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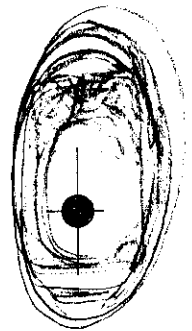
Europeanization as Convergence: The Regulation of Media Markets in the European Union

ALISON J. HARCOURT

Introduction

One of the challenges of Europeanization as an innovative research agenda is the identification of mechanisms through which domestic public policy is 'Europeanized'. In his chapter, Radaelli identified two types of mechanisms: vertical and horizontal. This chapter elaborates these mechanisms by considering the case of media market regulation in the European Union (EU). It is argued that Europeanization of this policy area can be understood by looking at the *interplay* between the two mechanisms. The first vertical mechanism consists of direct mandates from the European institutions in the form of directives, competition decisions, and European Court of Justice (ECJ) decisions. The second mechanism is horizontal. Whereas Radaelli's chapter illustrated a horizontal framing mechanism with the example of the open method of coordination (OMC), this chapter will provide evidence of the horizontal mechanism through the observation of forum politics (see also Coen and Dannreuther, this volume, on policy fora). This takes place when policy instruments are diffused through high level working groups, committees, platforms of regulators, and other EU-level fora. Although these fora are not institutionalized, as is the open method of coordination, they have produced substantial convergence in the choice of policy instruments used to regulate media markets at national levels. Therefore the two mechanisms, horizontal and vertical, have a compound effect in that the overall result—produced by the different EU institutions (Commission, EC competition authority, and the 'community of courts') and fora (working groups, platforms, and other fora)—is one of a Europeanization of national policy arenas.

One finding of this approach is that Europeanization is a multiinstitutional, multiactor, and multiprocess phenomenon. It is only by considering the



interaction and the overall cumulative effect of vertical and horizontal mechanisms that one can make sense of the real impact of the European Union in media market regulation. This approach is consistent with a research agenda that puts emphasis on compound effects and ultimately aims at measuring the impact of EU public policy (see Radaelli and Giuliani in this volume). This chapter detects convergence in policy paradigms, domestic laws, and policy instruments. This does not necessarily mean that all aspects of media market regulation in the European Union are converging. However, convergence in this area has gone well beyond the formation of 'communities of discourse' and shared beliefs. It has penetrated the fabric of law and the toolbox used by domestic policy makers. There is no doubt that Europeanization has produced substantial convergence at national levels.

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From the advent of the Single Market, a gradual convergence in Member State media regulation can be observed. Europeanization of this policy domain began during the 1970s with the first ECJ decisions, following which the latter has made over fifty media market decisions. These have provided the European Commission (EC) with a basis for a number of initiatives during 1980s which affected the media market, most significant of which is the 1989 *Television Without Frontiers (TWF)* directive.¹

Following TWF, the EC sought to advance policy-making in the media field with two initiatives: *media ownership* and *convergence*.² Both initiatives presented significant political impasses to the EC due to the lack of legal bases in the treaties. The Commission has since found other ways of governing media markets: through the suggestion of best practice, models and solutions to domestic policy problems, effecting national policies through the use of competition law, and the initiation of European level fora (e.g. EPRA, ISPO, JRC).³ European level fora served to promote regulatory instruments suggested

¹ Council Directive 92/38/EEC of 11 May 1992 on the adoption of standards for satellite broadcasting of television signals; Council resolution of 22 July 1993 on the development of technology and standards in the field of advanced television services; Council resolution of 27 June 1994 on a framework for Community policy on digital video broadcasting; *Television Without Frontiers* Commission Directive 89/552/EEC. Television Without Frontiers Directive 97/36/EC of 30 June 1997; Council Decision 1999/297/CE, of 26 April 1999, establishing a Community statistical information infrastructure relating to the industry and markets of the audio-visual and related sectors; Communication of 14 December 1999 from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and guidelines for the Community's audio-visual policy in the digital age.

² Green Paper on *Pluralism and Media Concentration in the Internal Market* COM (92) 480, 23.12.92; Green Paper relating to the Consultation Process Relating to the Green Paper on *Pluralism and Media Concentration in the Internal Market—an Assessment of the Need for Community Action*, COM (94) 353 final, 05.10.1994; EC *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation* COM (97) 623, 3 December 1997.

³ European Platform of Regulatory Authorities (EPRA); Institute for Prospective Technological Studies (JRC); Information Society Project (ISPO).

in Commission reports, green papers, and draft directives. Consultation with national experts and interest groups enabled the dissemination of suggested policy instruments to national levels. In parallel, the EC competition directorate has taken an increasingly active role in determining the development of media markets in Europe. The EC Merger Task Force (MTF) has taken an increasingly hands on approach to governing media mergers and acquisitions, even domestic market cases. In many cases, MTF decision-making has run roughshod over political choices made at the domestic level regardless of national cries of subsidiarity (even, in cases, those of national ministers and heads of state).

In order to observe the process of Europeanization, the chapter first examines vertical mechanisms (EC directives, ECJ decisions, EC competition decisions) and second horizontal mechanisms (suggestion of best practice through European level policy fora). Sections 'The Impact of ECJ Decisions on National Regulation' and 'Vertical Europeanization via EC Merger Policy' will provide an overview of ECJ and competition decisions. Section 'The Commission and New Modes of Governance' will overview how policy ideas travel through European level fora. Section 'Conclusion' will draw conclusions how Europeanization has driven convergence of national media policies.

The Impact of ECJ Decisions on National Regulation

The establishment and evolution of the European Union into its present state has largely been determined by the ECJ. Snyder summarizes the ECJ's role as an EU institution by stating 'the ECJ... has a central role in the creation of the EC and of its internal market, for the ECJ is a major creative force in Community law making, policy making, and politics' (1990: 26). The ECJ has taken many decisions relating to the media industry. These decisions in turn are influencing and fuelling Europeanization. As it is adjudging an industry affecting national culture and democratic outcome, many of the ECJ's media decisions have had political significance. Indeed, the ECJ was the first European institution to tackle the tricky and controversial question of whether media policy should be considered as coming under national cultural policy, and therefore be exempted from EU competition rules, or be considered as an EU single market issue. This has enabled other EU institutions to take an increasingly active policy approach towards governing media markets. In the 1990s, the ECJ considered the status of public service broadcasters.

The first significant ECJ case dealing with the broadcasting is the *Sacchi case*.⁴ In 1974, the Tribunal Court of Biella, Italy asked the ECJ whether the

⁴ *Case 155/73 Tribunale civile e penale di Biella* [30.04.74, ECR 0409-0433].

movement of goods within the common market applied to television signals. The ECJ ruled that 'in the absence of express provision to the contrary in the treaty, a television signal must, by reason of its nature, be regarded a provision of services'. The Court further established in the 1980 *Debauve case*⁵ that any discrimination by a Member State against a broadcasting signal due to national origin is illegal. The ruling related to three cable broadcasters of foreign origin which were transmitting advertising to cable subscribers in Belgium. Belgium legislation at the time banned the transmission of commercial advertising.⁶

The *Sacchi* and *Debauve* rulings were extremely significant for the future development of EU media policy. The *Sacchi* case declared that broadcasting be considered a tradable service. Therewith the sector was established as ripe for the single market policy-making. The *Debauve* case further eroded the national domain for broadcasting policy by permitting broadcasts from abroad. Both *Sacchi* and *Debauve* provided a legal basis for the EC 1989 *Television without Frontiers*.

The next ECJ dealing with cross-national broadcasting was the *Coditel case*.⁷ In 1980 an exclusive licence for showing the film 'La Boucher' was granted to Cinévog, a Belgian company, for use in Belgium and Luxembourg. The film could be shown on television only after forty months of its cinema release. However, the cable company, Coditel, had bought rights to the film from a German company which could show the film (in Germany) after only twelve months of general release. As Coditel also showed the film to its subscribers in Belgium and Luxembourg it was ruled to be infringing upon Cinévog's exclusive rights. The court ruled in favour of Cinévog, but added that each exclusive rights case must be examined in the context of the relevant market.

In contrast to the Cinévog ruling, in its next case on exclusive rights, the ECJ ruled that an infringement of European law occurred. This was the first of the *Magill* cases which handled the appeal for annulment of a decision made by the EC by ITP (Independent Television Publications of ITV). The case dealt with the public service broadcasters BBC, ITP, and RTE in Ireland and Northern Ireland, which owned exclusive rights to publish their programming schedules, and Magill TV Guide Limited, which wished to publish a programming guide. Magill had started publishing the guide including all programming schedules in 1985 but was prevented from doing so by an Irish court injunction in 1986 (a case brought about by the BBC, ITP, and RTE). The decision was overturned by an Irish high court. It was then taken up by the EC competition authority which determined in separate rulings that the

⁵ *Procureur du Roi V. Marc J.V.C. Debauve and others*. Case 52/79 [1980] ECR 0833, 18 March 1980.

⁶ Article 21 of the Royal Decree of 24 December 1966 (*Moniteur Belge* of 24 January 1967).

⁷ *Coditel SA V. Cinévog Films SA* Case 62/79 [1980] ECR 881.

exclusive licences infringed Article 86 of the treaty determining dominant market position. An annulment of the Commission decision was sought by the BBC, ITP, and RTE at the European Court of First Instance (CFI). The CFI in three separate rulings decided against the BBC, ITP, and RTE in support of the EC decisions.⁸ It stated that ITV had used 'the copyright in its weekly programme listings under national law to reserve the exclusive right to publish those listings, thus preventing the emergence on the ancillary market of television magazines, where it enjoys a monopoly, of a new product containing the programmes of all the broadcasting stations capable of being received by television viewers, for which there is potential consumer demand'. RTE and ITP appealed to the ECJ which in a final ruling in 1994 upheld the three CFI *Magill* decisions.⁹ These rulings had consequences for all EU Member States. PSBs could no longer enjoy exclusive rights to programming guides.

In the meantime, the European Union passed its 1989 *TWF* broadcasting directive which established a legal framework for the creation of a single audio-visual market. The EC was successful in TWF in adding requirements that dealt with issues that went beyond market regulation. TWF required: a majority proportion of transmission time be reserved for European works; 10 per cent of transmission time or 10 per cent of programming budget for European works created by independent producers; interruption of films by advertising limited to once every 45 min; exclusion of advertising during news, current affairs programmes, documentaries, religious programmes, and children's programmes; prohibition of advertising cigarettes, prescription medicines, and medical treatment; a limit of advertising time to 20 per cent of the daily transmission time and 20 per cent within a given clock hour; the protection of minors; and prohibition of incitement to hatred on grounds of race, sex, religion or nationality.

Following the 1989 Television Without Frontiers directive, there was a dramatic increase in ECJ court cases dealing with media markets (see Figure 8.1) which challenged the domain of media policy (as cultural policy) as belonging exclusively to the Member State. The first of these was the *Commission of the European Communities V. Kingdom of the Netherlands* case of 1991.¹⁰ When the first case was brought to the ECJ in 1989, under Dutch cable law, companies were prohibited from 'transmitting programs offered by foreign

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⁸ Case T-76/89 *Independent Television Publications Ltd V. Commission of the European Communities* [OJC 10.07.91 ECR II-0575] Court of First Instance (Second Chamber); and Case T-70/89 *The British Broadcasting Corporation and BBC Enterprises Limited V. Commission of the European Communities* [OJC 201/13, 10.07.91, ECR II-0535].

⁹ Joined cases C-241/91 P AND C-242/91 P *Radio Telefios Eireann (RTE) and Independent Television Publications Ltd V. Commission of the European Communities* [ECR I-0743, 06.04.95].

¹⁰ Two previous cases dealing with the foreign transmission of advertising also ruled against Dutch cable law: Case-352/85 *Bond van Adverteerders* [ECR 2085, 1988] and Case C-288/89 *Collectieve Antennevoorziening Gouda* [ECR I 4007, 1991].

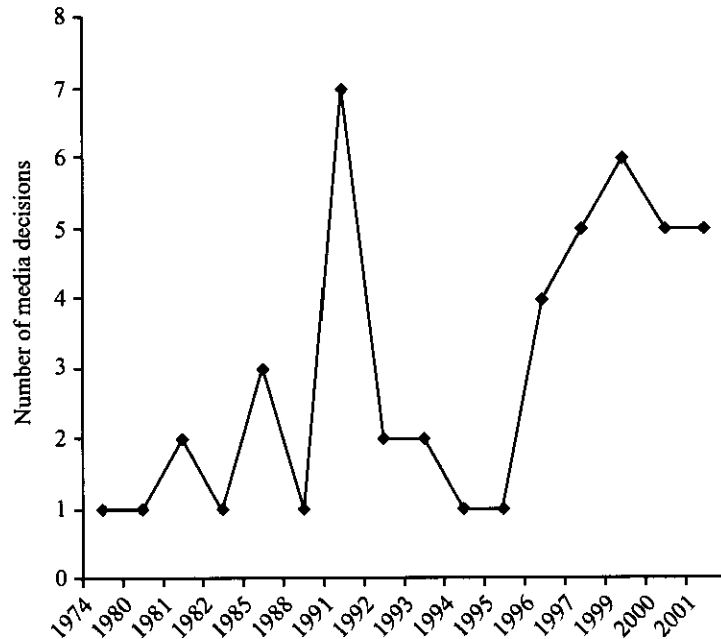


FIGURE 8.1. Number of ECJ media decisions 1974–2001

Source: Compiled by author.

broadcasting organizations and broadcasters in foreign countries were prohibited from broadcasting programmes with Dutch advertisements to the Dutch audience' (Korthals Altes 1993: 32). The Court ruled against the Netherlands, claiming that:

Even if such a restriction forms part of a cultural policy intended to safeguard the freedom of expression of the various social, cultural, religious and philosophical components of society by ensuring the survival of an undertaking which provides them with technical resources, it goes beyond the objective pursued, since pluralism in the audio-visual sector of a Member State cannot be affected in any way by allowing the national bodies operating in that sector to make use of providers of services established in other Member States.

Among other things, the Court's decision meant that domestic companies were no longer obligated to purchase content solely material from Dutch providers. The Netherlands subsequently had to make changes to its national Media Act of 18 December 1991, which provoked a greater sector liberalization than had been envisioned by the Dutch authorities. As Korthals Altes states 'it is European law that opened the Dutch broadcasting system' (1993: 329). The 1991 Dutch Act still represented a relatively strict regulatory

regime. As all terrestrial frequencies were reserved for the public stations, private television (national or transitional) were constrained to the local cable networks. However, the simultaneous enactment of the EC *Television Without Frontiers* in other countries rendered the Dutch Media Act useless in this respect. As a small country with many bordering countries, the Netherlands had the unique problem of a high level of cross-border transmissions (often in the Dutch language). At present, 40 per cent of audience share in the Netherlands comes from foreign broadcasts (CIT 2001). A large proportion of which goes to the Luxembourg-based channels, RTL 4 and 5.

Another case, decided only six days later, further chiselled away at the Member State jurisdiction for broadcasting policy. The Greek *Elliniki Radiophonia Tilorassi-Anonimi Etairia V. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* case was concerned with the Greek Law of No 1730/1987 which banned commercial broadcasters and in the ECJ's view, established a 'public television monopoly'. In 1988, the Mayor of Thessaloniki set up a television station and began broadcast. A Greek court injunction was issued to restrain transmission and ordered seizure of station equipment. The case was taken to a national court, which referred the case to the ECJ. Although this presented a case of sensitive national policy, the ECJ choose to intervene. It decided that the Greek public broadcaster monopolized not only *transmission* but also *exclusive rights*. In this respect, the Court ruled that the establishment of a public broadcasting monopoly 'must be regarded as an ostensibly illegal measure by virtue of the combined provisions of Articles 90 and 86, which cannot be justified by virtue of Article 90(2)'. By this period in time, perhaps in participation of the ECJ ruling, the Greek government had passed a new media Law No 1866/1989 allowing for local commercial television stations at the local level.

This determination on behalf of the ECJ to intervene in national media policy (often encompassing cultural policy aims) continued in 1992, when the ECJ ruled against the Belgian state in *European Communities V. Kingdom of Belgium*. It decided that Belgium had failed to fulfil its obligations under Articles 52, 59, 60, and 221 of the EEC Treaty on four accounts: by prohibiting cable programmes from other Member States where the programme was not in the language stipulated by Belgian law; by subjecting cable commercial broadcasters from other Member States to prior authorization, to which conditions might have been attached; by reserving 51 per cent of the capital of the Flemish commercial broadcaster for publishers of Dutch-language daily and weekly newspapers; and by compelling commercial broadcasters to constitute a compulsory part of their programming to cultural interest.

Two years later, another case was brought to challenge national broadcasting law. In 1994, the ECJ ruled that the United Kingdom had failed to adequately implement the *Television Without Frontiers (TWF)* directive in the *Commission*

of the European Communities V. United Kingdom of Great Britain and Northern Ireland case. The Commission informed the United Kingdom that it had failed to correctly transpose several articles of the *TWF* directive into its UK Broadcasting Act 1990. This because the UK Broadcasting Act treated domestic satellite services differently than non-domestic satellite services (in Section 43) and because it continued to exercise control over foreign broadcasts. The United Kingdom therewith maintained jurisdiction over Sky Television which was broadcasting from Luxembourg. The ECJ ruled in favour of the Commission and suggested a rewording of the 1990 Broadcasting Act, by which time the 1996 Broadcasting Act was almost in place.

This case was followed by the 1996 *Eurovision* case. The case dealt with programming rights acquired by the European Broadcasting Union (EBU) which were for exclusive use of its PSB members.¹¹ The European Commission had exempted the EBU from EU competition rules under Article 85 (3) (now Article 81 EC) to enable it to share exclusive rights in view of the EBU members' public service role.¹² Although the French commercial broadcasters Canal Plus and TF1 had been granted membership by the EBU in 1984 and in 1986 (while they were still public but were soon afterwards privatised), three private groups, La Cinq, M6, and Antena 3, were later refused membership. La Cinq, M6, Antena, RTI, and Telecinco took the case to the CFI. In two cases (one jointly decided), the CFI ruled against the Commission's decision to opt the EBU out from competition rules. In 1994, Métropole Télévision was again denied EBU membership, and asked the Commission to investigate under state aid rules. The Commission refused (Commission decision of 29 June 1999). Métropole Télévision took the case the ECJ in 1999. The Court decided in March 2001 that the Commission should have investigated the case. This means that the Commission will most likely be required to decide on PSB exclusive rights agreements in the future.

A case dealing with Flemish media regulation emerged in 1997 with *VT4 Ltd V. Vlaamse Gemeenschap*. According to Belgium law, the Flemish Executive can license only one commercial television broadcaster at a time. In 1987 this licence was granted to Vlaamse Televisie Maatschappij NV ('VTM') to broadcast its station VT4 for a term of eighteen years. Under the same provisions, only one broadcaster (radio or television) for the Flemish Community may be licensed to transmit advertising. This licence was also issued to VT4 for a term of eighteen years in 1987. In Flanders, VTM therefore holds a legal monopoly in commercial television and television advertising. With the eighteen year licence intact, VTM was bought by Scandinavian Broadcasting SA (registered

¹¹ From 1988, the EBU membership was restricted to public service broadcasters.

¹² Commission Decision 93/403/EEC of 11 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (OJ 1993 L 179, p. 23), whereby it granted an exemption under Article 85(3) ('the exemption' decision).

in Luxembourg) and VT4's broadcasting headquarters relocated to London. VT4 secured a non-domestic satellite service licence from the United Kingdom permitting it to broadcast to Flanders under UK regulation (pertaining to non-satellite broadcasts). In reaction to this evasion of Flemish media law, the Flemish *Minister of Culture and Brussels Affairs* prohibited the retransmission of VT4 programming by cable network operators in Flanders from 16 January 1995. This decision, by the Flemish minister, was overturned by the ECJ, which found it to be in conflict with *TWF*. This ECJ ruling enables media companies to bypass national laws by moving their headquarters abroad.

A similar case was ruled on the same day against Belgium, again upholding *TWF*. The United Kingdom had this time issued a non-domestic satellite service licence for UK Turner Entertainment Network International Limited (subsidiary of the US American Turner Group) which owns The Cartoon Network Limited and Turner Network Television Limited which broadcast programmes via the Astra satellite. On 17 September 1993 Turner International Network Sales Limited concluded an agreement with Coditel, the German cable television company to distribute Turner programming to Brussels. As there was no legislation at that time governing cable television in Brussels, a Royal Decree was issued the day before the agreement (on 16 September 1993) designed to stop the cable company from taking advantage of the lack of legislation. Coditel was prohibited from distributing 'TNT' and 'Cartoon Network'. Turner International Network Sales Ltd took the case to the Tribunal de Commerce in Brussels for an interim order allowing Coditel to carry out its contract. The order was granted by the tribunal on 26 October 1993 and Coditel began broadcasting. In June 1994 the Belgian State brought third-party proceedings against the interim order (of 26 October). In November 1994, the Tribunal de Commerce referred the case to the ECJ and banned Coditel from broadcasting until a decision had been made. This decision was reversed at in April 1995 by the Belgian Cour d'Appel, which withdrew the case from the ECJ. Meanwhile, the Belgian state began separate criminal proceedings against Paul Denuit, the managing director of Coditel, for ignoring the Ministerial Decree of 17 September 1993. The Tribunal de Première Instance referred the case to the ECJ which ruled in favour of Denuit in 1997 and upheld *TWF*. Again, as in the VTM satellite case, the ECJ ruling enables cable companies to circumvent national legislation by broadcasting from abroad.

The issue of cross national broadcasting resurfaced in 1997 with the *Tiercé Ladbroke SA V. Commission of the European Communities* case. Tiercé Ladbroke SA asked the ECJ for an annulment of the EC Decision of 24 June 1993. The EC had rejected a complaint lodged by Tiercé Ladbroke SA against Pari Mutuel Urbain (PMU) and Pari Mutuel International (PMI), the principal French sociétés de courses (horseracing associations). PMI had granted Deutscher Sportverlag Kurt Stoof GmbH & Co. ('DSV') exclusive rights to

French horseracing broadcasts in Germany and Austria. In September 1989, Ladbroke asked DSV to grant it the right to retransmit the broadcasts in Belgium. DSV refused in October 1989 on the grounds that its contract with PMI prevented it from retransmitting the French sound and pictures outside the licensed territory. However, PMI runs a service called 'Courses en direct' that enables horse races in France to be viewed live by satellite. PMI was prepared to licence this service to three Belgian companies: Pari Mutuel Unifié Belge, Tiercé Franco-Belge and Dumoulin—but not to Ladbroke. The EC rejected the complaint by Ladbroke. The Court upheld the Commission's decision.

In three recent decisions, the ECJ has been asked to decide on if the European Commission should rule on if the public service television should be prohibited to raise funding through advertising (as a digression of state aid rules). The Commission has thus far viewed this matter as one of national concern. In the three decisions raised by private companies in France and Portugal, the ECJ has ruled that the Commission should *indeed* be obliged to judge this issue in the future (*Télévision Française V. European Commission* (1999), *SIC V. Commission* (2000), and *Commission V. TF1* (2001)). The EC Directorate for competition subsequently came out with its 2001 *Communication on the application of State aid rules to public service broadcasting*¹³ in which it recognizes PSB importance for maintaining pluralism. The Communication, refers to the 'public service' Protocol of the 1997 Treaty of Amsterdam and quotes the 2000 EC *Communication on Services of General Interest in Europe*¹⁴ which states 'the choice of the financing scheme falls within the competence of the Member State, and there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenues) rather than a single funding scheme (solely public funds) as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest'. With this as a general rule, future advertising and funding complaints are to be decided on a case by case basis.

Most cases from this period onwards have dealt with the correct implementation of EC Directives. Four cases were brought to the ECJ by the Commission in 2000 and 2001 against France, Italy, Luxembourg, and Spain. The ECJ ruled that France had failed to implement Directive 95/47/EC.¹⁵ Italy was found to have failed to implement the 1997 TWF Directive, particularly the provisions relating to advertising.¹⁶ Spain (again in dispute with

¹³ Communication from the Commission on the application of State aid rules to public service broadcasting. *OJ C 320, 15.11.2001*, pp. 5–11 and Commission clarifies application of State aid rules to Public Service Broadcasting Press Release—IP/01/1429—17.10.2001.

¹⁴ *Communication on Services of General Interest in Europe* COM(2000) 580 final, p. 35.

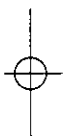
¹⁵ Case C-319/99 *Commission v. France* 2000 23.11.00.

¹⁶ Case C-207/00 *Commission v. Italy* 2001 14.06.01 Failure to transpose Directive 97/36/EC.



FIGURE 8.2. Number of MTF media decisions 1989–2001
 Source: Compiled by author.

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Canal Plus) was found to have incorrectly transposed Directive 95/47/EC (standards for the transmission of television signals) by requiring registration of digital television operators as a condition for licensing.¹⁷ Luxembourg was found to have failed to implement the 1997 TWF.¹⁸

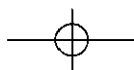
Vertical Europeanization via EC Merger Policy

Competition policy has long been recognized as a key policy area of the Commission (Wilks and McGowan 1995; Cini and McGowan 1997). Within the Commission, DG Competition has responsibility for competition decisions and since 1995 has housed the Merger Task Force (MTF). EC merger law has been utilized in a great number of decisions concerning media markets (Figure 8.2) which has promoted Europeanization in the regulation of national media markets, particularly in digital television.

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¹⁷ *Canal Satélite Digital SL v. Administración General del Estado* 2001 08.03.01 Ruling on technical standards and registration rules set by the Spanish government.

¹⁸ Case C-119/00 *Commission v Luxembourg* 2001 21.06.01 Failure to implement Directive 97/36/EC.



EC competition law is applicable to European markets when agreements between companies are seen to come into conflict with the creation of a Single Market or there is generally a perceived threat to competition through cartels, monopolies or mergers. However, Cini and McGowan highlight that a key objective of competition policy is the protection of the consumer, as has been tradition of United States, United Kingdom, and many other national competition regimes. This entails 'the defence of the individual against big business, usually for moral or political reasons' (Cini and McGowan 1997: 4).¹⁹ At the national level, this is where extra constraints on media markets have come in to play. For instance, in the United Kingdom, the application of competition law has been balanced by the use of the public interest test in the media sector. The same *political* considerations effect competition policy at the European level. These considerations have manifested themselves in various ways. Mostly political concerns are dealt with informally, within the *cabinet* of the competition Commissioner where a final decision on all competition cases is taken.

Following the 1989 *TWF* Directive and the 1989 Merger Regulation, there was a dramatic increase in the number of media market decisions (see Figure 8.2). Between 1989–99, the EC made over fifty formal decisions in the media sector. The majority of decisions were decided positively in favour of market concentration. However, eight of the decisions resulted in negative decisions. This is significant as between the period, 1990–99, only ten of 1104 merger decisions made by the EC were negative.²⁰ No less than six of these ten negative decisions dealt with the media sector.²¹ A further two negative decisions were taken in the media sector under Article 85 of the Treaty of Rome during the same period.²² This brings the total of formal negative decisions taken by the EC in the media sector to eight in a ten-year period. If informal decisions²³ are included, the total number of negative decisions made against media market concentrations amounts to nine. This occurred when the EC informally suggested that BSKyB

¹⁹ Cini and McGowan state that when the competition authority was set up, 'an identifiable consumer culture provided evidence of a public interest dimension within the policy' (1997: 24). At the time, consumer policy was also situated within the same Directorate General.

²⁰ Cini and McGowan also note the high occurrence of negative decisions in the media sector, amounting to 4 out of 7 by 1996 (1997: 130). Other authors have also commented upon this phenomenon (Kon 1996). Since this time (1999–2002) a further 865 decisions were taken—meaning a total of 1,969 have been made by the MTF between 1995–2002, eighteen of which were prohibitions. See EC competition Statistics on European Merger Control: <http://europa.eu.int/comm/competition/mergers/cases/stats.html>.

²¹ These are MSG Media Service Case No. IV/M.469 1994 [OJL 364, 09.11.94]; Nordic Satellite Distribution Case No. IV/M.490 1995 [OJL 53, 19.07.95]; RTL/Veronica/Endemol Case No. IV/M.553 1995 [OJL 294, 19.11.96]; Telefónica/Canal Plus/Cablevisión Case No. IV/M.0709 1996 [OJL 228/05, 07.08.96]; Deutsche Telekom/Betaresearch Case No. IV/M.1027 1998 [27.05.98]; and DF1/Premiere Case No. IV/M.993 1998 [01.06.98].

²² Screensport/EBU Case No. IV/32.524 1991 [OJL 063/32, 09.03.91]; Tiercé Ladbroke SA Case No. IV/33 1993 [OJL 699, 24.06.93].

²³ Many of these are decided in letters although there is a problem with this as letters have no legal validity. For discussion see Tucker, Emma 'Europe's Paper Mountain' *Financial Times* 11.02.98.

be excluded from British Digital Broadcasting (BDB) when the United Kingdom issued digital licences in 1997. Informal negotiations were also attempted to deal with the Premiere/DF1 digital platform until the case was officially registered with the European Commission in December 1997.

Following the *TWF*, the first negative decision concerning media markets was the 1991 Screensport/EBU decision.²⁴ The MTF determined that a joint venture between the EBU and News International presented a dominant market position. In 1988, the satellite sports company, Screensport, had filed two complaints with the MTF. The first related to its inability to access Eurosport exclusive rights. In its second complaint, Screensport claimed that Satellite Sport Services Ltd, a joint venture between the EBU and News International, presented an undue dominant position in the European market for sports broadcasting. The MTF decided to split the case in two, firstly tackling the legitimacy of Satellite Sport Services Ltd. In May 1988, seventeen Members of the European Broadcasting Union (EBU), which is made up of public service broadcasters (PSBs), had signed an exclusive rights agreement (the Eurosport Consortium Agreement) to share sporting broadcasts. Later that year, in December, the EBU set up the joint venture, Satellite Sport Services Ltd, with News International to provide sports programming. The EBU and News International then signed two exclusive rights agreements with the joint venture company: a Services Agreement and a Facilities Agreement. An additional Guarantee was signed between News International and Eurosport. The MTF ruled in favour of Screensport, and against the EBU/News International, determining an infringement of Article 85(1) as the joint venture excluded third parties access. The complaint against the EBU's exclusive rights agreement was decided later in 1993. In this case, the European Commission exempted the EBU from EU competition rules and permitted the EBU to hold exclusive rights to broadcast sports events (based upon the Eurovision system).²⁵ This decision was later challenged in the ECJ (as detailed in Section 'The Impact of ECJ Decisions on National Regulation').

The next case of significance was the 1991 *ABC/Generale des Eaux/Canal +/WH Smith* decision.²⁶ The proposed joint venture dealt with an agreement between ESPN Inc. (a subsidiary of Capital Cities/ABC), Générale d'Images (GdI) (a subsidiary of Compagnie Générale des Eaux) and Canal Plus to acquire the television interests of W.H. Smith. Capital Cities/ABC is a US communications group, with a particular interest in selling sports programmes (baseball and American football) to European pay television channels. Canal Plus is the French pay television channel. The three groups acquired WHSTV which belonged to W.H. Smith. WHSTV owns TESN, the

²⁴ 91/130/EEC: Commission Decision of 19 February 1991 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.524 – Screensport/EBU members).

²⁵ EBU/Eurovision Decision Case No. IV/32.150 [OJL 179/06, 22.07.93].

²⁶ ABC/Generale des Eaux/Canal+/WH Smith [IV/M.110, 10.09.91].

European Sports Network (ESPN)²⁷ (formerly Screensport), LifeStyle TV, Kindernet, Cable Jukebox, and the Molinare Group. (WHSTV also owned Yorkshire TV, but this was not included in the acquisition). The joint venture between the three companies was eventually permitted to go ahead. However, it is significant that the MTF used this case to more narrowly define the product market in broadcasting. It determined in its decision that pay television and commercial free access television constituted separate product markets. The case is also interesting because it again dealt with sports broadcasting which was deemed by the MTF to be 'particularly amenable for transnational broadcasting as (it) transcend(s) national, cultural, and linguistic barriers'. This is significant for future decisions as sports broadcasting is no longer considered to be restricted to national (geographical) markets, but is now a 'European' issue.

MTF investigations of concentrations taking place between the largest German media groups are numerous. Between 1994 and 1999, the MTF investigated no less than fourteen joint ventures involving German media groups. Nine investigations handled joint ventures taking place solely between German companies, within the national German market.²⁸ Six investigations dealt with German groups seeking joint ventures externally to Germany.²⁹ In 1994, the MTF decided the first two of these cases, which dealt with cross-border acquisitions: the Kirch/Richemont/Telepiù case and the Bertelsmann/News International/Vox case.³⁰ The cases were decided positively, but the MTF, as in the *ABC/Generale des Eaux/Canal + /WH Smith* case, narrows the definition of pay and commercial free access television.

The definition of broadcasting markets was narrowed further in the 1994 Kirch/Richemont/Telepiù case, (No. IV/M.410). In this case, Kirch and Richemont acquired joint-control of the Italian television group Telepiù S.r.l (owned at the time by Berlusconi). The Commission decided positively as the Italian language market presented a new market for the companies involved. On 27 June 1994, Richemont (through its subsidiary, Ichor) acquired CIT (which

²⁷ European Sports Network runs TV Sport, Sportkanal, and Sportnet.

²⁸ MSG Media Service (Case No. IV/M.469, OJL 364, 09.11.94); N-TV (Case No IV/M.810, OJC 366/05, 05.12.96); Bertelsmann/Burda/Springer Hos MM (Case No IV/M.972, 15.09.97); Bertelsmann/Burda Hos Lifeline (Case No IV/M.973, 15.09.97); Deutsche Telekom/Betaresearch (Case No. IV/M.1027, 27.95.98); DF1/Premiere (Case No. IV/M.993, 01.06.98); Bertelsmann/Burda/Futurekids (Case No. IV/M. 1072, 29.01.98). Havas/Bertelsmann/Doyma (Case No. IV/M.800, 27.08.98).

²⁹ Kirch/Richemont/Telepiù Decision (Case No. IV/M.410, OJC 225/04, 13.08.94); Bertelsmann/News International/Vox Decision (Case No. IV/M.489, OJ C 274/06, 01.10.94), Vox (II) (Case No. IV/M.525, OJ C 57/06, 07.03.95), Kirch/Richemont/Multichoice/Telepiù (Case No. IV/M.584, OJC 129/07, 16.06.95), Bertelsmann/CLT (Ufa), Case No IV/M.0779, OJC 364/05, 04.12.96), Betaresearch *et al.* (1998).

³⁰ The Kirch/Richemont/Telepiù Decision Case No. IV/M.410 1994 [OJC 225/04, 13.08.94] and the Bertelsmann/News International/Vox Decision Case No. IV/M.489 1994 [OJ C 274/06, 01.10.94].

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held 25 per cent of Telepiù) and Kirch (through its subsidiary Beteiligungs-GmbH) upped its stake in Telepiù from 34.72 to 40.73 per cent. The remaining shareholders in Telepiù were the Della Valle Group (23.39 per cent) and Fininvest (10 per cent). It was agreed that the President of the Board would represent Kirch. The Commission decided in this case that Kirch and Rlichemont's joint control of Telepiù did not give present a problem of coordination of competitive behaviour because Rlichemont and Kirch operated in separate pay-television television markets according to geographic criteria. This opened the Italian market for the first time to foreign competition.

This dividing of free access as opposed to pay-access markets was confirmed in a different media decision made by the MTF in the same year. In the 1994 Bertelsmann/News International/Vox case (Case No. IV/M.489), News International bought a 49.9 per cent stake in Vox, a German free-to-air television channel. Vox was 24.9 per cent owned by Bertelsmann. Because media markets are divided linguistically by the MTF, it was considered whether the acquisition strengthened either of the companies' dominant positions in the German television market. Up until this point, News International had entered the German language market some years before through a joint venture with Selco (50 per cent owned by Kirch's Pro 7). The Commission decided again that free access channels and pay channels constituted separated markets. Therefore, because Vox was a free-to-air channel, the MTF did not consider News International to be increasing its dominance in the German language market as the company was present in two separate markets: free-to-air and pay television. The MTF also considered the potential for Bertelsmann and News International to trade film rights. It was concluded that this did not at that point in time present a problem for the German market. However, this could be again of issue, now that Kirch is bankrupt and selling off its assets.

In 1994, the Commission made the first of what could be labelled four highly controversial negative decisions on joint ventures in the German market.³¹ In its 1994 MSG Media Service decision, the Commission ruled against a German joint venture for pay television Media Service GmbH (MSG) between Bertelsmann, Kirch and Deutsche Telekom (DT).³² The proposed was a joint pay-television venture between Bertelsmann AG, Taurus Beteiligungs GmbH (belonging to Kirch) and Deutsche Bundespost Telekom (the public telecommunications group). The MTF found the joint venture to be incompatible with the common market as it would have created a dominant position in three

³¹ MSG Media Service (Case No. IV/M.469, OJL 364, 09.11.94), Deutsche Telekom/Betaresearch (Case No. IV/M.1027, 27.95.98), and DF1/Premiere (Case No. IV/M.993, 01.06.98.), Betaresearch *et al.* (1998).

³² 94/922/EC: Commission Decision of 9 November 1994 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.469—MSG Media Service) *Official journal NO. L 364, 31/12/1994 P. 0001-0021*].

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markets: technical services (MSG), pay television (Kirch and Bertlesmann through Premiere), and cable distribution (DT). The Commission also considered that MSG was likely to gain a lasting dominant position in new media markets (of the future), particularly for digital television where it would foreclose the market to new entrants. Even though these were economic rationales for preventing the joint venture, it is plain to see that such a joint venture had serious implications for cultural (and political) representation in Germany.

The next media concentration to be prohibited by the MTF was Nordic Satellite Distribution (NSD) in 1995.³³ This related to the capacity of a satellite television responder. The MTF found that NSD (a joint venture between Norsk Telecomm, Tele Denmark and Kinnevik) would acquire a dominant position in the market for satellite television transponder services targeted towards Nordic viewers. This would in turn strengthen Tele Denmark's dominant position in the Danish cable television market. The vertical integration of NSD meant that the companies' respective positions in their national markets would reinforce each other. In addition, the Commission reasoned that the NSD would lead to the dominance of Viasat (Kinnevik's subsidiary) in the specific market of pay-television distribution (to direct-to-home households). The MTF expressed in this case that it wished to ensure that the Scandinavian markets, which were in a stage of liberalization, were not foreclosed to third parties (Buttersorth's Merger Control Review 1995).

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Soon afterwards, the Commission ruled against the 1995 *Holland Media Group (HMG)* joint venture.³⁴ The *Holland Media Group* had proposed a joint venture in commercial television in the Netherlands between RTL4 S.A., Vereniging Veronica Omroeporganisatie and Endemol Entertainment Holding BV. The Dutch government had requested a ruling on the case under Article 22(3) of the Merger Regulation. Had the Dutch government not referred the case, the Commission would have had no jurisdiction to judge it as the turnover thresholds were below those required by the Merger Regulation.³⁵ The MTF ruled the agreement would lead to the creation of a dominant position in the Dutch advertising market and strengthen Endemol's dominant position in the market for independent Dutch-language television production. Clearly, as this case solely dealt with a purely national case and a venture with a comparatively low turnover, the Commission's concerns in this case overstepped those of

³³ Commission Decision of 19 July 1995 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.490—Nordic Satellite Distribution) (96/177/EC).

³⁴ 96/346/EC: Commission Decision of 20 September 1995 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.553—RTL/Veronica/Endemol). Official journal NO. L 134, 05/06/1996 P. 0032–0052.

³⁵ If a case is referred to the European Commission under Article 22(3) of the Merger Regulation, the companies are permitted to go ahead with their proposed concentration while the case is being examined.

ensuring a competition market. When commenting on the case, Commissioner Van Miert stated that 'the strict application of the competition rules can also contribute to maintaining plurality in this sensitive sector' (Lang 1997: 42). Later in July 1996, the Commission approved the joint venture following the withdrawal of Endemol from the project. Endemol challenged the MTF over the ruling at the CFI and lost.

In 1997, five decisions were made on joint ventures within the German media market, which is showing an increasingly high degree of market concentration. The two joint ventures between the large press groups Bertelsmann and Burda³⁶, and Bertelsmann, Burda, and Springer³⁷ were examined and approved. In the three broadcasting cases, the MTF reached *negative* decisions. The broadcasting cases dealt with the proposed acquisition and joint control of the German pay-TV operator Premiere and BetaResearch by Bertelsmann and Kirch. Bertelsmann and Kirch owned Premiere and DF1 respectively, which represented the only pay-television packages in Germany. The plan was to launch a joint-digital platform. Together, the two companies also controlled the standard digital set top box and had extensive programming rights. In the first decision, the Commission pronounced the joint venture as incompatible with the common market as it represented a concentration in the 'European German-speaking market'. The Commission had initially put informal pressure upon the German government and the Bundeskartellamt (the German Cartel Office) to decide the case at the national level. When the German government decided to approve the joint venture (against the wishes of the 6 SPD German Länder which refused to license the service), the European Commission warned the three companies that they risked a fine of a maximum of 10 per cent of their combined turnovers if they proceeded with plans to launch the digital service without notifying the European Commission. The MTF opened an investigation. Under Kohl's leadership, the German government expressed opposition to a negative ruling on behalf of the Commission. ('Freund Kohl in geheimer Mission' *Süddeutsche Zeitung*, 17.12.97). Despite this political resistance, the Commission prevented the joint venture under EU Merger Regulation.³⁸

The second case (which was filed at the same time as DF1/Premiere) was Deutsche Telekom/Betaresearch.³⁹ This second case related to the joint control of the D-Box decoder by Bertelsmann, Kirch, and Deutsche Telekom. A negative decision was adopted by the Commission on 27.5.1998. Shortly

³⁶ Case No IV/M.972 Bertelsmann/Burda/Springer Hos MM [15.09.97].

³⁷ Case No IV/M.973 Bertelsmann/Burda Hos Lifeline [15.09.97].

³⁸ It was only possible for the Commission to intervene in the German market because the MTF could argue that domestic media concentration effected linguistic markets external to Germany-Austria and the German speaking minorities in the Netherlands and Belgium.

³⁹ Deutsche Telekom/Betaresearch Case No. IV/M.1027.

afterwards, the President of the Bundeskartellamt, Dieter Wolf, stated 'the majority of national states lacked both the strength and the courage to do anything about their respective monopolies. A higher political level was called upon to do so, and this is where the European Commission came in.'⁴⁰ This statement indicates that increasing media concentration renders national governments powerless to stand up to large media groups. The Dutch *HMG*, German *Bertelsmann/Kirch/Premiere*, and British *BDB* (below) cases clearly demonstrate this.

As in Germany, the UK's media market has also come under scrutiny from the MTF which has investigated four cases of dominant position within the British domestic market.⁴¹ In one case, the British Telecom/MCI (1993), the MTF prevented a market concentration. The second case dealt with BSKyB's involvement in British Digital Broadcasting (BDB). The DTI had approved BSKyB's participation in the creation of British Digital Broadcasting (BDB, now known as ONdigital). The Commission launched a series of informal discussions with UK regulatory bodies (Snoddy (1997) claims that these talks were initiated by the ITC). The Commission argued that the joint venture BDB would strengthen BSKyB's dominant position in the UK pay-television market and encourage cooperation (rather than competition) between BDB and BSKyB. In particular, the MTF stated that by granting a licence to the joint venture as it stood would strengthen the dominant position of BSKyB which would be contrary to a principle ruled in by the ECJ in *Ahmed Saeed Flugreisen*⁴² (Lang 1997: 32). The UK government referring to EC advice decided that BSKyB should not join the joint venture.

Again the issue of national media concentration came to the fore, this time in Spain. A case decided negatively in 1996 concerned the acquisition of Cablevisión by Telefónica de España and Sogecable SA, a subsidiary of Canal Plus España.⁴³ The MTF found that the venture affected the supply of services to cable television operators and prevented new entrants to markets for pay and cable television. Originally, the companies had notified the acquisition to the Spanish Competition Defence Tribunal (TDC), which vetoed the joint venture, but it was overruled by the Spanish government. After this, the Commission wrote to Canal Plus España requesting notification to the Commission (indeed,

⁴⁰ Wolf, Dieter (1997). Position on the subject of 'Commission and National Competence—A Debate'. Paper presented at the Future of Merger Control in Europe conference, European University Institute, Florence, 26.09.97 by Committee C (Antitrust and Trade Law) of the International Bar Association.

⁴¹ 1993 BBC/BskyB/Football Association Case No. IV/33.145 and IV/33.245 [OJC 94/6, 03.04.93]; 1993 British Telecom/MCI Case IV/M.353 [OJC 259/03, 27.08.93], 1997 British Telecom/MCI (II) Case No IV/M.856 [14.05.97]; 1997 BskyB/British Digital Broadcasting Case IV/M. 300.

⁴² Case 66/86, *Ahmed Saeed Flugreisen* ECR 802. The principle is based on Article 5 of the treaties. ⁴³ 1996 Case No. IV/M.0709 [OJC 228/05, 07.08.96].

informally the Commission had to put up a considerable fight to wrench the decision away from the Spanish government). Following a negative decision by the MTF, Sogecable sought an annulment in the CFI and a suspension of the Commission's activities until the Court had determined whether the operation had a Community dimension. The CFI did not suspend the MTF investigation (as it viewed this to be a substitution of the EC's administrative activities), but supported the MTF decision.⁴⁴ In any case, just before the CFI decision was announced, the operation was withdrawn due to a change in the Spanish government in 1996.

The Spanish government, then tried to prevent the launch of Canal Satélite Digital with two laws⁴⁵ (Llorens-Maluquer 1998: 578–85). The government stated that the laws were enacted to promote pluralism as they required the use of multicrypt (rather than simulcrypt) transmission and mandated the shared use of sports rights. As Canal Satélite Digital was using simulcrypt, this rendered their broadcasts illegal. The Commission opposed both of the laws as anti-competitive and in contrary to the free movement of goods and threatened to challenge them in the ECJ. As Llorens-Maluquer details well, a long battle between the Commission and the Spanish government ensued resulting in a revocation by Spain of both laws (1998).⁴⁶ In a parallel development, CDS challenged one of the laws (Real Decreto Ley 1/97) in a Spanish court (Tribunal Supremo), which referred case in turn to the ECJ. Long after the Real Decreto had been revoked, the ECJ ruled with the Spanish court, and against the Spanish government in January 2002.⁴⁷

In 1997, two Spanish cases dealt with the cable television company, Cable I Televisio de Catalunya (CTC), in the Spanish region of Catalonia. In the first case,⁴⁸ joint acquisition of CTC was proposed by the electric company, Endesa, the gas company, Gas Natural (the principle suppliers of electricity and gas in Spain), Stet (the Italian telecommunications operator), and Caixa Catalunya (the leading Catalan bank). In the second case,⁴⁹ the American companies, General Electric (through Cableuropa) and Bank of America (through SpainCom) proposed partial acquisition of CTC. The European companies were dubbed 'the European partners' and the American companies, 'the American partners'. The MTF authorized the acquisitions in both cases,

⁴⁴ 1996 Case T-52/96 Sogecable SA v Commission of the European Communities. [12.07.96, ECR 0797].

⁴⁵ 1997 Real Decreto Ley 1/97 incorporation of the EC Directive 95/47/CE; and 1997 Ley 17/97 (conversion into law of the decree law) Regulation of the Emission and Retransmission of Competitive Sport (Reguladora de las Emisiones y Retransmisiones de Competiciones Deportivas).

⁴⁶ Ley 1/97 amends Leys 1 and 16/97 with the changes mandated by the Commission.

⁴⁷ Case C-390/99 Canal Satélite Digital V. Spain 2002 [22.01.02].

⁴⁸ Cable I Televisio de Catalunya (CTC). Case No. IV/M.1022 [28.01.98].

⁴⁹ Cableuropa/SpainCom/CTC, Case No. IV/M. 1091 1998 [28.01.98].

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establishing joint control between the American and European partners in CTC. The Commission could not justify an intervention under the 1989 EC Merger Regulation and approved the cases. However, the MTF expressed dissatisfaction with the ruling (European Bulletin 1/2 1998: 25, 1999: 14).

With the amendment of the Merger Regulation in April 1997, paragraphs 1 and 3 of Article 85 have been extended to joint ventures to determine whether or not a dominant position is created or maintained. Even though turnover thresholds have been lowered from five to two and one half billion ECU under the new rules, only a small number of cases are expected to utilize the new lowered thresholds due to the organizational requirements involved (Fine 1997).⁵⁰ The new rules entered into effect on 1 March 1998. The Telenor case, which related to the provision of internet and audio-visual interactive services in Sweden, represented the first media case to which the new rules applied in 1998. The number of media cases is on the rise, but following 1999, when Van Miert left office, the EC has made no negative decisions in the media sector. This section has shown that the EC's MTF has had a strong influence on the development of media markets in Europe, particularly in the case of digital television, and the prevention of market concentration at the national level.

The Commission and New Modes of Governance

Sections 'Vertical Europeanization via EC Merger Policy' and 'The Commission and New Modes of Governance' looked at vertical mechanisms of Europeanization—how decisions of the ECJ and the MTF have influenced national media markets and laws. This section looks at the horizontal mechanism. The Commission is facing a number of problems in producing media directives due to limitations in the EU Treaties, reliance on economic policy instruments, and politicization of policy-processes. Depoliticization of the policy process during TWF negotiations was hard won by the Commission. Subsequently, the Commission met with insurmountable political obstacles during policy processes for the EC initiatives on *media ownership* and *convergence* (this is the convergence between telecommunications and media markets). These political obstacles have limited the Commission's capacity to regulate the media sector. However, although media regulation has represented a significant impasse to conventional policy-making (in the form of directives), the Commission has since found new ways of governing media markets. These are through the suggestion of best practice solutions to domestic policy problems

⁵⁰ Even the old rules have proved difficult in this respect. For example, when the MTF decided negatively to the Canal Plus/Metro joint venture, the decision had to be ratified by six national authorities.

(in green papers) and the establishment of media fora at the European level which have been used to diffuse suggested policy instruments.

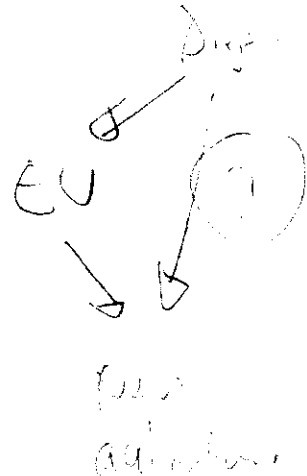
In 1993, the Commission came up with a new idea for regulating media markets: audience share.⁵¹ This policy instrument first appeared in a one-hundred page study commissioned by DG XV and sent out to national authorities in 1993. This, along with another technical studies on regulating media markets, was sent out to interest groups in 1995 during consultation on the EC's media ownership draft directive. The instrument has subsequently been adopted to regulate media markets in three countries: Germany, the United Kingdom, and Ireland. Diffusion of the idea in Germany was aided by the organization of meetings at the national by an EC head of unit, wherein national media experts discussed solutions to growing media concentration. Audience share was adopted as a key regulatory instrument in the 1996 interstate treaty. Under the German 1996 Interstate Treaty on Broadcasting, broadcasting companies are limited to a 30 per cent share of national audience.

The United Kingdom and Ireland also adopted audience share as an instrument for regulating domestic media markets. The UK 1996 Broadcasting Act introduces audience share to limit of broadcasters to 15 per cent (for both television and radio stations). In the United Kingdom, the civil servant drafting the 1996 Act adopted the idea of audience share directly from the EC studies. With the new instrument, there is now no limit in the United Kingdom on ITV license ownership, as long as the combination of company ownership and their corresponding license-holding does not exceed 15 per cent. The 15 per cent limit has remained in tact under the new 2002 Broadcasting Act. In Ireland, the same instrument was adopted in Ireland's 2001 Broadcasting Act.

The necessity to implement the 1997 *Television Without Frontiers Directive* at national levels, resulted in the adoption of new media acts in most Member States, prompted many countries to re-examine their regulation of national media markets. At this point in time, a number of countries (specifically Italy, Spain, Switzerland, Slovenia, and the United Kingdom) choose to embrace the EU's convergence initiative. In 1996, the Commission produced its convergence green paper which recommended a new joint authority for both media and telecommunications. The Commission's ISPO group which includes national experts from all Member States aided in diffusion of the idea.

Italy and Spain were the first to regulate for convergence. Italy's 1997 New Media Act established an Authority for Communications (Autorita per le garanzie nelle comunicazioni), which was set up in 1998. It replaces the *Press and Broadcasting Authority* and is situated within the new Ministry for Communications. It was the first regulatory authority in Europe to regulate

⁵¹ The concept of audience share was created by FCC consultant William Shew in the study *Measures of media concentration* (American Enterprise Institute) commissioned by News International and sent to the European Commission in 1989 (Harcourt 2003).



both telecommunications and media under one roof. It both issues broadcasting licences and regulates telecommunications companies. The new Authority monitors media mergers and acquisitions taking place across all related media markets, including telecommunications and new services. Spain also passed an Act in 1997 which set up a joint regulatory authority for both telecommunications and media markets. Switzerland (2000), Slovenia (2001), and the United Kingdom (2002) soon followed suit with new media acts setting up new joint authorities.

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Conclusion

This chapter has shown that national media market regulation has been effected through the interplay of horizontal and vertical mechanisms of Europeanization. The first mechanism consists of formal decision-making by the European institutions in the form of directives, competition decisions, and ECJ decisions. The horizontal mechanism consisted of the transfer of policy instruments through forum politics (high level working groups, committees, platforms of regulators). Taken together, the two mechanisms have led to a Europeanization of media market regulation at national levels in the form of formal changes to media laws, the adoption of suggested policy instruments, and regulatory approaches at the national level.

The first mechanism concerned formal decisions of the ECJ and MTF that have been shown to require changes to national laws in Belgium, Greece, the Netherlands, Spain and the United Kingdom. The section (The Impact of ECJ Decisions on National Regulation) showed how the ECJ was an important actor in promoting Europeanization by taking an assertive role in expanding EU legal competence in the media field. Its decisions are effecting national legislation. The ECJ's decision that broadcasting be considered a service, places broadcasting in the realm of economic policy to be determined at the European level and removes it from cultural policy which resides with the Member State. The Court has been consistent in upholding this decision throughout all of its media cases. From 1994, the ECJ has supported the clause in *TWF* which maintains that broadcasting be governed by the laws stemming from the state of transmission and not the state of reception. The court's position on public service has differed from that of Member States in that it found that public service broadcasters should be considered equivalent to commercial broadcasters. Section 'Vertical Europeanization via EC Merger Policy' discussed how the MTF has been increasingly interventionist in national media markets by narrowing the definition of media product markets and thereby expanding its own competence. The MTF was shown to have taken an active role in determining the structure of the media industry in Europe. The examples of

Spain and the Netherlands were given to show how the MTF had promoted greater sector liberalization than desired by Member States.

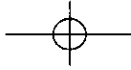
The second horizontal mechanism showed how the Commission has influenced national policies through the suggestion of policy instruments in EU level fora. The implementation of European Directives (particularly the 1989 and 1997 *Television Without Frontiers* directives) prompted overhauls of national laws. When drawing up new media acts, national civil servants choose to embrace EU policy solutions in domestic laws. This has occurred with the adoption of the Commission idea of audience in the German 1996 Interstate Agreement, the British 1996 Broadcasting Act, and the 2001 Irish Broadcasting Act; and the embrace of the Commission inspired 'convergence' initiative in the 1997 Spanish Law on Telecommunications, the 1997 Italian New Media Act, the 2000 Swiss Broadcasting Act, the 2001 Slovene Media Act, and the 2002 UK Broadcasting Act. Apart from the countries under examination in this chapter, recent media acts were introduced in Austria, the Czech Republic, Denmark, Estonia, France, Greece, Holland, Hungary, Luxembourg, Portugal, Poland, Sweden (on the transfer of media regulation models in the context of EU enlargement see Harcourt 2002). Indeed, all EU Member State media laws have shown effects of Europeanization which has resulted in an overall convergence in national policies at the national level.

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