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European Broadcasting Law and Policy

Jackie Harrison
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EUROPEAN BROADCASTING LAW AND POLICY

European broadcasting policy has attracted attention from many disciplines because it has dual nature: cultural and commercial. This book offers a detailed treatment of European broadcasting law, set against an overview of policy in this area. In this respect the authors identify tensions within the EU polity as regards the appropriate level, purpose and mechanism of broadcast regulation. Key influences are problems of competence, the impact of changing technology and the consequences of increasing commercialisation. Furthermore, the focus of the analysis is on the practical implications of the legal framework on viewers, and the authors distinguish both between citizen and consumer and between the passive and active viewer. The underlying question is the extent to which those most in need of protection by regulation, given the purpose of broadcasting, are adequately protected.

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EUROPEAN BROADCASTING LAW AND POLICY

JACKIE HARRISON AND LORNA WOODS



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SERIES EDITORS' PREFACE

In view of the economic and cultural importance of the broadcasting sector in the EU and its Member States, the appearance of this study of European broadcasting law and policy is timely. The content and delivery of broadcast media such as television are of central importance both for the viewer and for society more generally. Watching television remains a very important leisure activity for most people. Clearly technological innovations such as the internet have combined with the emergence of digital television to produce an increasingly diverse set of 'offerings' for consumers, but although internet broadcasting remains for the most part in its infancy, at the same time the introduction of interactive services on digital TV has led to a narrowing of the divide between what is 'online' and what is 'TV'.

Bringing together expertise from the fields of legal and journalism studies, the two authors fill an important gap in the available literature by providing an analysis and critique of the role of the European Union institutions in regulating broadcast media. They draw an important distinction in terms of seeing the viewer both as consumer and as citizen, ensuring that their analysis is not solely market-based, but is also informed by the difficult considerations which surround the future of public service broadcasting, alongside commercially driven offerings.

Part I of the book sets the scene, identifying the general issues which have shaped broadcasting policy in the EU context over the past thirty years, and highlighting the differing provisions of EU law which apply to different aspects of broadcasting policy in the context of a single market, including the regulation of ownership, content and delivery. Part II looks in more detail at some specific questions such as ownership, the broadcasting of sport and advertising, which touch upon some of the most controversial issues facing regulators at the present time. In their analysis, the authors seek to reflect the difficulty of combining both an economic viewpoint and a cultural viewpoint in relation to the social, political and economic centrality of broadcasting. As they note, this is complicated by

the factors which shape an EU-level response in the area of broadcasting such as the complex and incomplete nature of the EU's competences in the field, as well as the problems of regulating such a swiftly changing technological domain.

The authors argue that broadcasting is best understood as something which can contribute to social, political and cultural purposes. They find that current broadcasting regulation at EU level takes a multi-faceted approach to the role of broadcasting in relation to these purposes. Regarding viewers as citizens requires a different nature of regulatory thinking than does regarding them as consumers in a market-place. The citizen's domain is characterised by universal availability (even if in practice not all citizens take up what is on offer), whereas in the consumer domain private interest considerations of ownership and access dominate: the ability and willingness to pay is crucial. The authors perceive a shift in European broadcasting towards commercial overstatement and public service understatement, and they call for attention to be paid not merely to the creation of European champions capable of competing globally, but also to diversity of suppliers and content.

This work makes a stimulating contribution to the interaction of European law and broadcasting policy, and its careful and critical assessments and warnings are a most welcome contribution to the analysis of the current and future developments in the European Union's competence in broadcasting. Accordingly, we welcome this work's appearance in the series Cambridge Studies in European Law and Policy.

Laurence Gormley
Jo Shaw

PREFACE

The origins of this book lie in a discussion we had one summer about the broadcasting of sporting events, and the way in which access to such broadcasting rights was affecting the broadcasting sector. During the course of this discussion, we realised that similar themes were arising as arose in other contexts, such as the quota provisions in the Television without Frontiers Directive. Further, although there were some detailed treatments of the tensions within the EU polity as regards the appropriate level, purpose and mechanisms of broadcast regulation, there were no similar treatments of the substance of broadcasting law and policy at the EU level. Moreover, the existing discussions of the area seemed rather abstract; we considered that in looking at the substance of the rules, we should consider the practical implications from the perspective of those arguably most influenced by those rules, that is, the viewers. This has meant that, in addition to providing a detailed and accurate picture of the law (admittedly one of the objectives of this book), we would analyse that law and underlying policy to identify the extent to which the needs of viewers are protected.

One of the initial questions for us related to the scope of this book. As we point out, there is no one thing within the Union as a single broadcasting policy. Instead, the broadcasting sector is affected by a number of instruments: some, such as the Television without Frontiers Directive, are clearly aimed at regulating broadcasting, but others, such as the four freedoms and competition policy, have a more incidental effect. Where, then, to draw the line, as a complete treatment of all potential relevant areas would have resulted in an encyclopaedia rather than a book? The Television without Frontiers Directive was an obvious starting-point, but we then decided to include those aspects of law which would have an impact on the range of content available to viewers. To this end, we included a review of the infrastructure regulation, media mergers and the state-aid rules relating to public service broadcasting. A full treatment of the communications package and of competition rules and the

broadcasting sector in general lies outside the scope of this book. Likewise, although television standards are central to the reception of television services, and copyright issues may also affect content, they too have not been covered. The law is up to date as of 31 July 2006. We have, however, included in an appendix the main issues arising from the revised text of the proposal as agreed by the Common Position of the Council, 24 May 2007. Although at the time of correcting proofs the European Parliament had yet to vote on the revised proposal, it was not envisaged that there would be major changes to the proposal.

This book is long overdue. We would therefore like to thank the commissioning editor and series editor for their patience. We would also like to thank the many friends and colleagues, too numerous to mention individually, who have helped us, directly or indirectly, in the writing of this book. Particular thanks must go, in no specific order, to Neil Sellors, Chris Marsden, Steve Anderman, Christian Twigg-Flesner, Roger Brownsword and Sheldon Leader. Finally, this book is in memory of Henry, who inadvertently was responsible for starting this project off.

Jackie Harrison
Lorna Woods
September 2006

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PART I

Introduction

The broadcasting sector in the European Union (the Union) is in a state of flux. Rapid technological development and increasing commercialisation have provided new challenges for regulators and policymakers, who seek to harness the potential of new technology to provide a regulatory environment that is for the good of everyone. Despite extensive consultation and reviews of the regulatory framework in the Union over the last decade or so, a failure to consider directly the broadcasting environment from the perspective of all viewers has created a regulatory framework in which a full range of broadcasting services is not universally provided. The underlying assumption of policymakers is that, in a properly functioning broadcasting environment, industry will thrive economically, develop new technology and new services and consequently cater for all viewers. The expectation is that the resulting environment will also create greater viewer choice and broadcasting will continue (somehow) to fulfil its public service remit, particularly its socio-cultural and democratic function. Yet, in so far as viewers are considered, it is as consumers of broadcast services and not as citizens. This approach, we argue, fails to represent the citizen viewer and neglects the valuable attributes of broadcasting that go beyond purely economic concerns.

The history of broadcasting in the Union began at national level with governments' various attempts either to monopolise or control it.¹ From the start, broadcasting has attracted a high degree of governmental involvement because of its perceived power to influence those who listened to radio or watched television. As television became established post-war,

¹ Television broadcasting was relatively slowly established in the Union, but by the end of the 1960s all member states of what was then the European Economic Community had at least one television station. The regulation of television built upon the structures established for radio, but because of the high costs of television production, spectrum scarcity and concerns about the political and ideological potential of television, member states deemed it necessary to establish public monopolies in order to ensure that the service worked for the national public good. See D. Krebber, *Europeanisation of Regulatory Television Policy: The Decision-making Process of the Television Without Frontiers Directive from 1989 and 1997* (Baden-Baden: Nomos Verlagsgesellschaft, 2002), p. 39.

public and private broadcasting emerged and audiences were regarded as either citizens in need of support or consumers in need of entertainment (sometimes both). Broadcasting policy is either regarded as something that operates in the interest of public service, operates in the interest of economic freedom or attempts to reconcile both. In essence, two arguments proceed in parallel: those based in non-economic concerns; and those based on economic concerns.

The Union's policy initiatives towards broadcasting were, and still are, regarded as a means to encourage and foster, depending on your point of view, national identity, a common Union cultural heritage or commercial freedom for a valuable Union-based market. National broadcasters were expected to reflect their respective national cultural heritages. Citizens were able to share in a minimal but 'common knowledge'.² The assumption that broadcasting has an impact, however ill-defined and insubstantial, forms the basis for the view that broadcasting should serve social, cultural and political purposes, beyond commercial objectives.³ Parallel to these non-economic concerns was the issue of the evolving commercial identity of broadcasting, notably the introduction and expansion of the private sector, which began to coexist with public broadcasters. Of course, the philosophy of the two sectors is different. Private sector broadcasters do not necessarily have the public good as their primary purpose, whilst public sector broadcasters are often subject to public interest obligations. We will show how this bifurcated world constantly re-emerges in all aspects of Union broadcasting policy. Given the distinctions between the two types of broadcasting, and their respective interests, we are faced with the following problems: to what extent can we realistically expect private sector broadcasters to produce programming that serves non-economic purposes, therefore fulfilling the function of a public service broadcaster? Conversely, to what extent can we expect and do we want to expect public service broadcasters to provide commercial services? The answers to these questions need to be considered in the context of a highly competitive

² A. Graham, 'Broadcasting Policy in the Multimedia Age', in A. Graham, C. Kobaltdt, S. Hogg, B. Robinson, D. Currie, M. Siner, G. Mather, J. Le Grand, B. New and I. Corfield (eds.), *Public Purposes in Broadcasting* (Luton: University of Luton Press, 1999), pp. 17–46, p. 19.

³ These effects have generated what economists call externalities. Externalities arise 'once we suppose, as both common sense and research suggests (a) that television has some influence upon the lifestyles, habits, interests, etc, of those who watch it and (b) that these habits and interests have implications for those around us . . . even just the belief that television affects behaviour is sufficient for externalities to exist'; see Graham, 'Broadcasting Policy in the Multimedia Age', in Graham *et al.*, *Public Purposes in Broadcasting*, p. 26.

international environment. In short, the history of broadcasting in the Union centres on the interrelationship between commercial imperatives and a wide range of non-trade values.

Increased commercialisation, as a result of deregulation, liberalisation and privatisation policies; an increased number of players in the market, many of which are private sector entities; and more television channels, have together challenged existing assumptions about the Union's broadcasting environment and viewers' relationship to it, as well as the appropriate level and style of regulation. Economic pressures on broadcasters, driven by channel expansion, have led, across the Union, to increased competition for viewers. This has, in turn, had an impact on broadcasting content and formats, with successful formats and popular content tending to dominate programme schedules, arguably reducing choice and diversity of content available to viewers. Against this background, policymakers in the Union are under pressure to remove regulatory constraints from broadcasters in a commercialised environment so as to reduce their costs, which could also have an adverse impact on the quality and reach of content available to viewers.

The introduction of different distribution platforms and the subsequent growth of digital channels also have consequences for the level of access to content enjoyed by different viewers. Even if a diverse range of content were made available via this growth, the development of pay TV⁴ means that some viewers cannot afford to access certain types of content, usually what is called premium content: film and sport. The trajectory towards pay TV is likely to continue and prove far-reaching, with television content increasingly being seen as a commodity that must, in one form or another, be paid for.⁵ This is part of a more general trend in which content (however defined: entertainment, education or information) is seen, by transnational corporations, as a valuable commercial asset which may legitimately be restricted to those able and prepared to pay for it. At the same time, commercially driven technological developments are raising barriers to access to a diverse range of content and, increasingly, interactive television applications. This trend towards the reduction of free access is further exacerbated because it is no longer just films and sport that fuel pay TV, but the use of content archives, interactive dating,

⁴ Pay TV refers to digital television services for which a viewer must pay a monthly subscription to a pay TV supplier.

⁵ It is arguable that television was never really free, given the fact that public service broadcasters are often funded by licence fee or other form of tax. None the less they were free at point of access and the fee was not determined by reference to what one watches.

games and betting and, more recently, high-cost specially commissioned programmes and series.

While some viewers currently choose to remain in a passive linear, analogue, free-to-air environment, their freedom to do so will diminish and in some member states be short-lived. Across the Union, governments are preparing to stop transmitting analogue signals and to switch over to digital transmission. Although some digital television will be broadcast free to air, such as digital terrestrial television (DTT) in the UK (known as 'Freeview'), it is by no means certain that this will be the general pattern across the Union. Even if it were, free-to-air transmissions will increasingly introduce the viewer to newer technology, such as non-linear interactive television and the options to 'top up' their free-to-air viewing with subscriptions to further channels and services. Commercial services will certainly seek to benefit from anything that might be regarded as a meagre public service digital provision, as we have seen in the UK with top-up TV providers⁶ doing so on the back of 'Freeview'.

These developments illustrate a trend in the Union broadcasting market, towards the commodification of information and the increasing digitalisation of content. Given this, two assumptions are prevalent. First, a consumerist approach is the best way to organise the television market. Secondly, free-to-air television is insufficient in either the amount of programming hours of particular types of programming, or in the variety of genres provided, and does not fully serve the preferences of viewers. These assumptions return us to the questions we raised earlier. Is the commercial sector sufficient for all purposes, or has the public sector a unique role to play? A policy environment that accepts the assumption about the necessity of a consumerist approach and the insufficiency of free-to-air television is likely to create a digital divide. This is nothing other than a payment divide, with basic subscription charges and additional service charges dividing up between them the content to which a viewer can have access. Against this background, regulation seeks to balance commercial interests and technical considerations⁷ with the preferences of the viewer.

Our argument is straightforward. It is that, given the significance of broadcasting to the viewer and society, the viewing experience should be at the centre of policymaking, regulation and legislation. We are not

⁶ See for example www.topuptv.com/

⁷ There is some call for a distinction in regulation depending on whether the content accessed is broadcast traditionally or provided on demand. This push–pull distinction is very important in current regulation, indeed it could be said currently to define the way in which the viewer is perceived in regulatory terms.

suggesting that this should be the only concern, rather that it should be a central concern. The task of finding the 'right' balance is difficult and compounded by the fact that viewing experiences are diverse and the viewers' interests perceived to be in need of protection are not homogeneous. Regulation makes assumptions about the capacities of viewers to access and use technology and broadcasting services. We question the assumptions that geographical and financial barriers are not serious constraints to access and that the level of assumed competence of the viewer in using technology to create an individualised viewing experience. Within broadcasting policy, the viewer can be regarded as either a market-based consumer, or as a citizen with rights of access to certain content. Following on from this we propose that the viewing experience is shaped by whether regulation sees the viewer as a citizen or a consumer. This distinction remains central to our analysis of Union broadcasting policy. A secondary issue, linked to this distinction, is that of the expectations about how viewers engage with technology, which we refer to as the distinction between active viewing in a non-linear broadcasting environment, and passive viewing in a linear broadcasting environment (see table 1).

While we avoid engaging in audience psychology, it is nevertheless the case that the Union does seem to rely upon assumptions about how people will behave. These assumptions are not clearly elaborated; we analyse them in terms of the distinction between active and passive viewers (see table 1). For us the terms active and passive viewer make explicit what is often hidden within Union broadcasting thinking. Consequently they will be considered, in what follows, under our primary distinction, consumer viewers and citizen viewers and can be represented diagrammatically as shown overleaf.

In our opinion the viewing experience is quintessentially different when using the distinction between consumer and citizen. The consumer resides in the commercial domain. This is market-based and economically determined, viewers are individualistic, and viewers and broadcasters both regard content, in all forms, as capable of being purchased and owned. Information is not necessarily a public resource to be disseminated on behalf of the public good, but is private property to be exploited for financial gain. The citizen resides in the public domain and regards particular types of content as a social and civic asset. Such content should be available to all and enjoyed communally. Communication infrastructures are seen as adding to the cultural fabric of collective identity and belonging. The citizen requires that certain civic functions are

Table 1. *The scope of regulatory considerations regarding the viewing experience*

Commercial Domain	Viewing Experience	Public Service Domain
ACTIVE VIEWING EXPERIENCE (PPV, subscription, non-linear)	PERSONALISED SCHEDULES AND INTERACTIVE SERVICES	ACTIVE VIEWING EXPERIENCE (FTA, wide range of PSB services, non-linear)
CONSUMERS		CITIZENS
PASSIVE VIEWING EXPERIENCE (FTA, commercial, linear)	RELIANCE ON LINEAR SCHEDULING	PASSIVE VIEWING EXPERIENCE (FTA, limited range of PSB services, linear)
INDIVIDUALISTIC INFORMATION AS A COMMODITY		COMMUNAL INFORMATION SEEN AS PART OF PUBLIC SPHERE AND CULTURAL HERITAGE

Key to abbreviations in table, above:

- PPV – pay-per-view
- FTA – free-to-air
- PSB – public service broadcasting

fulfilled by broadcasters and, most importantly, believes that such services should not be subject to payment barriers. Naturally enough, the absolute nature of this distinction is heuristic. Many of us are both consumer and citizen. Thus, although the two categories are easily characterised as distinct, we also recognise that that distinction is, in reality, fluid. Nevertheless, our analysis of broadcasting requires the distinction to be maintained so that we can achieve a degree of clarity over what Union policymakers and regulators mean when discussing and deciding broadcasting policy.

The distinction between citizens and consumers also relates to the nature of the content that should be available to satisfy their respective viewing preferences. As regards citizens, content reach reflects programming which supports particular social, civil and political values, and which tends to emphasise the positive role of broadcasting in supporting democratic activity and in fostering a public sphere. Thus, we would expect to see a wide spectrum of programming covering different subject-matters

via a range of genres, importantly news, current affairs, documentaries, educational programmes and, it has been argued, sport.⁸ Since the ‘invention’ of modern sport in the late nineteenth century, sport has been strongly associated with the inclusive and exclusive construction of identity and difference. Since the development of modern sport occurred at the same time as a wave of nation-building, it has also always been particularly associated with nationalism. As we will see in chapter 2, one of the roles ascribed to public service broadcasting (PSB) is that of fostering national identity and social cohesion. Accepting this, broadcast sport has an important part to play in building a citizen’s sense of identity and belonging. The key aspect of citizens’ programming is the fact that it is universally available and free to air.

Quite different from this is the content diet of the consumer. No content type (or genre) is, in principle, excluded from their diets, although particular groups of consumers tend to focus on a narrower range of programmes, reflecting pre-existing interests and consumption patterns. While the content range itself may appear to be wide, from guns to bikes to sport and so on, it is usually gathered around core interests. A caricature of this viewing type is that a consumer watches the same thing from different sources. This can be contrasted with a citizen who watches varied things from the same source.

The factors affecting the viewers’ engagement with content, that is whether the experience is active or passive, comprise two categories: personal factors; and environmental factors. Personal factors relate to the viewers’ own skills and abilities in navigating the choices available (media literacy) and mastering the technology needed to make those choices.⁹ Environmental factors are those that arise from the broadcasting sector. Increased commercialisation has brought with it subscription and pay-per-view TV and some content types have become the virtually exclusive preserve of pay TV. To receive such content, a viewer needs to be able to pay for it and not everybody can afford to do so. Thus, a viewer might

⁸ M. Roche and J. Harrison, ‘Cultural Europeanisation through Regulation?: The case of media-sport in the EU’, unpublished paper presented at the *International Association for Media and Communication Conference*, Media Sport Working Group, Barcelona, July 2002, p. 16.

⁹ See Ofcom Special Report, *Consumer Engagement with Digital Communication Services*. An attitudinal segmentation model was developed to provide understanding of the way UK consumers engage with digital communication services. Five consumer segments were identified: enthusiasts, functionalists, economisers, abstainers and resisters. Available at www.ofcom.org.uk/research/cm/consumer_engagement/, p. 3.

have the personal capacity to be active, but be frustrated in so doing by environmental factors.

Consumers seeking an active viewing experience have to be able to pay for content and correspondingly arrange their viewing around a set of options that reflect their particular desired content reach and their willingness to pay. Such viewers assemble their own viewer package from a combination of free to air, subscription channels and pay per view, and construct their own particular programme schedule.¹⁰ A caricature of such a consumer is that they are unconcerned that others cannot enjoy the same privileges and their viewing choices are based entirely on a self-ish and individualised desire to maximise their own enjoyment. Their viewing choices could be characterised as being ones that could reinforce already held preferences and prejudices, and are located entirely in the commercial domain. Theoretically, such viewers may have a disregard for the social and cultural value of broadcasting and could choose endlessly to watch programming that is deemed to be 'unsuitable' or may be harmful.

Citizens who actively control their viewing experience will expect the content to be available to them, and from which they choose what to watch, to reflect the values and aspirations of their citizenship boundaries. This citizen seeking an active viewing experience assumes that not only are certain types of content available but also that access to that content is guaranteed. Such content is traditionally found, though today by no means exclusively, in free-to-air PSB, which is often supported by the state.¹¹ What is common to these two types of active viewing experience is that the viewers are media literate and able to locate the type of content they want. The bewildering world of multi-channels, different distribution networks and payment options is understood and,

¹⁰ For this type of consumer, content can be chosen eclectically and may include a reality TV programme with programmes from a pay-per-view culture channel in the same package. Some programming which arguably serves elements of the public service remit (i.e. educates and informs the audience) is now only available on a pay-per-view or subscription basis. Channels, such as Artsworld shown in the UK, initially required an additional payment per month, but now is available as part of a bundle of other channels which are acquired when a subscription is paid. Television news is still protected and shown on a free-to-air basis (although the number of news sources available is restricted according to the type of technology the viewer purchases). In a multi-channel pay-TV environment the further privatisation of certain types of information seems inevitable. The area of greatest concern to date has been in relation to the privatisation of particular popular sporting events (see ch. 12).

¹¹ State support can take a variety of forms from cash subsidies, tax breaks, through to access to frequencies. State support does not necessarily imply a direct state control of content.

subject to overcoming any environmental constraints, is successfully navigated.

The phrase passive consumer requires clarification. What we mean by the phrase is the viewing experience of the traditional linear free-to-air commercial television viewer who was targeted by advertising and who, it was hoped, would respond by consuming what was advertised. The content range reflects a tendency towards entertainment rather than a diverse range of programming. This viewer is a so-called couch potato. What we do not mean are those consumers who wish to purchase a service but are constrained by environmental factors, for example, willingness and ability to pay, or reception difficulty. While clearly illustrating the difficulties created by considering television content to be purely a commodity, here the best one can say of such viewers is that they are rendered inactive, over-spend or are left frustrated in their viewing choices.

The passive citizen viewer also represents a more traditional figure. Instead of customised packages, citizen passivity is based on a linear viewing experience with content selected from a very limited range of channels, usually provided free to air, traditionally by PSB.¹² Essentially, the passive citizen viewer is in the hands of the scheduler, and consequently, the limited channel options represent a constructed viewer content reach. Obviously such limitations and constructions vary across the Union and for a variety of historical and political reasons. However, the point remains that passive citizens have traditionally relied on PSB content, but this is precisely the sort of content, with its formal scheduling, that is being undermined by multi-channel, niche broadcasting. The increasing commodification of information has also meant that the variety of content available for universal distribution is constantly being reduced, thus forcing citizen viewers into ever more commercial considerations. As such, this form of passivity is becoming scarcer.¹³ In reality, such viewing looks irredentist, harking back to simpler times. The drift from this type of experience to a consumerist-driven environment is palpable and,

¹² The experience of Freeview in the UK is fascinating from this point of view. Initially offered as a free-to-air alternative to the pay TV channels provided by BSkyB, a subscription payment now allows for further channels to be added as top-ups, indicating that this type of viewing cannot escape from commercial options.

¹³ The British public service broadcaster, the BBC, is restructuring its production and commissioning of content to allow '360-degree commissioning' of all content to be shown on all platforms. The BBC's vision is that, although linear channels have several more years of life (in the US, the prognosis for such channels is that they have only five more years of life), the future of broadcasting must be focused on on-demand media as audiences move to use other types of media platforms to access content (L. Rouse, 'The BBC's Vision Thing', *Broadcast*, 28 July 2006, 15).

without counter measures, inexorable. The issue of whether content is available in the public domain or the commercial domain ultimately decides the viewing experience.

In toto, table 1 deals with the parameters of possible viewing experience that exist in both the linear and non-linear broadcasting environment. These quadrants of viewing experience represent no more than idealised possibilities and, as such, are the extremes of viewing experiences which, we argue, any regulatory policy should take into account. We use these types of viewing experience throughout the book as the extent of the viewing options available to both the Union consumer and citizen. Our concern is that Union broadcasting regulation, informed by broadcasting policy, while claiming to take into account the needs of the viewers, does not clearly recognise the distinction between consumers and citizens, nor take into account the fact that, for some, the viewing experience is necessarily passive. Union broadcasting regulation tends towards a perception of the viewer that conflicts least with commercial interests, that is an active consumer, arguably under-protecting those most in need of regulatory intervention.¹⁴ It is our view that regulators should remember passive citizens, who want to be able to watch a reasonably wide range of quality programmes without either having to pay for additional services and engage with new technology to find appropriate programming,¹⁵ or being forced to settle for increasingly emiserated public service television supplied free-to-air.

It could, of course, be argued that increased deregulation, facilitating greater industry freedom, is not problematic, a view we reject for a number of linked reasons. In general terms, there may be no co-ordination of provision across different broadcasters serving a common area. In such a scenario each broadcaster makes its decisions in the light of its own interests and obligations, without necessarily incorporating any reference to the overall provision of broadcasting services across a particular area, and, clearly, without reference to the possible viewing experience of anyone other than active consumers.¹⁶ Two things are wrong with this. First, that such content as is provided is exclusive of non-economic

¹⁴ Similarities can be found with criticisms of consumer policy: see e.g. G. Howells and T. Wilhelmsson, *EC Consumer Law* (Aldershot: Ashgate, 1997), p. 18.

¹⁵ Ofcom, *Digital Switchover: An Audit of Viewers' Priorities*. Ofcom notes that although switchover will pose relatively few challenges for some, other viewers may need help to ensure that they know what they need to do, when they need to do it and the options open to them (available on the Ofcom website), p. 1.

¹⁶ While active consumers are in the most favoured position, they are still susceptible to Henry Ford's version of consumerism, namely, you can have any colour so long as it's black.

calculations as to its merit. Secondly, there is the risk that industry members congregate to provide services in the middle ground, whether this be a result of cartel-type thinking, playing it safe, satisfying advertisers' needs for a significant audience share or merely (and often) a lack of imagination. While consumers' interests in having choices which they can pay for are taken into account (though even here there are some imposed limits to choice), it is not the case that such interests necessarily coincide with those of citizens. Indeed, as we shall show, most arguments to the contrary fail to deal with concerns of universality, quality and diversity of content.

A reliance on the market may provide choice, but it is less clear about the substance of that choice and the persons to whom that choice is really available. Given the inherently majoritarian bias, or bias towards those who can pay, of a market-based model, the difference between a consumer-based model and that based on citizens' interests is that the former 'emphasizes the satisfaction of aggregated individual desires, the other improvement in quality of collective civic participation and information . . .'.¹⁷ Individual choices aggregated do not necessarily lead to the best collective results, nor do they take into account the fact that not all will be able to afford to pay. Freedom of choice here is rendered a formal not a substantive freedom. As we shall see in chapter 7, there are specific problems relating to the way competition policy goals and broadcasting policy goals, especially goals focusing on issues such as freedom of speech, diversity and plurality, interrelate. Thus, any approach which only provides an increased level of formal freedom is only providing increased economic choices for those select groups who can afford to pay for the choices they wish to make. This 'cash limit' will, given the finite resources of the content market, limit the scope of others to choose, either because they cannot match market prices or because they are unwilling to pay. In either case, limits and restrictions to choice are set by price and not wider (cultural) concerns. Choices based on satisfying the preferences of those who are willing and able to pay also limits the choices of other groups, including future viewers who might have different preferences from contemporary viewers.

As we shall argue, the problems within the regulatory framework arise from a failure by policymakers to focus directly on the diversity of the viewing experience itself; to favour the active consumer and play down or ignore the particular difficulties faced by both the active and passive

¹⁷ H. Shelanski, 'The Policy Limits of Markets: Antitrust Law as Mass Media Regulation', *Law and Economics Workshop*, University of California, Berkeley, Paper 7, 2003, p. 7.

citizen viewer. In particular, the Union's broadcasting policy and law have, in part, been a by-product of a range of factors, both direct and indirect, which have caused a drift towards a broadcasting framework which assumes that the viewing experience is active and takes place in the commercial domain. We identify three main factors which account for this drift: technological changes; increased commercialisation of the broadcasting sector; and the conflicting policies and competences within the Union. The first two originate from the general broadcasting environment, that is, they are external; the latter is clearly specific to the Union.

As regards the first external factor, the impact of technological change on the broadcasting environment and on the viewer is enormous and difficult to unravel, let alone anticipate. We have already suggested that technological change affects both the broadcasting environment and the viewer in dramatic ways. The issue here is the type of regulatory response to such change that is appropriate. The question is whether regulation can, or should, be replaced by technology itself and reliance on the viewers' use of that technology (for example, via V-chips, electronic programme guides (EPGs) and encryption technologies); or whether technological developments necessitate specific regulatory responses. The current policy drift is towards the former view and is one which favours the active viewer who is both media literate and a technophile.

The second external factor relates to the increased commercialisation of the broadcast environment. Here we see an interconnection between commercialisation and liberalisation of markets, and the increased number of channels and platforms consequent on technological developments. In this context, choice and the viewers' ability to access and manage choice are again crucial and reflect the Union's general view about consumer choice. It assumes apparent increased choice in the number of products is good, without there being any consideration of quality of the products, or the consumers' ability to access them. As well as exacerbating the passive/active distinction, this approach may also influence the diversity of programming available, which also has repercussions for the public domain. Another aspect of the commercialisation of the broadcasting sector manifests itself in the strength of the private sector, which increasingly constitutes large transnational conglomerates. These transnational companies have the financial resources to lobby political institutions and use the court system, bringing expensive litigation to challenge the actions both of member states and the Union institutions that do not suit the industry's commercial interests, with the result that the Union

broadcasting world is forever subject to dispute over what is regarded by the industry as fair or unfair.

As for our third factor, within the Union, difficulties arise from the different fields of competence and the varying types of action the Union may take. Essentially, the problem with competence can be seen in two ways: first, the power struggle between member states and the Union; and secondly, the tension between trade and non-trade values. The stronger Union competence lies in the commercial context. Cultural policy, at least in its initial phase, was developed as exceptions to normal trade policy. Member states retain the power to determine their respective regulatory regimes, thus influencing the content available to the viewer, but they can only do so in so far as such regimes are compatible with the free-trade rules contained in the EC Treaty. The institutions, particularly the European Court of Justice (ECJ), have recognised that diversity, freedom of expression and the protection of culture are, in principle, worthy of protection, provided the measures to do so do not have a disproportionately adverse effect on trade. In sum, whereas member states might look to viewer protection, the Union seems to look to trade interests. The difficulties arising from this split are compounded by the fact that public service broadcasters, with their social, cultural and political remits, are national in nature. It is the private operators that have seen the opportunities of transnational broadcasting, even if it is just to evade national regulatory systems.¹⁸ The Television without Frontiers Directive¹⁹ (TWFD) has had the effect of supporting this type of behaviour, whilst providing limited support for social and cultural purposes in broadcasting. This may be seen as a result of the limitations on Union competence in the cultural field. In prioritising trade values, the system is geared towards content that satisfies the consumer rather than the citizen.

Our concerns for both the citizen and the consumer, as they are represented in broadcasting policy regulation and law, will be addressed through these three factors, and their interrelationship with the viewing experience in its different manifestations within the broadcasting environment. In chapter 2 we address the perceived value and functions

¹⁸ This practice is sometimes called regulatory arbitrage or forum shopping: C. Marsden, 'Introduction: Information and Communications Technologies, Globalisation and Regulation', in C. Marsden (ed.), *Regulating the Global Information Society* (London: Routledge, 2000), pp. 19–21.

¹⁹ Council Directive 89/552/EEC of 3 October on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities OJ [1989] L298/23, as amended by Directive 97/36/EC OJ [1997] L 202/30.

of broadcasting at a theoretical level. In chapter 3 we look in detail at the two external factors of technological change and the increased commercialisation of the broadcasting sector. In chapter 4 we look at the internal factor concerning conflicting policies and competences within the Union. Chapter 5 provides an overview and analysis of Union broadcasting policy, which is discussed, in accordance with our three themes established by the preceding chapters. Combined, these chapters form part 1 of the book and provide the analytic backdrop against which we look in more detail at particular aspects of the regulatory framework for broadcasting in part 2.

Given the significance of access issues to the distinction between consumers' and citizens' viewing requirements, we consider in chapter 6 the regulation of infrastructure under the Communications Package.²⁰ We then outline the decisions of the Commission and the European courts (ECJ and Court of First Instance) in relation to merger policy in chapter 7. These cases affect the power of member states to regulate their national broadcasting systems. With the vertically integrated nature of the international media environment, mergers potentially have an impact throughout the distribution chain, affecting both content and access to infrastructure. Not only may mergers limit plurality of content but they may also limit access to that content, adversely affecting the viewing experience. Chapters 8–12 consider the TWFD, looking first at negative regulation and then positive regulation. Even within the limitations imposed by negative regulation in TWFD there are weaknesses arising out of the patchwork regulatory approach and the principle of regulation by the member state of establishment (the 'home country' principle). The 'home country' principle allows a 'race to the bottom' in terms of regulatory standards (chapter 8), as broadcasters seek the lightest regulatory regime. In this sense, viewers might not be able to rely on the regulatory enforcement system in the country of reception. This tendency to require viewers to be self-reliant (or active) is reinforced by the tendency to self- or co-regulation, as well as other soft law measures, and the use of technology in place of law, especially in terms of controlling potentially harmful content. This may be the result of industry lobbying; certainly the need to take industry views into account in a changing technological environment

²⁰ Council Directive 2002/21/EC Framework Directive; Directive 2002/20/EC Authorisation Directive; Directive 2002/19/EC Access Directive; Directive 2002/22/EC Universal Service Directive and Directive 2002/58/EC Data Protection and Electronic Communications Directive OJ [2002] L 108. There is also a decision on Radio Spectrum: Decision 676/2002/EC OJ [2002] L 108.

can be seen in the context of the frequency of advertising rules (chapter 9). We consider content regulation (including the content of advertising) in two successive chapters, one dealing with negative rules (chapter 10), the second (chapter 11) dealing with positive obligations, notably quotas. A second type of positive rule is found in the listed-events chapter (chapter 12). One might anticipate that, whereas both citizenship- and consumer-based values require negative regulation to provide for their protection, citizenship values require additionally positive obligations to be imposed on broadcasters. The effectiveness of such positive obligations is questionable. Chapter 11 illustrates the difficulty of seeking to protect culture in a trade-based instrument. Additionally problems arise, particularly for the citizen, with the privatisation of certain types of information, such as sporting events (chapter 12). An alternative solution is to locate the obligation to provide universal access to appropriate content within the remit of PSB. In chapter 13 we examine state aid and the constraints placed upon member states and their ability to support public service broadcasting (PSB).

The book concludes with an assessment of the Union broadcasting policy including the recent review of the TWFD and, to a much lesser extent, the Communications Package. Although the review of TWFD, resulting in a draft second amending directive (DSAD), has provided the opportunity to consider the impact of technological development on the regulatory structure, it is our view that the TWFD review is in some respects insufficient. As we suggest in the [appendix](#) dealing with the revised proposed for DSAD as agreed by the Common Position of the Council, there have been no substantial improvements in this regard. Crucially, the proposed directive fails to consider the cultural values of broadcasting, and how diversity and pluralism might be protected, despite considering these issues during the review process. In so doing, it overlooks the needs of those whom broadcast regulation might be expected to protect, namely the citizen viewer.