EC of 20 July 1998 (OJ L 217, 5 August 1998, p.18).
- 25) See endnote 12.
- 26) Section 3(6) of the Communication.
- 27) Opinion of the Committee of the Regions on the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and guidelines for the Community’s audiovisual policy in the digital age (OJ C 317/25, 6 November 2000).
- 28) Committee of Ministers Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector.
- 29) Competition law is only briefly outlined here, since it is discussed in greater depth in the second part of this report.
- 30) See also Article 3 g) of the EC Treaty.
- 31) Council Regulation 17/62/EEC: First Regulation implementing Articles 85 and 86 of the Treaty (OJ No.13, 21 February 1962, pp.204-211), as amended by Regulation 1216/1999 (OJ L 148, 15 June 1999, p.5).
- 32) Council Regulation 4064/89/EEC of 21 December 1989 on the control of concentrations between undertakings (OJ L 257/90, p.13), as amended by Regulation 1310/97/EC of 30 June 1997 (OJ L 180, 9 July 1997, p.1).
- 33) Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29 July 1980, pp.35-37), as amended by Commission Directive 2000/52/EC of 26 July 2000 (OJ L 193, 29 July 2000, p.75).
- 34) See, for example, van Loon’s article in IRIS Special, “Television and Media Concentration”, pp.67 ff., particularly the decisions mentioned in footnotes 20-73.
- 35) According to the Cartels Regulation, the Member States are only competent to deal with mergers if the Commission has not initiated any procedure (see Article 9.3 of the Regulation). See section C of this report for more details.



- 36) Commission Green Paper COM (97) 623 on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation.
- 37) The convergence of consumer behaviour is also now being discussed (see “*Konvergenz und Regulierung*” by Hoffmann-Riem, Schulz and Held, published in Baden-Baden, 2000), although the present report is not concerned with this phenomenon.
- 38) The USA, for example, is planning to switch off in 2006, while Germany expects to do so in 2010.
- 39) One example is the Bayern virtual marketplace (www.baynet.de).
- 40) See endnote 36.
- 41) Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Towards a new framework for electronic communications infrastructure and associated services - 1999 Communications Review - Document COM (1999) 539, available as a PDF file at <http://europa.eu.int/ISPO/infosoc/telecompolicy/review99/review99.htm>.
- 42) The Commission proposed:
- a Framework Directive (Directive on a common regulatory framework for electronic communications networks and services), amended after its first reading - COM (2001) 380;
 - an Access Directive (Directive on access to, and interconnection of, electronic communications networks and associated facilities), amended after its first reading - COM (2001) 369;
 - an Authorisation Directive (Directive on the authorisation of electronic communications networks and services), amended after its first reading - COM (2001) 372;
 - a Universal Service Directive (Directive on universal service and users' rights relating to electronic communications networks and services) - COM (2000) 392;
 - a Data Protection Directive (Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector) - COM (2000) 385.
- All these documents are available in various languages at http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm
- 43) Regulation No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on Unbundled Access to the Local Loop (OJ L 336, 30 December 2000, pp.4-8).
- 44) This set of directives, which is meant to meet all the aforementioned demands in the electronic communications sector, has not yet been finally adopted. Only the Regulation on Unbundled Access to the Local Loop (see endnote 43) entered into force last year.
- 45) Defined in the Communications Review as “communications services and access services associated with granting access to a particular service to authorised users (eg conditional access services, electronic programme guides)”.
- 46) See Section 1 of the Communications Review: “Rationale for the 1999 Communications Review”, p.4.
- 47) See Section 2.2 of the Communications Review: “Results of consultation on the Convergence Green Paper”, p.6.
- 48) See Section 2.5 of the Communications Review: “Report on a possible European regulatory authority”, pp.9 ff.
- 49) European Conference of Posts and Telecommunications.
- 50) European Committee of Telecommunications Regulatory Affairs.
- 51) See Section 4.8.1 of the Communications Review: “Proposed new institutional arrangements”, pp.60 ff.
- 52) See Section 4.8.2 of the Communications Review: “National regulatory authorities”, pp.62 ff.
- 53) See endnote 42.
- 54) See Article 3.4 and 3.6 of the Framework Directive.
- 55) See Article 6 of the Framework Directive.
- 56) See speech by Mrs Reding (Speech/01/304) at the RTL Group Management Conference, held in Venice on 22 June 2001. The English version is available at: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist>.
- 57) Overview available at http://europa.eu.int/comm/avpolicy/stat/studi_en.htm.
- 58) For a detailed study of the notion of concentration, see Mailänder, *Konzentrationskontrolle zur Sicherung von Meinungsvielfalt im privaten Rundfunk*, Baden-Baden 2000, pp.163 ff.
- 59) See Article 5.1 of the *German Grundgesetz* (Federal Law), Article 10.1 of the ECHR and Article 11.1 of the European Charter of Fundamental Rights.
- 60) See section 3, below.
- 61) See endnote 31, above.
- 62) See endnote 32, above.
- 63) Although this rule does not entitle Member States to authorise concentrations that have been banned by the Commission, they may prohibit concentrations that have not been queried by the Commission or authorise them only under certain conditions; see Commission's declaration on the CCR in the Council minutes, published in WuW 1990, p.240 (242).
- 64) See also the very detailed survey of the application of EU competition law in the television sector in van Loon, *op.cit.*, pp.72 ff.
- 65) See, for example, the decision in case COMP/JV 0037 - BSKyB/Kirch, 21 March 2000, OJ C 110/45, 15 April 2000; for more information on this decision, see Helberger/Scheuer/Strothmann, *Non-discriminatory access to Digital Access Control Services*, IRIS Plus 1/2001, pp.2, 6 f.; see also Altes, *Paradigmenwechsel in der Europäischen Fusionskontrolle? Media Perspektiven 11/2000*, pp.482, 484 f., 487; for details of the relationship between competition- and industry-related objectives, see Mailänder, *op.cit.*, pp.191 ff.
- 66) MSG Media Service (case no. IV/M.469), decision of 9 November 1994, OJ L 364/1, 31 December 1999; Bertelsmann/Kirch/Premiere (case no. IV/M.993), decision of 27 May 1998, OJ L 53/2, 27 February 1999; Deutsche Telekom/Beta Research (case no. IV/M.1027), decision of 27 May 1998, OJ L 53/31, 27 March 1999; for more details of these cases, particularly the pledges made, see Altes, *op.cit.*, pp.482 ff; Helberger/Scheuer/Strothmann, *op.cit.*, pp.5 f.
- 67) See Altes, *op.cit.*, pp.485, 488.
- 68) For further details, see section B.1, above.
- 69) For information on the role of telecommunications authorities, see section B 1.(a), above.
- 70) OJ C 233/2, 6 September 1991; OJ C 265/2, 22 August 1998 (concerning access agreements).
- 71) See section C.I.1, above.
- 72) For information on EU policy on the audiovisual media, see section B.2, above.
- 73) Resolution of the European Parliament on Media Concentration of 15 February 1990, OJ C 63/137; Resolution of the European Parliament on media concentration and diversity of opinions of 16 September 1992, OJ C 284/44.
- 74) Green Paper on “Pluralism and Media Concentration in the Internal Market - An assessment of the need for Community action”, COM (92) 480 Final, 23 December 1992, pp.81 ff.
- 75) Green Paper COM (92) 480, pp.97 f., Explanatory Memorandum, pp.5 ff.
- 76) Green Paper COM (92) 480, pp.70 f.

- 77) Green Paper COM (92) 480, pp.81 ff.
- 78) Opinion of the Economic and Social Committee on the Commission Green Paper on Pluralism and Media Concentration in the Internal Market, OJ 1993 C 304/17.
- 79) European Parliament Resolution No. A 3-0435/93, OJ 1994 C 44/177.
- 80) European Parliament Resolution No. A 3-0435/93, OJ 1994 C 44/177.
- 81) For more details on the European Community's competence to safeguard pluralism in the media, see Röss/Bröhmer, *Europäische Gemeinschaft und Medienvielfalt*, Frankfurt am Main 1998; see also the brief summary of the arguments in Fischl, *Die Wettbewerbsaufsicht im Medienbereich zwischen Entwicklung und Neuorientierung*, Frankfurt am Main 2001, pp.47 ff.
- 82) For the latest discussions within the European Union, see Hieronymi, in *Nizza, die Grundrechte-Charta und ihre Bedeutung für die Medien in Europa*, Baden-Baden 2001; see also B.2, above.
- 83) Council of Europe Committee of Ministers Declaration on the freedom of expression and information, 29 April 1982.
- 84) Recommendation No. R (99)1 of the Committee of Ministers to Member States on measures to promote pluralism, Strasbourg, 19 January 1999.
- 85) For the European Parliament's latest ideas, see Hieronymi, in *Nizza, die Grundrechte-Charta und ihre Bedeutung für die Medien in Europa*, Baden-Baden 2001.
- 86) The Council of Europe made further practical proposals, including the introduction and definition of thresholds: Member States should examine the possibility of defining thresholds in order to limit the influence that a single commercial undertaking or group may have in one or more media sectors. Such thresholds may, for example, take the form of audience shares, the revenue/turnover of the companies involved or capital share limits in commercial media enterprises.
- 87) For details, see B.II.1(a).
- 88) Both to programme providers and consumers.
- 89) See "Report on media pluralism in the digital environment" (adopted by the Steering Committee on the Mass Media in October 2000), [http://www.humanrights.coe.int/media/documents/other/PL-Report\(EN\).doc](http://www.humanrights.coe.int/media/documents/other/PL-Report(EN).doc); regarding the access risks engendered by the development of new technologies, see also van Loon, *op.cit.*, pp.73 f.; concerning access for broadcasters of digital programmes to electronic conditional access systems, see Helberger/Scheuer/Strothmann, *op.cit.*, pp.2 f.
- 90) See also Council of Europe Recommendation No. R (99)1, Appendix II; see also report by the German Commission on Concentration in the Media (KEK), published under the title "*Fortschreitende Medienkonzentration im Zeichen der Konvergenz*", Berlin, 2000, p.47.
- 91) For more details, see Helberger/Scheuer/Strothmann, *op.cit.*, p.2.
- 92) eg in Germany, the *Landesmedienanstalten* (Land media authorities), see Sections 52, 52a, 53 of the Agreement between Federal States on Broadcasting (*RfStV*), statutes set out in Section 53 para 7 *RfStV*.
- 93) The extent to which this is true is hard to evaluate, since new services, particularly interactive services, require much more capacity than today's "simple" television channels.
- 94) The limited good of the future will be access to consumers.
- 95) See also Mailänder, *op.cit.*, p.163.
- 96) For example, if the holder of film and sports rights also owns TV stations and newspapers and wishes to exploit those rights more profitably or sell more subscriptions to his pay-TV channel, he can change the broadcast time of football matches and, at the same time, use his influence to ensure that the broadcasters and newspapers he owns report favourably on his actions. For another example of how a media mogul can influence reporting on his activities in his own newspapers, see Jochimsen, *Regulierung und Konzentration im Medienbereich*, AFD 1999, p.24.
- 97) For further information on the reasons for intermedia concentrations, see Mailänder, *op.cit.*, p.171.
- 98) For example, AOL/Time Warner, Vivendi/Canal+/Seagram, Deutsche Telekom/Beta Research; in Germany, the KEK has examined the increasing level of media concentration as a sign of convergence in its report drawn up in accordance with Section 26.2 *RfStV*; for details of the causes of commercial concentrations in broadcasting, see Mailänder, pp.165 ff.
- 99) Case of MSG Media Service (case no. IV/M. 469), decision of 9 November 1994, OJ L 364/1, 31 December 1999; the Commission did not investigate the applications made by the German authorities in accordance with Article 9.3 CCR in the cases of Bertelsmann/Kirch/Premiere (case no. IV/M.993), decision of 27 May 1998, OJ L 53/2, 27 February 1999 and Deutsche Telekom/Beta Research (case no. IV/M.1027), decision of 27 May 1998, OJ L 53/31, 27 March 1999.
- 100) See B.II.1 and endnote 46, above.
- 101) The Commission considered a similar idea in the 1999 Communications Review, but in the end rejected it, see B.II.1 and endnote 47, above. See also the Commission's Communication "Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age" and the related Opinion of the Economic and Social Committee, see B.I.2 (a), above.
- 102) The fact that telecommunications regulatory authorities are only set up on a temporary basis could prevent them from taking on such responsibilities.
- 103) Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 27 September 2000, COM (2000) 582, available at http://europa.eu.int/eurlex/de/com/dat/2000/de_500PC582.html
- 104) For details of planned reforms in the field of telecommunications law, see B.II.1, above.
- 105) See also the Council of Europe's proposals in its Recommendation No. R (99) 1, Appendix I.
- 106) Article 1 of the proposed Regulation exempts from the principle set out in Article 81.1 and 81.2 of the EC Treaty any concentration that restricts competition and satisfies the conditions of Article 81.3. Such concentrations therefore take immediate effect. Hence the current control system, which is based on prior notification and authorisation, is abolished. On this subject, particularly the problems caused by the current system, see von Bogdandy, *Rechtsgleichheit, Rechtssicherheit und Subsidiarität im transnationalen Wirtschaftsrecht*, *EuZW* 2001, pp.57-58.
- 107) Article 5 of the proposed Regulation. National courts shall have corresponding jurisdiction, see Article 6 of the proposed Regulation.
- 108) Explanatory Memorandum to the proposed Regulation, p.5; see also von Bogdandy, *op.cit.*, p.58: "a coherent network of competition authorities led by the Commission"; concerning individual co-operation and consultation tasks, see endnote 110.
- 109) Under Article 13.1 of the proposed Regulation, national competition authorities and the Commission are only authorised to suspend proceedings or reject a complaint if it is being dealt with by another authority. Under Article 13.2, a national authority can reject a complaint it has received if the case has already been dealt with by another competition authority. According to the Explanatory Memorandum to the proposed Regulation, the Commission thinks it is neither necessary nor appropriate to oblige other competition authorities to suspend or terminate their proceedings. It is the task of the network to ensure in practice that resources are used efficiently.
- 110) Regarding the recognition of national rulings, see the Commission's views in the impact assessment of the proposed Regulation (p.41). With regard to Article 234 of the EC Treaty and the Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters, see OJ 1998 L 319, p.9.
- 111) The proposed Regulation provides for extensive information and co-operation obligations, see Articles 11 ff.; regarding co-operation between competition authorities, see also the Commission's remarks in the Communications Review, B.II.1, above; see also the proposed co-operation and consultation system for the telecommunications sector.