

Western Broadcasting at the Dawn of the 21st Century



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Editors

Karsten Renckstorf

*Department of Communication, University of Nijmegen
The Netherlands*

Rolf T. Wigand

*School of Information Studies, Syracuse University/NY
United States of America*

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Western Broadcasting at the Dawn of the 21st Century

Edited by

Leen d'Haenens

Frieda Saeys

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Chair Jean Monnet "Europe's Media Policy"

Ghent,

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Preface

You are holding a fully updated and enhanced version of the *Media Dynamics & Regulatory Concerns in the Digital Age* book first edited with Quintessenz in 1998. This book deals mainly with broadcast media in general, i.e. radio and television, leading to all kinds of forms of convergence with the new, interactive media. The publication maps out Western countries, belonging to the classical typologies of western democracies (Western Europe and North-America). Necessary attention is also paid to the developments within the European Union and the fading out of the East-West dichotomies within Europe. It is meant as a handbook for both undergraduate and graduate students in communication studies as well as their teachers, but can also be a useful tool for policy makers and media professionals and anyone with an interest in a comparative approach to recent developments on the broadcast media scene. The approach taken (i.e. theoretical framework followed by concrete media cases) is twofold. This also becomes clear in the accompanying CD-Rom in that:

- facts and figures are provided: data about the general developments in the western broadcasting arena and a few concrete, well-chosen broadcasting examples in order to clarify, illustrate, compare;
- a technique of analysis is offered: thanks to the systematic mapping out of certain aspects of developments in the broadcasting scene within a general theoretical framework and thanks to comparing concrete implementations in different countries, a critical analysis is drawn, allowing the reader to assess similarities and differences in great detail.

Some theoretical considerations behind this approach lie in the finding that broadcasting continues to be perceived as a barometer of the society in which it came to being. Broadcasting is an important indicator of its political, economical, social, cultural and geographical context. The last decades, however, the socio-economical conditions and societal organizational forms are becoming more and more uniform: diversity among countries is less and less the case than within each of the countries under scrutiny (e.g., economical, political, cultural, ethnic differences). The classical broadcasting typologies that used to be very useful tools for the analysis of broadcasting, are becoming less and less worth-while in the current context. Notwithstanding, the organization of broadcasting in western countries continues to show a certain degree of variety, which can be ascribed to the contexts within which broadcasting came to being in each country. The societal diversity among the western countries which used to be more pronounced, has continued to bear its stamp to a certain degree on the further development of the broadcasting scene. An illustration is the ever important PSB concept in the United Kingdom, the impact of ideologically inspired pillarized broadcast organizations in the Netherlands, the influence of the unitary Belgium in Flemish and Walloon broadcasting respectively.

The first contact of a user of broadcast media is the program, the output. But, in order to be able to comprehend, to assess, and critically evaluate that output as a communication expert, one needs to be aware of the context within which these programs came to being: financial possibilities as well as limitations, often linked to the mission statement of a broadcaster, in its turn determined by the statute, that needs to fit within well-defined both national and international frames. In interaction with technical developments, all these factors are determining both the format and content of radio and television programs.

Within each of the broadcasting cases under scrutiny, attention is paid to the legal statute, the organization and operation, financing mechanisms, mission statement, programming policy, without neglecting the reaction of society. The latter are listeners, viewers, commissioners, and financers (government, advertizers, etc.) as well as the creative sector. Furthermore, within each media case, the following dimensions are taken into account:

1. A historical dimension: the description of the coming into existence and the development of the respective broadcasting organizations is deliberately kept short. Nevertheless, some historical perspective is deemed necessary in order to assess the intrinsicalities of each broadcasting situation.
2. The media production dimension: from the individual level of the broadcasting organization to and including international structures.

Each of the chapters illustrating a concrete broadcasting case in a given country looks at the following issues:

- *Short media history*, presenting the political and infrastructural context (including the main broadcasting laws and national regulatory bodies) until the 1980's (depending on the date of initial switch to mercantile goals on the national media scene).
- Emphasis on the *current situation* of the public and commercial broadcasting services in the 1990's (audience figures, market shares, appreciation figures, reach of radio and television).
- *Media content*: resisting Americanization, with figures and tables on supply of different program categories, including local fiction versus foreign imported (mostly American) fiction.
- *Media economics*: brief presentation of the local media mogul(s), current activities, shares in press, radio, television, new media, other.
- Special emphasis on national *anti-trust and cross-ownership media law initiatives*: brief presentation of anti-trust and cross-ownership laws (including cases with potential interest for an international audience); impact of lack thereof (referring to the high level of concentration); links with the European jurisdiction (and incompatibilities with the EU framework such as the Television Without Frontiers Directive).
- *The future*: convergence between the broadcasting and telecommunications industries. Attention is paid to the new, interactive media (digitization, video-on-demand,

Internet...) as well as various initiatives and investments on the part of the public and private radio and television sectors.

Structure wise, this book is divided into two sections: the first section examines the general theoretical framework; the second maps out eight Western European media cases and three non-Western European models. The first section of the book, which is a background study of the so-called European level, includes six chapters focusing at different aspects entailing European policy-making initiatives.

The first chapter (*Coppens, d'Haenens & Saeys*) deals with the regulatory framework, first seen from a general perspective, answering questions such as "Why regulate at all?" and "How to Regulate?" and summing up the different regulatory bodies in the countries under scrutiny in the book.

In the second chapter (*Castille*) follows then an illustration of the Commission's regulatory efforts put in the "Television Without Frontiers" Directive. Although the focus is on the European Commission, it is, nevertheless, important to realize that these European activities are undertaken by national governments working together.

The third chapter (*Pauwels & Cincera*) takes a close look at Europe's communication industry which has been in the process of restructuring itself through alliances, mergers and takeovers during the last decades. The margins of the EU competition and anti-trust policies are explored. This policy is wedged in between two well-nigh irreconcilable tasks: establishing an internal open market and striving not to hinder the activities of large-scale groups on the one hand, and ensuring diversity and pluralism on the other hand. After years of trying, simultaneously meeting both these objectives remains a difficult task.

The fourth chapter (*Biltreyst*) deals with one obvious consequence of trade liberalization and the new world order: the growing, world-wide success of American cultural products. Production centers from the USA systematically have extended their field of operation into the exploding audiovisual scene in Western Europe, the new liberal marketplaces in Eastern Europe and Asia, and they have embraced the new technologies. Special attention is given to fiction as a program category, as fiction production crystallizes all problems related to investment, financing, and profitability.

The fifth chapter (*d'Haenens*) takes a pragmatic look at the future of public service television in a world of rampant commercialism. The primary concern here is the mission of public service television in the years ahead. Offering a model for public service television would be an impossible task since it has developed along partly converging and partly distinct lines in each European country, as can be seen in the second section of this book. No one-size-fits-all solution can be formulated. The focus is on what may be termed the two contextual conditions for public service television to fulfill a function without its program supply becoming redundant with respect to that of other channels (commercial, multi-genre TV, or single-format, pay-per-view or subscription TV): creative legislation and sufficient long-term public funding.

The sixth chapter (*d'Haenens & Bink*) takes a look at the current state of the new media market in the various EU countries, as the result of a process of convergence oc-

curing between the formerly separate broadcasting, information and telecommunications sectors. Thanks to advances in digital technology it is now possible to send moving pictures, sound and text (data) over the same channel between any two points on the planet without any loss of clarity (bandwidth problems notwithstanding). This chapter explores the consequences from the point of view of the consumer (local or personalized services, open channels, channels for ethnic, religious, and sexual minorities, etc.), and formulates predictions regarding future developments in the media world.

The second section of the book maps out eight national broadcasting cases in Western Europe followed by three non-Western European cases. While currently at a crossroads, European broadcasting remains highly diverse due to the fragmentation of national policies. The broadcasting cases in the various countries within the European Union are selected on their intrinsic characteristics, and incompatibilities between media regulation at the national and European levels are systematically assessed. The summaries of the eleven chapters are as follows.

The chapter by *Antoine, d'Haenens & Saeys* shows that broadcasting in Belgium can be considered as a prototype of broadcasting in general in Western Europe, which was dominated for years by public broadcasting organizations that drew deeply for their inspiration upon the ideas of the British public services. This situation was to change profoundly, but this did not occur until the eighties. Moreover, Belgian broadcasting also provides a clear indication of the lines of social division in the country and the developments taking place within them, i.e. political and ideological divides, as well as those of language and region. Belgium's political structure is quite complex and has undergone significant changes over the last 25 years. At present, the country comprises three regions (the Flemish, Walloon and Brussels Capital regions) and three Communities (The Flemish, French-speaking and German-speaking Communities), each of which has its own legislative and executive institutions.

Antoine writes about Luxembourg, a tiny country at the heart of Europe, which has always understood the advantage which this strategic position affords it and the opportunity it provides for exploiting an inexhaustible, non-physical resource: radio and TV programs broadcast over electromagnetic waves and the concession systems associated with them. Lacking the means to fend for itself in public-sector radio broadcasting, the Grand Duchy decided, from the outset to concede its radio broadcasting rights to a private operator. Luxembourg was the first European country to have experience of private mass media and their logic, the Duchy's radio and TV broadcasting landscape being inseparable from the existence of the CLT, *Compagnie Luxembourgeoise de Télédiffusion* (Luxembourg TV-broadcasting Company), Luxembourg's main taxpayer.

The chapter on the Netherlands (*van der Haak & van Snippenburg*) illustrates that until recently, the Dutch government held on to a pluralistic public broadcasting system built along social and cultural lines, including in the eighties and early nineties, when international commercial broadcasting arose and national commercial broadcasting was legalized. Even today the government seems intent on keeping the public part of the whole broadcasting system as strong as possible in a context of national and international competition in commercial broadcasting. Social segmentation has lost import-

ant ground, but is still very present in the broadcasting system, as in Dutch society as a whole. Together with the relatively balanced program supply of NOS and NPS and the highly specific programs offered by the remaining small license holders, the programming of the large broadcasting associations representing the Netherlands' major social and cultural groupings make for a fairly pluralistic public broadcasting system. But in the near future, investments in content alone will not be enough. As a consequence of digitization the traditional radio and television programs can and will be distributed by alternative means. Digital cable, ADSL, DAB, DVB-T, DVB-satellite and broadband internet are the buzzwords. Leaving these areas to the telecom, cable, computer and internet operators would seriously threaten the impact of public broadcasting. The Dutch public broadcasters are therefore experimenting with most of these new distribution techniques. In particular two areas are being explored: Internet applications (electronic program guide, streaming audio, etc.) and the introduction of thematic TV-channels (news channel, culture channel and children's channel).

Ib Poulsen and Henrik Søndergaard argue that in Denmark radio and television were introduced in a period of strong political reluctance to any kind of commercialism within the electronic media, and as a consequence the consensus was that radio and television should be preserved as a public service institution. Another issue of particular importance in the development of Danish television are the special conditions governing the language and culture of such a small country as Denmark. On the one hand, due to this small size, these are very sensitive to foreign cultural influences, and their survival would be problematic in the absence of public support. On the other hand, a small cultural area means that the economic basis for an independent media culture is severely limited. It is not cheaper to produce radio and television in Denmark than elsewhere, but with a population of only about 5 million it is evident that the electronic media will have to operate with considerably restricted means, whether financed by license fees or run along business lines. When Danish radio and television were organized as a public monopoly, this was not only due to cultural, political, and ideological reasons, but also to the fact that the Danish market simply was too small to be economically attractive to commercial interests.

As in most European countries, the French broadcast media system (*Regourd*) was originally structured as a public monopoly. Until 1959, the beginning of the Vth Republic, the French Radio and Television (*RTF*) was in fact an integral part of the public administration: no more than a ministerial department devoid of any legal personality. Broadcast media must be 'the Voice of France' – in other words that of the government. Thus in France the legal monopoly resulted in political hegemony. The repercussions of this political subservience can still be felt today. In the last decade the French legislator seems to have tried to provide for two conflicting objectives: retaining an anti-trust legal framework to guarantee operator – and therefore program supply – diversity on the one hand, and conversely, favoring the creation of media groups strong enough to face international competition and the globalization of the communication market.

Until the middle of the eighties, the broadcasting system of the Federal Republic of Germany (*Ros*) consisted of a number of public corporations, to the exclusion of any

other organizational form. Following the Second World War broadcasting policy in the Western occupation zones was shaped by the Western occupying powers, especially the United States, Great Britain and France. The broadcasting policy adopted by the occupying powers was based on two principles: the broadcasting system was to be free of state influence, and it was to be independent of commercial interests. To this end, the powers chose a system of independent public broadcasting institutes, in the image of the BBC. Owing to the division in occupation zones and to the Allies' wish for decentralization, a third characteristic was added, viz. the regional structure of the system. Germany's commercial channels emerged in the framework of a number of pilot projects for cable distribution. The Ludwigshafen pilot project was started up on January 1, 1984, and also provided for the possibility of private-sector radio and television broadcasts. A new phase of expansion began in 1992–93. Six new channels were set up, mainly based on specific target groups. All in all, in 1998 there were 17 supraregional German private channels in the Federal Republic.

At the very beginning of the third millennium, the passwords of the Italian media system (*Sorrentino*) are: diversification and internationalization. Alliances, mergers and acquisitions follow one upon another at a relentless pace. This process creates unexplored territory for the Italian media system, which is traditionally used to moving and defining its image on the national scene where conditions of monopoly or oligopoly, as in the case of television and telecommunications, or conditions of protected markets have barred access to foreign operators. Mediaset continues to be the only true commercial television group. Economic consolidation is an absolutely necessary condition for the group headed by the tycoon Berlusconi in order to set going a process of diversification made mandatory by the law of July 31, 1997 regulating the television sector.

Public service broadcasting in the United Kingdom (*Coppens & Downey*) is often cited as the basis for many similar broadcasting systems around the world. Yet in many ways it is different from those systems which are claimed to be modeled after the BBC. Competition was introduced in the British television market as early as the 1950's, while other public broadcasters continued to enjoy a monopoly position until the end of the 1980's. Competition has made PSB into an evolving concept with commercial broadcasters obliged to fulfil certain public service functions, the notion of PSB has not changed as dramatically in Britain as in many other countries. Britain's public service idea, although copied many times, still remains quite unique. But the seemingly inevitable drift towards an essentially commercial digital broadcast system raises the question of the future of public service broadcasting, particularly, but not solely, the licensee-funded BBC, in Britain. With the birth of the fifth terrestrial channel, the launch of digital satellite and terrestrial television, digital audio broadcasting, and further experimentation with video-on-demand and the fast growing Internet (one in three British homes is connected to the Net), the British media landscape promises to become very interesting and increasingly complex.

The question whether actual trends are merely a consequence of European and national legislation or also of intrinsic changes within the media themselves can only be answered by looking at some non-Western European cases. Therefore, and for the sake

of comparison and completeness, the following three chapters critically assess one Eastern European broadcasting case (Russia) and two North-American cases: the US free-for-all versus Canada's cultural identity-building model.

The Soviet Union, as shown by *De Smaele and Romaschko*, had a centralized, monopolistic, State-owned media system under Party control, whose programming entirely consisted of propaganda. Societal changes led Russia to introduce a dual system, with State and private broadcasters operating along one another. The *Federal Service for Television and Radio Broadcasting* was established as the licensing agency of both State and non-State broadcasters. In July 1999 it was replaced by a new *Ministry for Press, Television and Radio Broadcasting, and Mass Communications*. A bill on broadcasting was prepared but, after several years, it still has not been made into law. Radio and television are still largely dependent (financially and organizationally) on the government, while corporate control (especially Russian banks) over the media is growing. The notion of public service television remains alien. ORT, the first and most popular channel, is a public broadcaster in name only, as it is partly owned by the State and by private shareholders. RTR and *Kultura* are State-owned nationwide broadcasters. Another 90 State broadcasters operate locally. Independent broadcasters are generally local stations; NTV can be considered nationwide, and Moscow-based TV6 broadcasts to large portions of the country. The growth of private channels has gone hand in hand with the development of the advertising market, the introduction of systematic audience research, and the commercialization of the media content.

The Canadian media system (*Taras & Klinkhammer*) was shaken by enormous changes in 2000. Indeed the geological plates on which the system has rested for the past twenty years have shifted dramatically. What we are seeing in effect is a transition from an older media model in which broadcasters focused only on broadcasting and newspaper owners were only concerned with newspapers to a new system in which multi-platform media groups dominate the landscape. During the 1990's the Canadian media skyline could be described as a series of low level buildings with the publicly financed Canadian Broadcasting Corporation (CBC) and its French language counterpart – Radio-Canada looming a little larger than the rest. Today, three immense skyscrapers dominate the horizon. BCE, Global and Quebecor all tower over a much smaller and more run down CBC.

The last chapter deals with the US electronic media system (*Ostroff*), which is large and highly complex, with over 10,500 commercial radio stations and almost 1,200 commercial television stations. There are also more than 2,000 noncommercial radio stations and almost 400 noncommercial television stations. More than 67% of the 100 million homes subscribe to cable television. Some 7 million homes receive programming directly by satellite or microwave-based *wireless cable*. Commercial television stations can choose to affiliate with one of six national networks, while more than 120 'basic' (primarily ad-supported) television services are delivered by multi-channel providers. Twenty-six pay channels as well as pay-per-view services are available to cable subscribers. Radio is even more complex. Since the rise of television, radio has been primarily a local medium. However, much of the programming, such as recorded

music, is from centralized sources. Broadcasting, cable television and the other services are regulated by the federal government, but cable television systems are also regulated in part by municipal or other local governments. In 1997 the FCC (Federal Communications Commission) issued its rules for the new digital television service. The 'big four' network affiliates in the ten largest markets (which serve about 30% of the TV households in the US) had to begin digital transmissions by May 1999. Those affiliates in the remaining top 30 markets had to begin as of November 1999. At that point digital signals reached about 53% of US television households (although few had the receiving equipment to view the programs). All commercial stations must offer digital services by 2002, and public television stations by 2003.

As part of this book edition, a CD-Rom is enclosed in the back cover. Sections of the book are mentioned on the CD-Rom, after its content has been restructured, since the CD-Rom adopts a thematic approach as opposed to the country-by-country angle used in the book. The use of an index makes the CD-Rom easy to browse through. Other additional information such as bibliographic references are mentioned on the CD-Rom, including many hyperlinks to useful websites.

Leen d'Haenens
Frieda Saeys

Media Policy and Regulatory Concerns

by Tomas Coppens, Leen d'Haenens and Frieda Saeys

Chief among media policy instruments is some kind of regulatory framework – created by a given authority at whatever level – which defines and limits the activities of electronic media. The legal framework in which it operates determines to a great extent the nature of a broadcasting system. In Western Europe, for example, five major periods in broadcasting regulation can be distinguished:

1. The first broadcasting laws enacted in the early twentieth century had little to do with broadcasting as we know it. Broadcasting was then purely a technical issue, needing no regulating beyond some technical norms.
2. A second wave of broadcasting laws appeared in the 1920's. Between 1925 and 1935, most developed countries passed 'real' broadcasting legislation which included rules about content. State monopolies on broadcasting were established in several countries.
3. In the 1950's broadcasting regulation had to be adapted to the arrival of a new medium. Television changed broadcasting and the laws that governed it.
4. In the 1980's new technologies and a shift in political opinion in favor of private enterprise caused a major change in media policy, especially in Europe. State monopolies were abandoned; massive deregulation revolutionized broadcasting.
5. A fifth and – for now – final phase is going on now as broadcasting is becoming more and more international in nature and is converging with other media.

I Models of Broadcasting Regulations

Many authors have tried to classify broadcasting systems according to the political and legal forces that affect them, since "each government has shaped its national broadcasting system in keeping with its own nature, especially its political nature" (Head, 1985: 57). Starting off with a simple bipolar axis with at one extreme the 'free' American model and at the other end the totalitarian (often Soviet) model, typologies have become increasingly complex, distinguishing among up to six or seven broadcasting models. In reality most broadcasting systems contain elements belonging to several broadcasting models. As Hedwig de Smaele will show in her chapter on the Russian media, even the Soviet model contained some 'Western' elements, such as advertising. McQuail (1983: 133) also writes: "Most national media institutions and practices and most relations between state and media display a mixture of several elements: libertarian, 'responsible,' and authoritarian." These nuances are often lost in even the most elaborate typology. In a later edition McQuail (2000) questions the relevance of such models in today's media society. Nowadays, with economic imperatives coming more

and more to the fore and the media showing increasing complexity, the ideologies which inform the various broadcasting models have become secondary. But typologies remain useful inasmuch as they let us understand the differences in relations between government and media.

Summarizing some classic typologies, we can roughly extrapolate four major models:

1. *The authoritarian model.* As old as the media themselves (and worldwide still probably the most widespread model), the authoritarian concept aims to make broadcasting a part of the State. Radio and television are to support the government at any cost. In his classic work, *Four Theories of the Press*, Siebert (Siebert, 1956a: 18) states: "The units of communication should support and advance the politics of the government in power so that this government can achieve its objectives." Censorship is therefore a major regulatory tool. Although criticized by Nerone (1995), who claims that Siebert's authoritarian model is based on too many different ideological movements (Communism, Fascism, Roman Catholicism) to be compressed into one single model, the authoritarian model is present in most typologies. Lowenstein and Merrill (1990), Head (1985), and Hachten (1996) all describe this model, with the latter stressing its loathing of diversity: "To the authoritarian, diversity of views is wasteful and irresponsible, dissent is an annoying nuisance and often subversive, and consensus and standardization are logical and sensible goals for mass communication" (Hachten, 1996: 15–16).
2. *The Communist model.* Although often considered as a subcategory of the authoritarian model (Head, 1985; Lowenstein & Merrill, 1990), the Communist model does have some distinctive features. According to Lenin's theory of the press, broadcasting serves a threefold function, that of collective 'propagandist, agitator, and organizer' (Altschull, 1984). It differs from the authoritarian model inasmuch as it prohibits private media ownership. The media are owned by the working class, i.e., the Communist Party, and are used for socialization, education, information, motivation, and mobilization (McQuail, 1983: 93–94).
3. *The Western, Paternalistic model.* Broadcasting systems in Western Europe, and especially in the United Kingdom, are the best examples of this model – called 'paternalistic' because of its top-down approach: media policy is not a product of what the audience wants, but of what the authorities believe the audience needs and wants (Head, 1985). Peterson's social responsibility theory (Peterson, 1956) is similar inasmuch as it stresses that the media have duties towards society at large and that authorities need to make sure these duties are adhered to. Lowenstein and Merrill (1990) divide this model up into more specific ones, while McQuail's valuable democratic-participatory model (small-scale and two-way media – 1994) can be seen as amending the paternalistic model, which is in fact dominated by a monopolistic public broadcaster. Most European cases presented in this book are good examples of the paternalistic model, and they illustrate how it has been changing into a fourth model:

4. *The Western, Libertarian model.* Similar to the previous model – Hachten (1996) does not even see more than one Western model – the most important difference lies in the media's commercial function. Siebert (1956b: 51) emphasizes that besides providing information and entertainment, under this model the media have a third function: "developed as a necessary correlate to the others to provide a basis of economic support and thus to assure financial independence. This was the sales or advertising function." The American broadcasting system, as presented in this book by David Ostroff, is a textbook example of this model. It can also be argued that the European broadcasting systems are evolving into this libertarian model, despite the presence of a strong, and sometimes non-commercial, public broadcaster.
5. All the aforementioned models are based on the notion that broadcasting is a powerful medium, and they are to some extent inspired by the classic stimulus-response theory as well as a static vision of societal relations. Many authors, mainly from critical schools, have defined other models which include alternative broadcasting institutions (underground media, grassroots media, etc.). These alternative models can often be considered as slight variations on one of the major models. Hachten (1996: 27) defines his *revolutionary concept* as "a concept of illegal and subversive communication utilizing the press and broadcasting to overthrow a government or wrest control from alien or otherwise rejected rulers." It is a concept closely linked with forms of dictatorship, whether right-wing (authoritarian model) or left-wing (Communist model). Another model closely related to the authoritarian model is the **developmental concept** (Hachten, 1996; McQuail, 2000). This views in a more positive light the media models to be found in underdeveloped countries (lack of funding and infrastructure, etc.). As McQuail (2000: 155) writes: "In the circumstances it may be legitimate for governments to allocate resources selectively and to restrict journalistic freedom in some ways." In practice, the difference between this concept and the authoritarian model is marginal. A final model we would like to mention is McQuail's **democratic-participant theory** that can be seen as a variation on the western-paternalistic model. Key concepts include grassroots media, participation, and two-way communication. The best example of this concept is the wave of free radios that swept across Europe in the 1970's, partly as a protest against the monopolistic, bureaucratic, and centralist public broadcasting corporations.

II Why Regulate at all?

In today's democracies, one principle underlies all broadcasting regulations: that of freedom of speech. Europe's main reference in this field is Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR, 1958 – introduced three years after the International Declaration of Human Rights and its Article 19), which guarantees the freedom to have and spread any opinion without government intervention. That same Article does, on the other hand, also limit this fundamental right by stating that governments can subject the media to a system of licensing. In other

words, although the principle of free speech is recognized, the principle of restricting media activities is equally acknowledged. The UN's International Telecommunications Union (ITU) even requires its Member States to license electronic media.

The initial motive behind broadcasting regulations was and remains *technical* considerations. To ensure interference-free broadcasting, some sort of frequency scheme was necessary, and not just at a national level. Technical issues dictated the first national broadcasting laws, dating back to the early twentieth century. And although some technical limitations are outdated and terrestrial broadcasting is being replaced by cable or satellite broadcasting, some technical regulations will always be needed. A subsequent factor in electronic media regulations was the shortage of frequencies. Choices had to be made about who could broadcast (hertzian beam transmissions, and later transmissions through cable or satellites) and who could not. A democracy requires clear and fair legal criteria to allocate access. Another regulatory motive follows as the government needs a control mechanism to establish whether those broadcasters granted access meet these criteria (Hoffman-Riem, 1996).

A second, important principle for regulation in a democracy is to ensure political and cultural *diversity* by safeguarding the free flow of ideas, or the position of different minorities. Most democracies have rules about access of political factions to radio and television, about minority programming, or, on a higher level, about media ownership as another element of diversity. Many examples of this can be found in this book. But, as Feintuck (1999) mentions, diversity has its own limits. Explicitly violent or pornographic scenes can, for instance, be justified in the name of diversity. But higher principles, such as the protection of children, can restrict diversity. Another example can be found in the tension between freedom of information and the right to privacy. While the diversity principle has been pursued differently in the US (libertarian model) and in Europe (paternalistic model), today diversity is less and less part of the political discourse and more and more defined in economic terms.

Thirdly, there is an *economic* ground for regulating the media. Governments can choose not to interfere with the free market if seen as providing society with what it needs while offering a range of economic benefits. But Gibbons (1998: 74) sees the deficiencies of the free market as the main arguments in favor of regulation. The free market is inadequate in several respects. A non-regulated free market can lead to media concentration, even monopolies, with the usual side effects: artificially high prices for consumers, and of course a decrease in diversity. Another part of economic media regulation can be inspired by attempts to unify a trade market. Integrating national and international law is a major drive for regulatory reforms in the EU Member States. The European Union provides us with the best example of how different legal frameworks have to be tuned into one another. In a (not so) distant future other economic alliances such as NAFTA or MERCOSUR may lead to similar moves. Although national broadcasting regulations remain in force in all countries, international regulations cannot be ignored, however insufficient they may be at the moment. The 'Television Without Frontiers' Directive, as discussed by Valérie Castille later on in this book, is still mostly focused on hardware and driven by economic considerations.

In the 1970's a tendency for deregulating broadcasting was noticeable, prompted by technical change and an increasing belief in the benefits of the free market. In the 1980's Europe was hit by a deregulatory wave: state monopolies were abandoned, the number of broadcasters grew spectacularly, as did commercial funding (Barker, 1997). But this also had less than desirable effects – extreme forms of commercialization, concentration, cross-ownership – which led to what has been described by Dahlgren (1995: 15) as a 're-regulation' "to counteract the negative aspects of market forces and to optimize the positive role [the media] can play." Examples of such re-regulation can be found in numerous cases presented in this book: limits on children's advertising in Belgium (which may be introduced in the whole of the EU), plans to limit commercial funding for the French public broadcaster, the creation of new public service channels in the United Kingdom and Germany (children's, cultural, educational channels).

But won't digital media make regulation obsolete? It may be argued that heavy regulation deters media companies from investing in new technologies, and that limits on cross-ownership are useless as media convergence is rapidly rising. And digital media hold the promise of a wide range of channels, 'something for everyone,' thus making 'diversity' less of a ground for regulation. The digital age, however, started with large-scale media mergers and alliances (e.g., Time-Warner and AOL, CLT and Bertelsmann, Canal Plus and Vivendi), raising questions about exactly how diverse this new digital media landscape will be. It seems that a decreasing number of companies are going to be in a position to decide who gets access to which technology and at what cost (Humphreys & Lang, 1998).

III How to Regulate?

A central element of broadcasting regulation is a system of *licensing* which establishes who can broadcast and who cannot. The ITU actually requires its members to work out licensing criteria. This means that broadcasting can only be allowed provided that the broadcaster has obtained a license from the government that is responsible for the use of wavelengths and that can determine the exact nature of the licensing criteria. Authorities usually attach all kinds of conditions to the granting of a license. Nationality is often one such condition, since radio and television are linked to a nation's culture and can be important nation-building factors in times of crises. Economically, the nationality criteria can also be used to protect domestic media institutions against foreign control.

A second, central element in many licensing procedures is rules to prevent concentration and to *restrict cross-ownership*. Fixed quota or merger commissions are the main instruments to achieve these aims. As the chapter by Caroline Pauwels and Patrizia Cincera will demonstrate, the European Union is particularly active in that area and has intervened in national regulation on many occasions in order to prevent excessive concentration. There are doubts as to the actual effectiveness of this EU policy,

however, especially given the conflicting nature of two of the EU's goals in the matter: limiting concentration and favoring competition with American and Asian conglomerates.

As a third element we could refer to Head's (1985) 'regulation of fairness' which results in a set of rules about *objectivity*, *impartiality*, and *accountability*. These rules are vital for the establishment of a healthy and balanced relationship between broadcaster, government, and audience.

Program regulation is often an essential element of licensing procedures as well. Governments may require broadcasters to offer a wide range of programming, or programming for a given minority or language group; they may also impose limits on some types of content (usually sex and violence), or set a watershed for certain programs; and they can restrict foreign programs for cultural or economic reasons (or both).

A final major element of regulation has to do with *funding* from different sources. Commercial funding is often limited in order to protect the consumer from excessive advertising or at least certain forms of advertising, or to prevent advertisers from having too much influence on programming.

Although the aforementioned elements are present in many regulatory frameworks, there can be *considerable national differences* in regulating the media, resulting in very diverse broadcasting systems, as was already shown when discussing the various media models. In the USA, for example, the authorities opted for a federally controlled system, dominated by private enterprise with minimal intervention by the State. Most European nations, however, still emphasize the *steering role of the government*. Such differences are becoming smaller, as economic rules take over. Authoritarian or Communist regimes take intervention even further and strive for complete control.

Another difference is the *geographical level* on which the main decisions concerning media policy are made. France and the United Kingdom are examples of very centralized regimes, in which the national governments define media policy. In Germany and Belgium, regional authorities are the most important media regulators; the role of the national government is limited to co-ordination. Other countries such as the USA and Russia have a mixed system whereby both the central and regional governments have a major say in broadcasting matters. In Europe supranational regulation is becoming more and more important. Organizations like the Council of Europe and the European Union play an increasing role in broadcast regulation. In most democratic States, at least part of the regulatory process has been withdrawn from the government and entrusted to more or less independent regulatory bodies.

Legislation itself, of course, remains the preserve of the parliamentary institutions – though some codes of conduct drawn by regulatory institutions can be seen as legislative documents – but the impact of regulatory bodies cannot be ignored as they can have numerous functions (Robillard, 1995):

- Most regulatory bodies play a crucial role in the organization of broadcasting by allocating licenses, mainly to commercial broadcasters.

- Controlling and sanctioning broadcasters is another typical task for a regulatory body. If broadcasters fail to meet the criteria on which their license is based, they can be given penalties, ranging from a small fine to license withdrawal.
- Nearly all regulatory bodies have an advisory function, which allows them to influence legislation.
- Some act as a watchdog to safeguard broadcasters' independence from the government or from economic powers.
- A rare function is that of appointing top media decision makers, such as the president or general managers of public broadcasters, as is the case in France.
- Regulatory bodies can have some minor judicial powers as well, and serve as a complaints commission.

In this book many different examples of regulatory bodies will be presented. Table 1 enables the reader to get to know the various institutions involved in media regulation active in the different countries dealt with in this book.

Some are responsible for both private and public broadcasting (e.g., the American FCC or the French CSA), some only for private broadcasting (e.g., the British ITC). Some have authority over only one medium (e.g., the British Radio Authority), the scope of others stretches as far as other forms of telecommunications (e.g., the FCC). There can be a difference in degree of independence: British regulatory bodies are fairly independent, as opposed to the French CSA. The composition of the bodies is another dissimilarity. Regional German regulatory bodies can consist of dozens of members, while the Flemish *Commissariaat voor de Media* has only three members. A final, major difference lies in the actual power such institutions have.

Table 1. *Institutions Involved in Regulation and Thus Shaping Media Policy*

Country	Institutions involved in regulation	Function
GENERAL: EU	Court of Justice of the European Communities	The Court ensures that the law is observed in the process of Community integration.
	European Commission	The Commission proposes Community legislation, monitors compliance with legislation and with the Treaties, and administers common policies.
	European Parliament	The Parliament represents the peoples of the Community. It takes part in the lawmaking and budgetary processes and has limited, but increasing, powers of control.
	Council of Europe	The Council, composed of 15 members (one minister from each government), takes decisions and adopts Community legislation.
	Institute for European Media Law (EMR)	The EMR studies the latest developments in European media policy
	European Broadcasting Union (EBU)	The EBU represents the interests of public service broadcasters before the European institutions and provides a full range of other operational, commercial, technical, legal and strategic services.

BELGIUM	Flemish Media Council	The Council provides advice to the Flemish government on matters concerning media policy.
	Central Regulatory Body with regard to Broadcasting in the French Community	The CSA is a regulatory body on radio and television policy in French-speaking Belgium.
	Telecommunications Federal Regulatory and Supervisory Body (BIPT)	BIPT is responsible for strategic (it is competent to give opinions regarding post and telecommunications sector policies), regulatory (drafting of Belgian regulations and transposition into Belgian law of European directives), operational (management of licenses, approvals and frequencies), conciliation (between operators), and monitoring missions.
DENMARK	The Danish Ministry for Cultural Affairs	The Ministry is responsible for shaping the Danish culture policy
	TV-Byen	The Danish Broadcasting Corporation representing the TV-Broadcasting channels DR1 and DR2
	Radiohuset	The Danish Broadcasting Corporation representing the Radio-broadcasting channels P1, P2, P3 and P4
	Telestyrelsen	National Telecom Agency, in charge of administrative and regulatory functions based on the legislation governing telecommunications.
FRANCE	Ministry of Culture and Communication	The Ministry is responsible for shaping the French culture policy
	Higher Audiovisual Council (CSA)	The CSA is the independent administrative body in charge of protecting the independence of the media in France.
	Telecommunications Regulatory Authority (ART)	ART is an independent regulatory body on telecommunications in France
GERMANY	Association of German Public Service Broadcasters (ARD)	The ARD looks after the interests of the public broadcasters in Germany.
	Association of Private Broadcasters and Telecommunications (VPRT)	The VPRT looks after the interests of the private broadcasters and the telecommunications and multimedia companies in Germany.
	Association of Regulatory Authorities for Broadcasting	The ALM safeguards the interests of member regulatory authorities ('Landesmedienanstalten') in the broadcasting field at national and international level.
	Regulatory Authority for Telecommunications and Post (RegTP)	The Regulatory Authority is in charge of promoting the development of the postal and telecommunications markets through liberalization and deregulation.
ITALY	The Italian Regulatory Authority in the Communications Sector (AGCOM)	AGCOM was established to carry out the tasks assigned under EU directives, both in the field of the telecommunications market and of audiovisual deregulation.
	The Ministry of Communications	The Ministry is responsible for shaping the Italian (tele-) communications policy.
LUXEMBOURG	Media and Audiovisual Department	Advisory body on media policy in Luxembourg.
	Luxembourg Telecommunications Institute	Regulatory body on telecommunications in Luxembourg.

THE NETHERLANDS	The Netherlands Broadcasting Corporation (NOS)	Corporation of the Dutch public broadcasters.
	The Dutch Media Authority	The Dutch Media Authority upholds the rules which are formulated in the Dutch Media Act as well as in the regulations based on this act.
	Ministry of Education, Culture and Science (OCW)	In charge of regulating education, culture and science policy in the Netherlands.
UNITED KINGDOM	Independent Television Commission (ITC)	The ITC licenses and regulates commercial television in the UK. It looks after viewers' interests by setting and maintaining the standards for programs, advertising and technical quality.
	British Broadcasting Corporation (BBC)	Corporation of UK public broadcasters.
	Office of Telecommunications (OFTEL)	OFTEL is the regulator – or “watchdog” – for the UK telecommunications industry. The main way OFTEL regulates is through monitoring and enforcing the conditions in all telecommunications licenses in the UK.
	Department for Culture, Media and Sport	The Department for Culture, Media and Sport aims to improve the quality of life for all through cultural and sporting activities and through the strengthening of the creative industries.
RUSSIA	State Committee of the Russian Federation on Communications and Computers	The State is the central body of the federal executive power, responsible for state management in the field of communications and development of all kinds of telecommunications and postal service.
CANADA	Canadian Broadcasting Corporation (CBC)	Canada's public broadcaster.
	Canadian Radio-Television and Telecommunications Commission (CRTC)	The CRTC is vested with the authority to regulate and supervise all aspects of the Canadian broadcasting system, as well as to regulate telecommunications service providers and common carriers that fall under federal jurisdiction.
UNITED STATES	Federal Communications Commission (FCC)	The FCC is charged with regulating interstate and international communications by radio, television, wire, satellite, and cable.
	National Telecommunications and Information Administration (NTIA)	The National Telecommunications and Information Administration (NTIA), an agency of the U.S. Department of Commerce, is the Executive Branch's principal voice on domestic and international telecommunications and information technology issues.
	National Association of Broadcasters	The National Association of Broadcasters is a full-service trade association that promotes and protects the interests of radio and television broadcasters.
	Corporation for Public Broadcasting	The corporation is public broadcasting's source of funds for analog and digital program development and production. CPB also funds more than 1,000 local public radio and television stations across the country.

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The 'Television Without Frontiers' Directive Mainstream and Independent European Broadcasting in the Digital Age

by *Valérie Castille*

I Introduction*

The television quotas must be viewed in the broader legal framework pertaining to the 'free circulation of services' laid down in Article 59 of the EC Treaty. Since broadcasting activities are described as services, the Member States are obliged to reckon with the construction of a single European audiovisual area (see chapter on media policy and regulatory concerns by Coppens, d'Haenens & Saeys). The most important community instrument which achieves this is the 'Television Without Frontiers' (TWF) Directive. This Directive aims to free broadcasting and reception of foreign European TV-programs within the European Community.

In this chapter, we emphasize the very flexible terms of the quotas phrasings of the 'Television Without Frontiers' Directive. Issues of lawfulness and desirability of television quotas are beyond the scope of this chapter. We therefore refer to other authors (De Witte, 1995: 29; Grosheide & Mochel, 1997: 18–24; Hitchens, 1996: 47; Pauwels, 2000: 40–45; Salvatore, 1992: 975–976; Waelbroeck, 1996: 13–22).

II The Directive

2.1 Scope

The regulations making up the 'Television Without Frontiers' Directive (European Council, 1989) form the legal regulatory framework for the application of television broadcasting activities in the European Community.¹

For the purpose of this Directive 'television broadcasting' means: "The initial transmission by wire or over the air, including that by satellite, in un-encoded or encoded form, of television programs intended for reception by the public. It includes the communication of programs between undertakings with a view to their being related to the public. It does not include communication services providing items of information or

* This paper is an update of a previous document concerning the flexibility of the television quotas (see Castille, 2000).

¹ The TWF Directive is also applicable in countries (although they do not belong to the European Community) which belong to the European Economic Space (e.g., Sweden).

other messages on individual demand such as facsimile, electronic data banks and other similar services.”

This definition of ‘television broadcasting’ in Article 1a of the TWF Directive tells us that the new interactive services, such as video-on-demand, are not affected by the Directive, unlike pay-per-view services, which are offered simultaneously to a mass audience; in other words, they involve a point-to-multipoint connection rather than a point-to-point connection as is the case with interactive services.²

2.2 Implementation

The TWF Directive is based on two pillars, the ‘minimum rules,’ and a number of requirements applicable throughout the European audiovisual space.³ The Directive contains ‘minimal’ coordination provisions⁴ in the following fields: television quotas, advertising and sponsoring, protection of minors, and right of reply. In these different fields, the TWF Directive guarantees the same ‘minimum rules’ in each Member State of the European Community. Article 3 of the old TWF Directive explicitly states that Member States remain free to implement more detailed or stricter rules for the broadcasting organizations falling within their jurisdiction. This possibility can of course create problems as it can lead to different national stipulations within the European audiovisual space.

Besides the application of these minimum regulations in the national legislation, the TWF Directive requires each Member State to adhere to several crucial principles. The ‘obligation of control’ by the originating State means that all television programs originating from and meant for reception in the Community must meet the legal requirements of the broadcasting Member State. This system of exclusive control by the originating state means that the latter must – when a broadcasting license application is being submitted – check that the applicant meets the minimum requirements of the TWF Directive (Castille, 1996). After issuing the broadcasting license, the State must then see to it that the broadcasting organization still meets the minimum rules (Castille, 1996). When the originating state finds an irregularity, it must rebuke the broadcasting organization and impose any necessary penalty.

The State where a broadcast originates is required to guarantee freedom of transmission – and therefore the free circulation of programs – so that there is no need for the State of reception to intervene in any way (Castille, 1996). The control exerted by the

² For a definition of the difference between broadcasting and telecommunications, see among others Gay-Bellile, 1996: 19–20; Rony, 1996: 17–18; Uyttendaele, 1996: 47–95; Wangermee, 1996: 13–25.

³ For a more exhaustive description of the TWF Directive, see Castille, 1998a: 37–42; Castille, 1998b: 1–15.

⁴ In European law there was a choice between harmonization or a ‘minimal’ coordination of the stipulations.

originating state is enough to ensure freedom of broadcasting and reception (no limitations or obstacles⁵) in all other Member States.

With the TWF Directive providing for 'minimal coordination' in connection with the principle of national control, the logical conclusion is that it leads to the mutual recognition by Member States of one another's national legislation.

2.3 Television Quotas⁶

The television quotas aim to support the European audiovisual program industry, the reasoning behind this being that the stronger this industry becomes, the better it will be able to compete with the US program industry on the European market (De Witte, 1995).

Article 4 of the TWF Directive requires Member States to see to it that those broadcasters falling under their jurisdiction as broadcasting reserve a 'majority proportion' of their (total) transmission time for European works:

"Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria."

As a matter of fact, Article 4 of the old TWF Directive made it compulsory for each channel to devote the majority part of its total transmission time to European works; the wording of the new Article 4 eases this requirement somewhat: "(...) should be achieved progressively, on the basis of suitable criteria."

The old TWF Directive does not give a definition of the basis that must be taken into account for the calculation of the proportion. However, by excluding explicitly 5 categories of programs, the Directive gives as it were a negative definition of this basis. The five excluded program categories are: news, sport events, games, advertising, and teletext services. There is no obligation as to broadcasting times (primetime/late hours).

The definition of 'European production' is found in Article 6, based on 'country of establishment' for producers and 'country of residence' for authors and workers.

⁵ The TWF Directive provides for the possibility of suspension in cases of clear and serious infringement of the stipulations regarding the protection of minors. Before the State of reception can suspend the transmission, a number of cumulative conditions must be met.

⁶ The stipulations concerning television quotas and the waiting time for theatrical movies are not applicable to local television programs which are broadcast nationally.

'European works' means the following:

1. Works originating in EU Member States.
2. Works originating in European Third States party to the European Convention on Trans-frontier Television of the Council of Europe and meeting the conditions of paragraph 2.
3. Works originating in other European Third Countries made exclusively or in co-production with producers established in one or more Member States by producers established in one or more European third countries with which the Community will conclude agreements in accordance with the producers of the Treaty, if those works are mainly made with authors and workers residing in one or more European States.

In comparison with the 1986 version, the definition of European works has been broadened as a result of a double dispute:

1. An internal dispute within the European Community.⁷
2. An international dispute between the United States and the European Community.⁸

Article 5 provides for the compulsory broadcasting of or investment in European works created by independent producers:

"Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time appointed to news, sport events, games, advertising and teletext services, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production."

⁷ "The political bargaining which took place between single-market supporters, who wanted the adoption of the Directive in order to liberalize the market of broadcasting, and cultural and industrial policy-makers, who made the quotas a condition for agreeing to the text of the Directive, led to the inclusion of European television program content requirements in the Directive which was eventually adopted in 1989" (De Witte, 1995: 104).

⁸ "Largely as a result of United States pressures, the European Parliament significantly modified the Council's proposal, adding measures that allowed the Member States to exercise discretion in meeting the quotas and reducing the quotas for 'European works' to 50%" (Lupinacci, 1991: 119, Grosheide & Mochel, 1997: 18-24).

The aim is obviously to encourage investments in new European independent works. Unlike Article 4 (which pertains to broadcasting only), Article 5 gives channels a choice between a broadcasting obligation or an investment obligation.

If a channel chooses the broadcasting obligation, then it must devote 10% of broadcasting time to recent, independent European works. If it chooses the investment obligation, 10% of its programming budget must be earmarked for recent independent European works.

Due to the lack of a definition of the term 'independent producer' in the TWF Directive, Member States have been free to interpret any way they chose. Article 5 does however include one other requirement: part of these independent European works must be 'recent.' Recent means that these works must be broadcast within five years of their creation. How large the proportion of 'recent' works must be is indicated in Article 5 through the term 'adequate.'

At the end of 1994, Henry Ingberg (1991: 30) described the flexible system of the TV quotas as follows:

"What does this mean in practice? It means that one does what one can to achieve one's goal. Those texts paraphrasing or commenting on the directive, seem to indicate that it isn't possible to go below the quota that was in place before the implementation of the directive (the 1988 results). To go back to our TNT Cartoon example, the channel argued that it could not be in violation of the directive since it initially broadcast no European program whatsoever! I am of course overstating the facts (or am I?), but there is need to look closely at the real meaning of this statement: 'whenever achievable through appropriate means.' You may remember what I had to say about the initial political compromise, and this highly contentious wording is a direct reflection of it." [our translation]

The delicate nature of a system of minimal coordination linked with the obligation of mutual recognition cannot be over-emphasized. Furthermore, the wording of the TV quota provisions is quite noncommittal: "where practicable," "by appropriate means," "progressively", "on the basis of suitable criteria," etc. This can only lead to varying interpretations in national legislations and, logically, to a very flexible application of the quotas in practice.

This noncommittal wording is the result of a political⁹ compromise¹⁰ between advocates and opponents of the TV quotas.¹¹

⁹ "Pourtant, l'acheminement progressif vers une diffusion d'œuvres majoritairement européennes reste un objectif politique dénué d'obligation juridique, vœu pieux et à la discrétion des Etats" (Buffet-Tchakaloff, 1990: 373), "(...) eine politische Zielvorstellung" (Möwes & Schmitt-Vockenhäusen, 1990: 123).

¹⁰ "Le contenu de la Directive opère un compromis entre les pays d'Europe du Sud, France en tête, qui revendiquaient une harmonisation protectrice, et les pays hostiles au dirigisme culturel ou au protectionisme communautaire contre les œuvres étrangères, surtout américaines, c'est-à-dire la

Some kind of counterweight to this legal flexibility was therefore needed. We will limit ourselves to the compulsory two-year report of the Member States and the monitoring by the European Commission. In this two-year report the Member States have to give a statistic survey of the extent to which the channels have achieved the TV quotas. In all the cases where a channel has not achieved the required proportion (European works, European works of independent producers, recent works), the Member State has to give the reason for it. Finally, the Member States must indicate which measures they have taken against any channel having failed to comply with the requirements. The European Commission then processes all these national reports and makes the results public.

In 1990, Mr. Bangemann confirmed that the two-year monitoring system was to be seen as a legal counterweight:

"While the Council failed to agree on a more restrictive wording, it made provisions for the weakness of the legal stipulations to be offset by political control, to be exerted, pursuant to Article 4, paragraph 3, by the Commission acting as the guarantor of actual commitments."¹² [our translation]

In total four reports have been drawn up and published by the European Commission (1994, 1996, 1998, and 2000). In this chapter we only pay attention to the last report, which pertains to the 1997–1998 period (for a discussion of the three previous reports, please see Castille, 2000).

III The 'Television without Frontiers' Directive in 1997

In 1995, the European Commission announced a proposed amendment to 1989 TWF Directive.¹³ The first round of monitoring of the application of the TV quotas by the Member States enabled the Commission to suggest amendments to Articles 4–6.

As regarded Article 4, the Commission narrowed down the basis for the calculation of the TV quotas by adding *teleshopping*¹⁴ to the other explicitly excluded program categories. Both 'stock' and 'flux' programs remain eligible for inclusion in the quotas.

République fédérale d'Allemagne, les Pays-Bas, la Grande-Bretagne, le Danemark et le Luxembourg" (Buffet-Tchakaloff, 1990: 357).

¹¹ See Hitchens, 1996: 47: "The essentially economic motivation for the Directive became complicated by the inclusion of a quotas for European works. The quotas indicated a more confused response to the Directive's goals. The economic motivation for the TWF Directive became enmeshed with cultural goals."

¹² Answer (January 4, 1990) in the name of the Commission to a written question by Mr. Kenneth Collins, November 23, 1989: 646.

¹³ For a more general situation: Defalque (1995): 193–198.

¹⁴ About the growing importance of *teleshopping* see, among others, La lettre du CSA (1994): 1–11.

The European Commission also noted that while generalist channels had no trouble complying with the quotas, this proved much more difficult for the ever-increasing number of specialist channels. The Commission thus came up with the idea that these channels should be allowed to choose between the existing broadcasting obligation or an investment obligation of 25% of their programming budget. According to the Commission's proposal Member States would have to provide some leeway as regards specialist networks.

As regards newly created television networks, the Commission provided for a three-year period at the end of which they must meet the quota requirements. This period is necessary in order to let them reach financial stability. Moreover, this period of three years corresponds to the fact that the measures for the promotion of European works are only applicable for ten years.

Considering that the Commission's proposed amendment provided for differential treatment according to channel type (generalist or specialist channel), a logical inference would be that it was attempting to reduce the flexibility of the current Directive. Moreover, as made obvious in the national reports, the current wording had been a source of uncertainty and therefore of legal disputes resulting in both a distortion of competition and the disintegration of the internal market. Dropping the offending caveats would ensure a higher level of certainty from a legal point of view.

The Commission also wanted these measures to be no longer valid after a ten-year period, as a quota system in place for an indefinite time would only serve to keep the European production industry in a perennial state of fragility owing to the fact that rationalization and reinforcement would not be stimulated.

It appeared from that first round of monitoring that compliance with Article 5 was generally satisfactory on the part of broadcasters, which meant that it was a valid piece of legislation. Existing measures were therefore retained to a large extent. The only change proposed by the European Commission concerned the 'adequate proportion' of recent independent works, to become "at least 50%." As it has important implications with regard to corporate concentration, Article 5 will not be withdrawn after ten years.

The European Parliament¹⁵ was largely in agreement with the amendments proposed by the European Commission – amendments directly based on the results of the First Communication. However, the Council saw things in a different light, choosing (1996) to maintain the quotas as set out in Articles 4 and 5 of the TWF Directive:

"The Council decided to retain the system for promoting European works introduced by Directive 89/552/EEC. Taking the view that this leaves Member States an advisable degree of flexibility, while ensuring the desired promotion of European audiovisual works. The Council also set up a Contact Committee to keep a very close watch on the implementation of the Directive, particularly as a forum for debate on matters relating to Articles 4 and 5. The clause in Article 4(4) and in Article 1 (32) of the com-

¹⁵ For the response of the Social Economic Committee and the European Parliament on the proposed amendments of the television quotas, see Castille (2000).

mon position will enable Parliament and the Council to review such matters on the basis of a report from the Commission and taking into account an independent study on the impact of the measures in question at both Community and national level.”

The Council only agreed to amendments broadening the excluded program categories as basis for the calculation of the TV quotas (adding teleshopping to the list). The notion of ‘European work’ was also broadened with a view to promoting more co-productions. The European Parliament (1996) and the European Commission agreed to this.

On July 30, 1997, the new TWF Directive was published in the Official Journal (European Parliament & Council, 1997); in particular, it was meant to bring clarifications in the field of jurisdiction disputes (Castille, 1998a: 38–39). As already abundantly clear from the July 1996 Common Position, the flexible quota system was maintained in the new Directive. There was no distinction made between specialist and generalist channels, and no time limit in the applicability of the quotas (Traimer, 1997: 127–129).

While the new TWF Directive does devote several considerations to TV quotas, these do not offer a lot to hold on to from a legal viewpoint. Consideration 30 emphasizes that a gradual system is necessary to account for economic realities. The notion of ‘independent producer’ is not even defined in a consideration. Consideration 31 only mentions that a number of criteria must be reckoned with: property of the production company, number of programs delivered to a given broadcasting organization, and ownership of the secondary rights.

The amended TWF Directive makes much of co-productions, especially in connection with a greater opening to former Eastern bloc countries. Article 6, paragraph 4:

“Works that are not European works within the meaning of paragraph 1 but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the Community co-producers supply a majority share of the total cost of the production and that the production is not controlled by one or more producers established outside the territory of the Member States.”

The fourth report of the European Commission¹⁶ (European Commission, 2000) reviews the implementation of Articles 4 and 5 in the application period of the amended TWF Directive (1997–1998).

So that the Member State reports would all be of a reasonably similar format the Commission drew up a number of guidelines (1999). These were in fact a second version incorporating changes made necessary by provisions of the 1997 Directive, amending the 1989 Directive (Suggested Guidelines, 1999: 1). These guidelines were drawn up at the Contact Committee meeting of November 9, 1999. The Contact Committee was created as part of the 1997 review of the TWF Directive. It includes representatives

¹⁶ See europa.eu.int/comm/avpolicy/regul/twf/art45/art45_eng.htm.

of the relevant authorities of the Member States and is chaired by a representative of the Commission (art. 23a). One of his tasks consists of being "the forum for an exchange of views on what matters should be dealt with in the reports which Member States must submit pursuant to Article 4 (3), on the methodology of these, on the terms of reference for the independent study referred to in Article 25a, on the evaluation of tenders for this and on the study itself."

These guidelines are meant to harmonize the collection of the data used in the national reports, but are not legally binding (Suggested Guidelines, 1999: 1). Member States are only asked to state in their report the reason why, if such be the case, they use different definitions from those of the guidelines.

This fourth Communication consists of three Chapters and three Appendixes. In Chapter I the Commission gives its opinion regarding the application of Articles 4 and 5 for the reference period, as provided for in Article 4(3) of the Directive. Chapters II and III contain the summaries of the reports sent in by the Member States and by those EFTA States that are part of the European Economic Area (European Commission, 2000: 3).

The Commission's opinion on the application of Articles 4 and 5 for the period 1997/1998 is quite positive: "As regards the channels' compliance with the rules on the broadcasting of European works and independent productions, the results indicated by the national reports are generally satisfactory. (...) The aims of the Directive have broadly been met" (European Commission, 2000: 4). It remains to be seen to what extent this comparative optimism is justified, since it remains unclear whether 'broadcast European works' includes non-national European works.

IV The Part of the Television Quotas in the Information Society

Since the scope of the new TWF Directive has not been changed – the result being that the new interactive services are not subject to the provisions of the Directive, therefore escaping the quota provisions – the following question arises: what is the place of the TV quotas in the emerging information society?

One of the features of the information society is increasing use of the same technology in various industries, such as telecommunications, media/broadcasting, and IT. According to the December 3, 1997 Green Paper, this is a major feature of the Information Society: "(...) increasing use by different sectors, notably the telecommunications, media and information technology (IT) sectors, of the same technologies. Evidence of such convergence has been mounting in recent years with the emergence of the Internet and with the increasing capability of existing networks to carry both telecommunications and broadcasting services" (European Commission, 1997).

At the end of 1998, the European commissioner in charge of media policy published a report entitled 'The Digital Age: European Audiovisual Policy' which was the result of conversations between 'a High Level Group on Audiovisual Policy' (Oreja, 1998). This

report is very important because it states explicitly that the starting point of any audiovisual policy review must be the recognition of the special character of the media and the necessity to keep a balance between the 'market' on the one hand and the public interest on the other hand. In this report the special role of broadcasting is once more emphasized:

"The audiovisual industry is not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry par excellence, whose 'product' is unique and specific in nature. It has a major influence on what citizens know, believe and feel. (...) namely, there has never been assumed in Europe that the broadcasting and audiovisual sector should be treated as an economic subject only or that the market would guarantee a pluralistic service" (Oreja, 1998).

In a recent Communication the Commission (1999b) sets out the principles and guidelines for the EU's audiovisual policy in the digital age as well as the Commission's priorities for the next five years – including maximizing the competitiveness of the European audiovisual industry to ensure that digitization does not simply result in a flood of imported or archived (repeated) material. The Commission stresses "that the European audiovisual market remains overwhelmingly dominated by American productions":

"Whilst the digital revolution poses new challenges to European Union audiovisual policy, the fundamental goals of this policy remain the same, namely: to encourage the production and distribution of European works, by establishing a secure and stable legal framework to guarantee the freedom to provide audiovisual services on the one hand, and through appropriate support mechanisms on the other" (European Commission, 1999b: 7).

In its last general report dated January 15, 2001 about the implementation of the TWF Directive, the European Commission once more emphasizes the importance of the TV quotas. We note the constant will of the European Commission to retain the quota principle as long as it is adapted to the 'digital' environment, in order to promote 'European' content in TV broadcasts and thus improve the competitiveness of the European program industry in general. In consideration of the total review of the TWF Directive in 2002, the Commission has ordered three different studies to be completed in early 2002. The first one – pursuant to Article 25a of the TWF Directive – pertains to the impact and implications of the TV quotas on the European program industry and aims to assess "the impact of measures to promote the distribution and production of European television programs. It will, in particular, evaluate the effectiveness of the quotas in the Directive as compared with other measures" (Third Report from the Commission: 17). The findings of this research are expected in the short term.

V Conclusion

Although, based on several recent documents, we can believe in the determination of the European Commission to maintain TV quotas in the information society, we cannot escape the impression that compliance on the part of European broadcasters in no way guarantees the development of a single European audiovisual area. Indeed, the European Commission needs to pay attention to the difference between national and non-national European programs. If we are to create a truly pan-European audiovisual area, we need to encourage the broadcasting of non-national European works.

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