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THE IMPACT OF EU LAW AND POLICY ON COMMUNICATION RIGHTS

Abstract

Among the many entities that give shape to the “information society” at the international level and create the circumstances for citizens to exploit its full potential, protect individual rights from undermining by new technologies but also determine new parameters for their use for the sake of law enforcement or the prevention of crimes, the European Union (EU) is an important as well as under-researched actor.

Its law, as well as policy, affects many aspects of communication, thereby impacting established communication rights such as the freedom of expression as well as the parameters of national media systems and more generally the quantity and quality of information that is accessible and received by European citizens. In the present study, it is sought to identify some of the most important domains of European law and policy in this respect, to briefly put them into context and to sketch important recent trends. To this end, three areas are argued to represent the most crucial conditions to realize communication rights of European citizens: infrastructure, content and process. In what ways rules at EU level affect these areas is the subject of analysis.

1. Introduction

Communication has been argued to be a fundamental human right as well as an essential element of citizenship in the “information society” (Hamelink & Hoffmann, 2009). Communication is here considered a fundamental human right with additional relevance for the exercise of political citizenship within the EU since it lacks many of the opportunities to influence decision-making as well as the democratic and judicial scrutiny mechanisms provided at the national level. This understanding of the concept as an umbrella term includes the established rights of freedom of expression, the right to access to information and the right to privacy, but goes beyond them to embrace issues such as media governance, pluralism and media ownership to facilitate a certain quality of communication as well as positive entitlements to access, inclusion and participation (for a more detailed discussion of the concept of communication rights see *Idem*).

The following study seeks to identify and give a brief overview of the most important dimensions of European law and policy which need to be considered in an effort to understand their combined impact on communication rights of European citizens. Even though neither the European Communities (EC) nor the EU have an explicit mandate when it comes to human rights, or communication rights more specifically, this is not to say legal rules and policies that are the result of European integration did not affect these rights. On the contrary, because it does *not* have this explicit mandate, there is no coherent human rights policy that could serve as a guideline for EU activities or specific competences to regulate directly to this aim while at the same time the forceful effect of its law on national legal systems (such as e.g. the supremacy and direct effect of some of its supranational First Pillar measures) can alter the nature of media systems in EU Member States or the degree of protection and nature of individual rights. As argued elsewhere (Hoffmann, 2008), especially considering the importance of communication rights for the legitimacy of European integration it is important to understand how activities in various areas of European law and policy affect the protection of these rights. Under this premise, it is an important question how the very process of European integration has impacted communication rights of its citizens.

Whereas for the purpose of the following study, the EU is thus the main focus of analysis, norms put forward by the Council of Europe (CoE) as the most active actor establishing and guarding norms in areas such as human rights, democracy and the rule of

law retain their relevance as normative yardstick for evaluation, especially in the light of Art. 6(2) *Treaty of European Union* (TEU) which explicitly acknowledges that the Union respects the *European Convention on Fundamental Freedoms and Human Rights* (ECHR) while Community judges frequently draw on it as sources of inspiration to interpret EU law (Asscher, 2002: 138).¹ Yet, a detailed analysis of all relevant case law of both Courts can not be provided here for reasons of scope. It is also important to note here that, while the ECHR is an important yardstick, it is not the purpose of this study to assess the compatibility of specific EU measures with Council of Europe standards as expressed in the ECHR and the case law of the European Court of Human Rights (ECrHR), but rather to map EU developments that are relevant to understand their combined impact on citizens' communication rights. For this purpose major instruments of European law and policy will be identified and their relevance of communication rights made explicit. While those rights are not exclusively impacted by EU measures, it is considered here to be an important area of investigation, especially in the light of expanding competences and the increasing use of Third Pillar instruments to devise policies under the umbrella of a "war against terrorism" that have far-reaching repercussions *inter alia* for the practice of journalism (Banisar, 2008).

1.1. Assessing Communication Rights

At the time of writing there is no one widely agreed upon, let alone codified, definition of a set of communication rights (for more details, see Hamelink & Hoffmann, 2009; CRIS CAMPAIGN, 2005). Efforts within UNESCO during the 1970s and 80s seem to have concentrated primarily, if not exclusively, on finding a comprehensive, universal legal formulation, which has led to much frustration and friction. Again today, after the political impasse that was the consequence of the *éclat* in the 1980s and a renewed interest in the concept around the UN World Summit on the Information Society (WSIS), there are good reasons to remind ourselves of the arguments in favor of seeing the debate on the right to communicate/communication rights² as an "open work", as proposed by Birdsall (2006). He proposes to adopt a "cultural-rhetorical strategy embracing a vision of a RTC [right to communicate] that encompasses cultural diversity and ambiguity in meaning" rather than aiming at legalistic definitions. He explains his proposal by pointing out that

it is ambiguity that allows a right to become accepted as a universal human right. At this level of conciseness and generality a right can be open to

interpretation and re-interpretation over time and from place to place; it is, in short, an open work.

(Birdsall, 2006)

There are clearly several problems with this approach, if codification of a right to communicate was the declared aim. Firstly, no codification of a provision in hard law would be desirable with ambiguity as a starting point and indeed intention – surely, openness to interpretation is an inherent characteristic of rights, but at least some practical implications must clearly have been envisioned by the authors of a law. Secondly, including the argument of cultural relativism as an *a priori* ground for deviation could seriously undermine the whole point of arguing for a *universal* human rights claim. Nonetheless, Birdsall's proposal has its merit since he recognizes the problems and sees the value of non-legalistic avenues and the importance of culture to bring about positive change.

Also law can best be understood as an ongoing process and as such is relatively open-ended. Making explicit a human rights claim has thus at least partly symbolic value and does not necessarily need to be defined in detail and all its implications made explicit before hand.

Making an end to the debate by proposing a final, comprehensive definition of the right(s) at stake is neither the intention nor within the reach of the present work. Neither is arguing for a particular legal formulation or a specific road map for implementation. Rather, inspiration is drawn from arguments that point to a lack in current legislation and policy due to a limited understanding of the relevant elements of communication processes in society in order to realize the ideal of human dignity (Hamelink, 2003; 2004). It is further proposed that with the developments toward the emergence of a "information society" those arguments have gained rather than lost in relevance during the past decades (Bovens, 2002; 2003).

Whereas much work has been done concerning the formulation of a right to communicate, there is a lack of empirical research that addresses the status quo at the national, regional or international level. Therefore, here, it is a deliberate choice to view current developments that influence communication processes through the prism of communication rights standards. These rights will here be understood as a guiding principle, not merely a "cross-cutting issue" of importance to merely a limited number of domains (as WSIS was criticized to have done, see e.g. Pekari, 2004). Not the paradigmatic developments in jurisprudence will then be the predominant interest here, but taking a "screenshot" of the major trends that influence people's ability to communicate.

1.2. An operational definition

Many attempts have been made to define and categorize the content of the right to communicate or to formulate specific communication rights (for more detail see Hamelink & Hoffmann, 2009). For the purpose of the present study they are either too metaphysical as to enable the derivation of empirical standards, contradictory, blur legal and philosophical arguments or too comprehensive to be useful as a guideline. Alternatively, to provide for a clear and workable operational definition, I propose to order thinking not along the lines of legal categories that would be used in order to formulate specific rights and freedoms, but by looking at the different elements of communication whose protection and facilitation are the declared point of the endeavor.³

By doing this, it is hoped to avoid watering down the concept of fundamental human rights by making everything, which is of importance for the process of communication its own, separate right. On the other hand, it is argued here that focusing solely on the core rights of the individual an analysis of the status quo and developments that affect the potential for communication in societies at large would be superficial and incomplete. Therefore, existing human rights concerning communication are understood as the legal element of a larger endeavor to secure and enable a certain kind of environment. Primarily, human rights provisions serve to protect the individual from interference. Their spirit, however, requires a broader societal effort that goes beyond the formally legal realm. Individually enforceable rights must be embedded in a broader framework that makes them viable. While bringing about such a framework is not exclusively in the hands of law- and policy-makers, the most important parameters will be set at that level and are thus at the heart of the subsequent analysis. Distinguishing three domains then seems to include the most prevalent conceptions of the content and rationale of communication rights. These are: *infrastructure, content and process*.

The most basic facility that is needed to enable communication beyond face-to-face encounters of a limited amount of individuals is infrastructure. This includes the existence of telecommunication infrastructure such as cables and satellites to enable telephony or Internet services. Furthermore, the opportunity and ability to use those services is of importance. This means that accessibility becomes an important measure. In order to speak of access, there must not only be the technical feasibility (e.g. the cable) but also the necessary hard- and software (e.g. a computer with adequate browser), service (e.g.

Internet) provided at an affordable rate and the capacity and skills of users. European efforts to enhance so-called *eInclusion* and *eAccessibility* will be examined here. Also, the efforts at EU level to create the needed media structure for a European public sphere will be considered here.

Content covers existing provisions that protect the freedom of expression as well as those that entail a right to access information of public interest and those concerning the confidentiality of communication. At the level of mass mediated communication, this domain includes the ideal of media pluralism as a prerequisite for the ability to form a well-informed opinions and thus be able to make informed choices in a democracy. Measures of media concentration and ownership issues will be relevant here as well as the overall regulatory environment for audiovisual media, especially when it comes to the compatibility with the European tradition of public service broadcasting (PSB) and competition law.

Process is proposed as the last domain to incorporate one of the major criticisms brought forward against current legal protection regimes. Participation in public decision-making beyond voting is at the heart of this domain. In order to effectively institute participation there must be an adequate level of information on matters of public interest as well as the opportunity to “talk back to and be listened to” by decision-making bodies. Such participation in the field of communication is then more than mere “consumer choice”, passive access to the mass media, or even confined interactive chats on the Internet. The participation meant here is interactive public dialogue about the public good. Its aim is to contribute to the debate about society, its values and priorities, and, above all, the common future. It is a dynamic and ongoing process aimed at change and transformation (Traber, 1999: 8). The EU's information and communication policy will thus be the most relevant area of inquiry here.

Overlap between the three domains is inevitable. So, for example, media pluralism may be understood as a prerequisite to being properly informed of matters of public interest, while the right to access information is only really empowering if there is a way of effectively participating in an existing public space. Also, all domains incorporate legal as well as policy issues that will have to be addressed. Nonetheless, the three domains provide a useful way of structuring analysis, since they do not bare the danger of confusing existing law with activist aspirations by formulating “new rights”. Also, they provide for sufficient leeway to address not solely legal developments. This way, the most relevant domains of European law

and policy will be addressed from this perspective which so far have drawn attention from either economic, legal or communication science perspectives, but are hardly ever addressed in an integrated matter. This way, our knowledge has remained fragmented and emerging discourses isolated and ill-contextualized.⁴

2. Locating Communication Rights in EU governance structures

Looking to locate relevant legal provisions then, there is the law of the EU itself, including the *EC* and *EU Treaty*. While neither explicitly mentions communication rights, when it comes to the *EC Treaty*, especially provisions concerning the freedom to provide services (Article 49) and articles concerning the protection of a “level playing field” between undertakings (Articles 81, 82, 86, 87) are of relevance for the regulation of media. Since 2000, provisions on the freedom of expression and privacy are entailed in the (still unbinding) *Charter of Fundamental Rights*.

Furthermore, there is secondary law such as laid down in Regulations (e.g. the *Merger Regulation*) and Directives (prominently the *Audiovisual Services Directive*) as well as the case law of the ECJ.⁵ The latter is of relevance for the protection of communication rights in Europe since on the one hand, the judges in Luxembourg can provide for an additional layer of protection of those rights which are affected by European law and on the other hand because European law can interfere with the domestic protection of just those rights. As Asscher (2002) concludes, especially the ECJ’s jurisdiction on matters of economic freedoms, competition, and state aid as referred to in the *EC Treaty* are of direct relevance here. So, for example, national efforts to ensure pluralism within the media landscape may interfere with the free movement of goods or services.

When it comes to relevant policies, European-level initiatives to enhance accessibility and inclusion in respect to “information society services”, especially the Internet, as well as efforts to inform and communicate with European citizens will be of interest in this context.

Below, some of the most relevant aspects of the realization of communication rights which are influenced by European-level rules and that ought to be part of any effort to fully understand their impact on those rights are identified.

3. Infrastructure

3.1. The EU approach to a European public sphere

In the early 1980s the EU took a set of quite idealistic steps in pursuit of increasing accountability through the media system on the basis of a public service broadcasting ideal, following the initiative of the then newly reformed European Parliament. In 1982 the so-called Hahn Report recognized that there was an imbalance in the representation of the European institutions and policy issues discussed at the national level that would demand structures directly accountable to a European public in order to sidestep national filtering and take the European Union “straight to the people” (Ward, 2004: 44). In order to alleviate the acknowledged lack of legitimacy, the broadcasting media were identified as the most important means available to give “a share of the political responsibility of the Union” to its citizens (European Parliament, 1982: 5). The Hahn Report also emphasized the need to internationalize cultural production as well as production staff in order for Europe to “penetrate the media”, de-attach content from its national settings and consequentially “europeanize” it (Idem: 8).

In response, in 1984 the European Parliament passed a Resolution that called upon the Commission to create the legal and political foundations for the establishment of a pan-European channel (for more details, see Sarikakis, 2005). The Commission responded by pointing out the challenges and potential of emerging satellite technology which provided a chance to effectively increase democratic legitimacy. It also emphasized that the increased television capacity posed a threat to the fragmented European television market, since the huge level of program hours required to fill the new capacities could easily benefit US industries at the expense of its European counterpart if productivity was not to be increased. Thus, the perceived economic necessity for the Community to encourage a European-wide industry that could face the “US menace” with equal dynamic and strength soon added a competitive edge to the Parliament’s initial propositions.

As Ward (2004) notes, the question whether there actually was sufficient demand for such a channel seemed not to have seriously occurred to either the Parliament or the Commission. Also, the “profane” issues of logistics and economics were set aside rather easily. Generally, a rather simplistic belief in the identity-conferring power of television to bring forward community bonds and mutual understanding between the citizens of the Member States continued to underpin the overall approach to the project (Schlesinger, 1995:

6). The outcome was the establishment of a prototype, called the *Eurikon* project. It lasted five weeks and even though it had not broadcast to a broad audience, it received negative feedback. Nonetheless, green light was given and a full-fledged television service was created following its model (Collins, as cited in Ward, 2004: 49). The channel relied on mixed financing from the Commission, the Dutch government and advertising revenue. Lacking to attract a broad audience - and thus advertising revenue to supplement its other revenue flows - the project failed.⁶

This failure marked a turning-point in European ambitions in the field of media policy and the use of mass communication to alleviate the legitimacy deficit of its institutions. The creation of a pan-European communicative space was subsequently trusted to the commercial sector which can already be noted in the 1984 Green Paper called *Television Without Frontiers*, which preceded the 1989 Directive, where any role for public service broadcasters to play in the emergence of a pan-European audiovisual space was “conspicuous by its absence” (Idem).

3.2. *eInclusion and eAccessibility*

*“Any 'digital divide' implicitly signals a neglect of universalism in the provision of access [...] This especially impacts those who are already disadvantaged by economic and social status, and quite often both”
(Ferrel Lowe, 2007: 15)*

While the inequality in access to new ICTs has become a global concern, in the EU democratic deficit discourse worries about the “digital divide” are often coupled to the hopes expressed concerning the potentials of so-called *eDemocracy* (for a further discussion of the concept see Tuzzi, Padovani & Nesti, 2007).

Framed in a mostly economic rationale, however, in 2003, the co-called *e-Europe* initiative was launched in order to accelerate Europe's, “transition towards a knowledge based economy and to realize the potential benefits of higher growth, more jobs and better access for all citizens to the new services of the information age”.⁷

In the framework of a renewed Lisbon strategy for economic growth and employment *e-Europe* was followed up in 2005 by the *i2010* program, which aims at creating a *Single European Information Space*, strengthening investment and innovation in ICT research and, lastly, supporting inclusion, better public services and quality of life through the use of ICT.⁸

Despite a broader approach, the primary aim of the program remains an economic one, illustrated by the Commission's calculation that “benefits from e-Inclusion in the EU could be in the order of €35 to €85 billion over five years”, while the stated objective of promoting e-Inclusion is stated to be turning it from “a social necessity into a significant economic opportunity for Europe” (Commission of the European Communities, 2007b: 5). The statistical background for this assessment is provided e.g. in the so-called *Riga Dashboard*, where the problem of an aging European society is made tangible in terms of financial and social sustainability:

By 1995 70 million people over the age of 60 were living in the Union, almost 20% of the population. By 2020, this figure will rise to 25% and people of 80 years and older will more than double. At the same time, the total working age population (15-64 years) is due to fall by 21 million between 2005 and 2030. This demographic evolution raises many challenges that ICT can help to address, creating many benefits to older individuals, but also making the economy grow in more productive ways.

(Commission of the European Communities, 2007c: 21)

In this context, a number of benchmarks have been set (i2010 High Level Group, 2006) which have led to an increased effort to monitor a number of key indicators to measure developments. Already in 2005, the Commission had published a *Communication on e-accessibility* (Commission of the European Communities, 2005a) and stressed the need to make many types of products based on ICT easier to use. On the basis of data available in 2006, it was clear there were a number of problems when it comes to inclusion:

For instance at the time,
57% of individuals living in the EU did not regularly use the Internet in 2005;
only 10% of persons over 65 used Internet, against 68% of those aged 16-24;
only 24% of persons with low education used the Internet, against 73% of those with high education;
only 32% of unemployed persons used the Internet against 54% of employed persons.

Only 3% of public web sites surveyed complied with the minimum web accessibility standards and guidelines, hindering access to web content and services for people with disabilities who comprise some 15% of the EU population.

(Commission of the European Communities, 2007c: 3)

Targets for what has been dubbed *e-Inclusion*⁹ were subsequently set in a Ministerial Declaration at the end of the 2006 Riga conference and EU Member States committed to

halve by 2010 the gap in Internet usage by groups at risk of exclusion, such as the elderly, people with disabilities, women, rural populations, lower education groups, “less-developed” regions and unemployed persons.

In 2007, the Commission presented its first report on progress (Commission of the European Communities, 2007c). A *Disparity Index* was developed to measure the gap between ICT usage of the average population and vulnerable groups. Also factors beyond physical access to infrastructure that can impact actual usage and barriers to access such as digital literacy have been addressed. Overall the report suggests that the objectives set out in the Riga Declaration are yet unlikely to be met by 2010 (Commission of the European Communities, 2007c: 9).¹⁰ On the other hand, during the 2008 mid-term review of the *i2010* initiative it was highlighted that 2007 had been the first year in which more than half of the EU population regularly used the Internet (Commission of the European Communities, 2008a: 33). Still, a staggering 40% of the EU population had still *never* used the Internet (Idem: 34, *emphasis added*). While average Internet use by citizens living in rural areas, women and the middle aged was already close to the EU average (and the relatively small difference had declined since 2005), the continuing disparities between the overall population and those aged 65-74, the retired and economically inactive, and those with low education were again pointed out as a major concern (Idem: 34). Furthermore, following up on the 2005 *Communication on e-accessibility*, a special report was drawn up “Measuring Progress of eAccessibility in Europe”, specifically focusing on the needs of people with disabilities (Cullen, Kubitschke & Meyer, 2007). Also here, only limited progress has been made. The EU lacks behind when compared to countries such as the US, Canada or Australia when it comes to policy-making on this issue, which is fragmented and very differently implemented in Member States. In 2008, the research team did not find any change. Thus, it has argued for the need for EU action to enhance *eAccessibility* for persons with disabilities as well as the elderly, possibly in the form of a Directive, in two follow-up studies (Cullen, Kubitschke, Mc Daid, Blanck, Myhill, Quinn, O'Donoghue & Halverson, 2008; Cullen & Kubitschke, 2008: xvi).

At the end of 2008, the Commission adopted another Communication, in which it suggests the establishment of a EU high-level group of experts to guide a process of a common European approach to *e-Accessibility* (Commission of the European Communities, 2008b). The European Disability Forum (EDF) together with consumer organization ANEC and

the European Older People's Platform have however expressed their disappointment about the lack of ambition of the proposed initiatives (AGE/ANEC/EDF, 2009).

4. Content

4.1. Freedom of Expression

One of the conditions for democratic will-formation in the public sphere is the freedom of everyone to express oneself and engage in public discourse without undue interference. Article 11 of the *EU Charter* guarantees the freedom of expression and provides in its second indent that the pluralism of the media shall be respected. It is also linked to Article 10 of the ECHR, meaning that limitations on it will not be allowed to exceed those accepted under the Convention (McGonagle, 2006: 93).

In its interpretation of Article 10 the ECtHR has repeatedly emphasized the fundamental importance of freedom of expression in a democratic society and the personal development of every person, while it also famously pointed out that the protection of the article does not exclusively cover

'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.¹¹

The Court has further recognized the "public watchdog" function of the media, thus acknowledging the special importance of Article 10 in relation to the press and journalism.¹² The definition of the limits to this freedom are here of special importance. Article 10 is a classic qualified right, meaning that the general assertion of the freedom as granted in the first indent is followed by a second that seeks to balance the right against competing rights and interests.¹³ The ECtHR has recognized the broad interpretative potential of Article 10(2) and reacted by selecting one principled criterion by which it weighs claims made by governments to restrict freedom of expression: the restriction must be "necessary in a democratic society" (Article 19, 1993).¹⁴ It thus leaves a margin of appreciation to the national authorities to apply restrictions under pressing social need in accordance with essential hallmarks such as tolerance and broad-mindedness and to domestic courts to interpret and apply national laws on interference with free speech (Hamelink, 2004: 51). The Court has produced a large amount of case law, interpreting *inter alia* the limitations of the right to freedom of expression on the grounds of national security¹⁵, privacy and reputation

of others¹⁶, relating to the incitement of violence¹⁷ or the protection of public morals.¹⁸

If the fostering of pluralism (which will be addressed below) may be conceived of as the “upper limit” of freedom of expression, its “lower limit is that this freedom must not be used to damage human dignity which it is in fact designed to serve” (Dommering, 2008: 24). This is mirrored also in the ECHR, which protects against the abuse of rights in Article 17, thereby prohibiting the abuse of Convention rights to destroy the rights and freedoms of others. So, for example, the ECtHR bases its case law on racism and incitement on Article 10 (2) and 17 of the European Convention.¹⁹ In EU measures, two major issues have resurfaced that aim at defining a common lower limit to the freedom of expression: the protection of minors and the protection against discrimination and hateful content. Most recently, the preoccupation with terrorism has also resulted in EU action impacting the freedom of expression.

Protection of minors

Under the auspices of the Council of Europe, the *Convention on Transfrontier Television* of 1989 laid down rules especially concerning advertisements that could be viewed by children and which have been partially replicated in EU measures. The *Television Without Frontiers Directive*²⁰ (TWF, 1989/1997) already contained minimum harmonization to protect children from TV programs that could seriously impair their physical, mental or moral development (Article 22). The new *Audiovisual Media Services Directive*²¹ (AVMS, 2007) extends this to on-demand services, so that they may only be provided in a way that minors will not normally hear or see them (Article 3(h)). This is to be achieved by password protection, encryption or other technical means.

When it comes to children, it is considered necessary to devise specific rules especially when it comes to advertising. So, in addition to general requirements such as the recognizability of advertisement (Article 3(e)(1)a AVMS), there are more specific rules to prevent advertisements to cause moral or physical detriment to children, for example by requiring audiovisual commercial communications not to

directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the

special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

(Article 3(e)(1)g)

In the new *AVMS Directive* it is also made explicit that product placement is prohibited for children's programs (Article 3(g)2), that advertisements for alcoholic beverages are not to be aimed specifically at minors (Article 3(e)(1)e) and provisions are made for the minimum duration of children's programs uninterrupted by advertisements or teleshopping (Article 11(2)).

Also in the sphere of "soft law" the protection of minors has figured at the EU level. After the *Green Paper on the Protection of Minors and Human Dignity* was put forward in 1996, reflection at European level was initiated on the ethical dimensions of the Information Society (Commission of the European Communities, 1996). The follow-up consultation process resulted in the *Recommendation on the protection of minors and human dignity in audiovisual and information services* to be adopted in 1998.²²

In the same year the Council of the EU put forward an Action Plan dealing with illegal and harmful content on the Internet. On 30 April 2004 the Commission followed up on the second evaluation report by proposing an additional Recommendation, which it adopted in December 2006.²³ When considering legislation designed to protect children's physical and mental integrity, it is often too easily forgotten that minors also enjoy a set of communication rights, including freedom of speech and privacy, which may be restricted excessively by those measures. Indeed, no specific provisions regarding children are included in instruments such as the *Privacy Directive* (see below). As the European Children's Network (2007) has pointed out, "often children are presented solely as innocent victims, which can reinforce a view of them as 'incapable', rather than as social actors in their own right".

Racism and xenophobia

Looking at EC measures that relate to the prohibition of racist or xenophobic speech, again the *TWF Directive* and its successor, the *AVMS Directive* which updates and transposes regulatory principles to so-called non-linear services (mostly relating to the Internet) are relevant here. Even though, the *TWF Directive* "devotes surprisingly little attention to concerns for the protection of human dignity and measures to be taken to prevent the broadcasting of hateful content", a number of provisions refers to these goals (McGonagle,

2007: 6). So, for example, Article 22A of the *TWF Directive* states that “Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality”.

The transposition of provisions concerning these issues (Article 3) into the new AVMS Directive now *de facto* means engaging in Internet content governance at the European level. This has been criticized for requiring harmonization of an area which had previously been subject to national regulation without explicit justification and possibly even in conflict of ECtHR jurisprudence (van Eijk, 2007: 11). Article 3b of the Directive now requires that

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

In contrast to the earlier *TWF Directive*, now the “incitement to hatred” is explicitly linked to the “jurisdiction” of Member States, which had been one of the stated motivations for a revision (McGonagle, 2007: 6).

Also, the EU has issued the so-called *e-commerce Directive*²⁴, in force since January 2002 that intends to forge a legal framework for electronic commerce applying key internal market principles to information society services (Pearse & Platten, 2002: 365). Like the *TWF Directive*, it too operates the country of origin principle (Art. 3(2)), meaning that Member States may not restrict the freedom to provide information society services from another Member State. Thus, service providers will only have to fulfil the legal obligation of the Member State where they are established. The Directive also relates to the circulation and storing of illegal racist and xenophobic expression or incitement to hatred and violence. However, it also explicitly conceives of the free movement of information society services as an exercise of freedom of expression as protected in Article 10 ECHR and contains a number of “safety clauses” for the sake of Internet Service Providers (ISPs), which include conditional exemptions from civil and criminal liability. So, ISPs cannot be held liable for data they transport or give access to when they play a passive role as “mere conduits” (Article 12).²⁵ After becoming aware of illegal content of a service an ISP is hosting, however, it could be held accountable if it does not remove or block access to the unlawful data (Article 14). Generally, no positive obligation can be imposed on the ISPs to actively monitor Internet content (Article 15).²⁶ However, states may compel them to immediately inform public authorities about illegal data reported by recipients of their services. Member States may

also oblige ISPs to identify their subscribers at the request of public authorities. As a consequence, ISPs may be asked to block access to content deemed illegal.²⁷

In 2008 a *Framework Decision* specifically relating to combating racism and xenophobia was adopted that had been in the making for seven years.²⁸ Similar to the First Protocol to the Council of Europe *Cybercrime Convention*²⁹ it requires EU Member States to introduce criminal provisions relating to racism and xenophobia.³⁰ Criminal offenses to be established by Member States include “publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin” (Article 1(1)(a)), or the “the commission of [such an act] by public dissemination or distribution of tracts, pictures or other material” (Article 1(1)(b)).³¹ Unlike the Protocol to the Council of Europe Convention, the Framework Decision is not limited to online activities and does not explicitly address insults or threats. As Peers (2009: 22) emphasized in a comparative analysis of the two instruments, however, “in some cases, the public incitement of hatred or violence covered by the Framework Decision would overlap with a threat or insult as defined by the Protocol”. No criminal offenses have been established relating to “cybercrime” under EC law due to a lack of competences. Given that the ECJ has, however, confirmed the EU's criminal law competence in matters relating to the environment, this may not remain this way in the near future.³²

The “war against terrorism”

In 2005, the Council of Europe *Convention for the Prevention of Terrorism* was adopted, which included in Article 5 the requirement of State Parties to criminalize recruitment, training and the “public provocation to commit a terrorist offence”. In Article 5(1) the scope of the offense is determined by the requirements that there must be a specific intention to incite the commission of a terrorist offense and that making available of a message to the public causes a danger that such offenses may be committed. While the Convention further includes a safeguard clause (Article 12) which requires states to respect the freedoms of speech, association and religion, the principle of proportionality and prohibits arbitrary, discriminatory or racist treatment, unlike for example the *Protocol to the Cybercrime Convention*, it does *not* contain an opt-out provision based on established national principles concerning freedom of expression.

At EU level the three offenses contained in the Convention are taken over in the

recent revision of the *Framework Decision on combating terrorism* (2002) that requires Member States to amend their criminal law as regards the definition of terrorism.³³ The Commission launched the revision “in order to devise effective solutions toward fighting terrorist propaganda through various media” (as cited in Banisar, 2008: 10). In November 2008, the Framework Decision was amended³⁴ to include the crime of “public provocation to commit a terrorist offence” (Article 3(1)(a)) which is defined as:

the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, *whether or not* directly advocating terrorist offences, causes a danger that one or more such offences *may* be committed” (*emphasis added*).

For the offense to be punishable, it is furthermore explicitly stated that “it shall *not* be necessary that a terrorist offence be actually committed” (Article 3(3)). Public provocation would thus have to be an inchoate crime.

Serious concerns were voiced about including the offense of “public provocation”, especially considering its potential to criminalize the expression of political views that would not even advocate terrorism – after all, finding there to be a “danger” of terrorist offenses would suffice for an expression to fall within the scope of the offense (Hayes, 2008).³⁵ Also the comparative weakness of human rights protection in contrast to those contained in Article 12 of the Council of Europe Convention was widely conceived to be problematic (see Banisar, 2008).³⁶

4.2. Privacy, the confidentiality of communication and personal data

Privacy and its derivative, the protection of personal data is a recognized fundamental right that is enshrined in the ECHR (Article 8) and the EU Charter (Article 8). This right was designed to protect individuals from state power and can be traced back to the experiences of pre-war Germany, where excessive accumulation of personal data under the Nazi regime at least partially contributed to the practical possibility of human rights abuses (Keyder, 2008). The emergence of new telecommunication technologies and the Internet together with advances in genetic technologies have but intensified concerns about privacy in general and the protection of personal data specifically. In times of increasing technological capacities to track data flows, store individual data and fuse existing databases, the

protection of privacy rights is a key necessity if a free, participatory public sphere is to be supported. The right to confidentiality of correspondence also entails claims on freedom from surveillance – especially relevant in the context of contemporary legislation on the use of encryption software and electronic tools of surveillance in the age of the “war against terrorism”.

Also here, developments at the EU level have gained significant importance in addition to the more “obvious” levels of the nation-state or the Council of Europe.³⁷ Under the First Pillar, the 1995 *Privacy Directive*³⁸ (1995) is the most relevant instrument here. It was put forward to establish a common denominator for privacy law among the Member States in order to facilitate the free flow of personal data within the Union and provides for a minimum of data protection in automated processing of personal data or other handling of personal data in filing systems Member States have to implement in their national law.³⁹ However, processing that relates to public security, defense, state security and a Member State's criminal law activities are not within the scope of the Directive (Article 3(2)). It further specifies a number of obligations on the side of data controllers and a number of rights on the side of data subjects (for a more detailed analysis, see Privacy International, 2007).⁴⁰ The Directive also requires that if data is exported to third countries outside the Union, those countries must “ensure an adequate level of protection” (Article 25). Whether this adequacy criterion is met is for the European Commission to determine.⁴¹ When it comes to the question of scope of the Directive, the ECJ in 2003 delivered an important judgement that established that the Directive not only must be interpreted in the light of Article 8 of the EHCR, but also that it can be invoked directly by individuals to avoid the application of domestic laws that are in violation of it (EU Network of Independent Experts on Fundamental Rights, 2004: 64).⁴²

In 1997 the Directive was complemented by the *Telecoms Data Protection Directive*⁴³, which explicitly extended protection to digital services and mobile networks. In 2003, a further update of the original Directive was adopted aiming at further extension of privacy protection in a technologically neutral manner in order to keep up with the fast pace of innovative developments in communication technologies (see below).⁴⁴ With the Amsterdam reforms, Article 286 TEC required EC institutions to comply with Community acts on the protection of individuals with regard to the processing of personal data and their free movement. So, protection was expanded to include the EU institutions with *Regulation (EC)*

45/2001 (2000) on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data.

In connection with the Directive, the so-called ARTICLE 29 Data Protection Working Party has been established that together with the European Data Protection Supervisor (EDPS) has issued a number of important reports on issues concerning privacy and has for example recently launched a consultation concerning the use of body scanners at airports (2009). Recent examples include working documents on setting up binding corporate rules or the protection of children's personal data.⁴⁵ During the last years, the EDPS has additionally critically assessed data protection under the Third Pillar and the reform Treaty and criticized the interim Passenger Name Record agreement (see below), the European Central Bank concerning SWIFT transactions that involved the interception of transfer data by US intelligence agencies (Privacy International, 2007).

However, the emphasis on cooperation in justice and home affairs within the Third Pillar since Amsterdam, relevant European rules are not anymore exclusively made under the First Pillar of EC law. Separate data protection responsibilities are also contained in the *Europol Convention*, the Council Decision setting up *Eurojust*, the *Convention implementing the Schengen Agreement*, and the *Convention on the use of Information Technology for Customs Purposes* (Privacy International, 2007).

An example of a notable development under the Third Pillar then, which directly affects privacy of European citizens has been the 2000 *European Union Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, which Asscher qualifies as essentially an “eavesdropping convention” (2002: 147, translated by the author). In 2004, the Council of the EU further decided that from 2008 on the exchange of law enforcement information was to be built on the “principle of availability”.⁴⁶ The principle would allow law enforcement agencies of Member States access to all data contained in national and European databases, avoiding the “obstacles” that have been in place on the basis of traditional cooperation instruments such as the 1959 (Council of Europe) *Convention on Mutual Assistance in Criminal Matters* or the 2000 *Convention on Mutual Assistance in Criminal Matters*. As has been pointed out in a recent report by the Council of Europe's Commissioner for Human Rights (2008), “these 'obstacles' in many cases constitute fundamental safeguards for the individual”, since in many cases they involve judicial authorization of specific requests for information. Even though the proposal to

formally adopt the principle has been withdrawn, the principle still remains the underpinning rationale on data exchanges, for example in the *Prüm Treaty* (see below).

One year later, the Commission proposed a *Framework Decision for the protection of personal data processed in the framework of police and judicial cooperation in criminal matters*. It was to be adopted only after three years of intense debates within the EU bodies by the end of 2008 and contains minimum rules about transferring personal data in the framework of police and judicial cooperation between Member States.⁴⁷ Whereas the adoption marked a welcome premiere, it being the first general data protection instrument in the Third Pillar, the European Data Protection Supervisor regretted that the *Framework Decision* does *not* apply to domestic data, no distinction is made between different categories of data subjects, the exchange with third countries is not addressed adequately and inconsistencies with data protection under the First Pillar remain.⁴⁸ A general criticism has been that the instrument encourages “in the EU 'Third Pillar' area, a trend towards the lowest common data protection denominator”, which does not live up to standards such as have been set by the Council of Europe (Council of Europe, 2008). Perhaps most controversially, the activities of secret services and police in the context of national security are excluded from the scope of the Decision.

In May of 2005, seven Member States⁴⁹ signed a Treaty to facilitate the exchange of data - especially addressing the fight against terrorism, cross-border crime and illegal migration - allowing each other access rights to their DNA analysis files, fingerprinting systems and vehicle registration databases (notably not exclusively for the purpose of criminal investigations, but in the case of the automated search of fingerprint data and vehicle registration data also for preventive purposes). With a Council Decision in 2007, this so-called *Prüm Treaty* was subsequently incorporated into the body of EU law.⁵⁰ The European Data Protection Supervisor's concerns about possibly inconsistent national laws on data protection have not been incorporated, while some Members of the European Parliament (MEPs) have been quoted criticizing the “dizzying speed” with which the agreement was adopted on the initiative of the German Presidency.⁵¹ Currently, more than 5, 5 million people's data are contained in the EU Member States' databases and the numbers are rising “not least because the legal limits for taking DNA samples from citizens are gradually weakening” (Töpfer, 2008: 15). Even though a recent judgment of the ECtHR is bound to limit the efforts of Member States to compile databases by retaining data of

suspects of crimes (even after an individual was acquitted or a case was discontinued) including fingerprints, cellular samples and DNA profiles,⁵² the foundation has been laid for the creation of a European-wide network of police databases. Also, there are plans to include the Visa Information System and the European fingerprint database, so far only used for asylum proceedings, in the databases police has access to (Idem: 14).

When it comes to the regulatory framework for electronic communication networks and services, the main emerging instruments are contained in the so-called *Telecoms Package* that has been proposed by the Commission in November 2007 and is currently in the process of being adopted. It includes proposals for two Directives (together amending five previous Directives) and a Regulation to bring about an internal market for electronic communication.⁵³ Regarding privacy issues, the main issues of controversy remain (voluntary) data retention (meaning the obligation to store Internet and telephony traffic data) and IP issues (see e.g. ARTICLE 29 Data Protection Working Party, 2006; Arbeitskreis Vorratsdatenspeicherung, 2007; Arbeitskreis Vorratsdatenspeicherung, 2009; also other NGOs such as Statewatch, Privacy International or European Digital Rights have issued statements on the issue).⁵⁴

Data Retention

When in 2000, the European Commission proposed the draft *Directive on Privacy in Electronic Communication* in order to strengthen the competition within the European communication market, its initial version was welcomed by civil society actors, since it would have extended individual privacy rights that applied to telecommunications to include the broader category of “electronic communications”. This, however, changed when the Council of Ministers sought to introduce data retention provisions on the Directive for law enforcement purposes.⁵⁵ Initially, the European Parliament strongly opposed the data retention provisions, fearing that European citizens would end up being put under “generalized and pervasive surveillance, following the Echelon model” (EPIC, 2006). In the aftermath of the attacks of September 2001, however, the European Parliament could not hold up against the pressure and on May 30 2002, eventually voted for the Council’s position. On June 25 2002, the Council adopted the *Directive on Privacy and Electronic Communications (ePrivacy Directive)*.⁵⁶ While the Directive did strengthen the consumer’s right against unwanted commercial use of her or his data, the citizen’s right to privacy

towards public authority has been tremendously weakened. Under this Directive, Member States can adopt legislation that mandates the retention of traffic and location data of all electronic communications for purposes of national security or the prevention, investigation and prosecution of criminal offences (Article 15). Also, there does not need to be a belief that a certain user is in fact involved in any criminal activity (Banisar, 2008: 11).

Shortly after the terrorist attacks in Spain and the U.K. the *ePrivacy Directive* was amended again by the so-called *Data Retention Directive*.⁵⁷ Article 6 of the new instrument now requires Member States to ensure that communications providers retain, for a minimum of 6 months and a maximum of two years, necessary data as specified in the Directive.

Article 5 of the Directive specifies these categories:

- a. data necessary to trace and identify the source of communication;
- b. data necessary to identify the destination of the communication
- c. data necessary to identify date, time and duration of the communication;
- d. data necessary to identify the type of communication;
- e. data necessary to identify users communication equipment or what purports to be their equipment; and
- f. data necessary to identify location of mobile communication equipment.

Article 8 provides that

Member States shall ensure that the data specified in Article 5 are retained in accordance with this Directive in such a way that the data retained and other necessary information relating to such data can be transmitted upon request to the competent authorities without undue delay.

In a 2006 *ARTICLE 29 Data Protection Working Party* decision on the Directive, the “historical dimension” of the instrument were pointed out, while it was considered that “it encroaches into the daily life of every citizen and may endanger the fundamental values and freedoms all European citizens enjoy and cherish”.

A challenge against Article 95 EC as the correct legal basis of the *Data Retention Directive* brought forward in 2006 has recently been dismissed by the ECJ.⁵⁸ Again during the most recent revision process of the *Telecoms Package*, proposed Art. 6(7) in the new draft *ePrivacy Directive* concerning the retention and processing of traffic data “for security purposes” has sparked widespread criticism (European Data Protection Supervisor, 2009; European Digital Rights, 2009). One major concern is that the proposed Directive could result

in the collection of yet more traffic data than is already being collected under the *Data Retention Directive*, without setting a time limit (Working Group on Data Retention, 2009).

This represents the latest phase in a steady corrosion of European privacy safeguards since the attacks of September 11. Until then, EU legislation had prohibited communications providers from retaining data for any longer than necessary to resolve billing disputes.⁵⁹

Another topic, which has continued to spark controversy, is the transfer of personal data beyond the borders of the EU.

US-EU Agreements on the transfer of personal data

The rules on data protection contained in the two Directives discussed above contain the requirement that personal data may only be transferred to non-Member States when the level of protection is “adequate” to the one prescribed by the Directives' provisions. The European Commission can find that a country satisfies this criterion and thus effectively clear the way for data transmission. Although the Commission never officially issued any formal judgement on the adequacy of US privacy protection standards, the North-American self-regulatory approach to the issue (meaning the absence of data protection legislation) would suggest that they would not meet the standards set out in the European *Data Protection Directive*.

In order not to interrupt data flows between the EU and the United States, however, after two years of negotiations and heavy protest of privacy and consumer advocates as well as the European Parliament, a so-called *Safe Harbour agreement* (SH) was installed on July 26, 2000. In a nutshell, the agreement assumes that companies would voluntarily commit to adhere to a set of privacy principles determined by the United States Department of Commerce and the Internal Market Directorate of the European Commission. Those companies would then be assumed to operate “adequate” privacy protection standards and could continue to receive data. When in 2004, Dhont, Pérez Asinari and Pouillet conducted a study into the implementation of the SH on request of the Directorate General of the Internal Market, they found wide-spread non-compliance and ignorance of SH principles. While they argue that deficiencies in implementation cannot necessarily be ascribed to bad faith but rather must be attributed to a confusion over the obligations as set out in the SH and different perceptions of what data protection means, they point out the flagrancy of the deficiencies in compliance (105).⁶⁰

Two months after the 9/11 attacks the US required all airlines to provide its customs authorities with access to electronic data on passengers entering or leaving the country. These so-called passenger name records (PNR) usually include name, address, phone numbers, passport information, credit card number, seat preferences and other information. After initially having pointed out that such a requirement would conflict with EC data protection laws, the Commission eventually issued a Decision stating their satisfaction with data protection in the US as required by the *Privacy Directive*. This opened the doors to a proposed agreement of transmission of data on all passengers entering the US, while no provision was included on data on US passengers entering Europe and no guarantees were given that data would not be shared with other agencies or private companies (Keyder, 2008). Eventually the agreement was not signed in the face of massive protest.

Yet, in March 2004, the Commission issued a Decision to conclude an agreement to authorize airlines to provide the data requested by the US.⁶¹ The EP and the EDPS subsequently brought an action against the Council and Commission before the ECJ which in 2006 annulled both the Commission Decision on the adequacy finding and the Council Decision on the conclusion of the PNR Agreement since no adequate legal basis can be found in the *EC Treaty* to enter into an agreement with the US to transmit personal data.⁶²

In a new attempt to satisfy US demands, in 2007 the EU (as opposed to the EC) concluded an agreement to provide the data and to ensure compliance by means of a *Framework Decision*.⁶³ Given that this time the agreement was reached under the auspices of the Third Pillar (the fact that the EU has no legal personality does not seem to have been a problem), consultation of the official EU data protection advisory body, *ARTICLE 29 Data Protection Working Party*, was not considered necessary.

In its opinion on the new agreement issued after its conclusion, the *ARTICLE 29 Data Protection Working Party (2007a)* notes that the safeguards it contains are yet weaker than in the previous agreement, while especially the included emergency exceptions, used under exclusive discretion of the US authorities, leave too many questions unanswered.⁶⁴ As of March 2009, eleven Member States still have to ratify the agreement before it enters into force.⁶⁵ In the meanwhile, however, it is applied provisionally and will expire only when a superseding agreement is concluded or after a period of seven years after signing the agreement. Agreements to transmit PNR in the context of fighting terrorism and organized crime have also been concluded with Canada and Australia.⁶⁶

Within the EU, air carriers already assemble and transfer data to authorities of Member States in the context of border control and illegal immigration, the so-called Advanced Passenger Information (API) in the context of Directive 2004/82. This data, however, is limited to official passport data. In November 2007, the Commission put forward a *Proposal for a Council Framework Decision on the Use of Passenger Name Record for Law Enforcement Purposes*.⁶⁷ Presumably to preempt critics commenting on potential human rights violations, the proposal opens with the statement that: “Terrorism constitutes one of the greatest threats to (...) fundamental rights” (Keyder, 2008). In this proposal, it is argued that PNR was a necessary supplement to API in the fight against terrorism since it allows making “risk assessments” and connections between known and unknown persons. The ARTICLE 29 Data Protection Working Party together with the Working Party on Police and Justice (2007b), the EDPS (2008) as well as civil society organizations have voiced serious concerns towards the proposal and have questioned the effectiveness and proportionality of the measures. The EU Agency for Fundamental Rights has also published a very critical Opinion in which it additionally points to the risk of discriminatory profiling on the basis of PNR and its incompatibility with human rights provisions as contained in the *EU Charter of Fundamental Rights*, the ECHR or the *International Convention on the Elimination of all Forms of Racial Discrimination*:

the available evidence suggests that profiling practices based directly on, or factually targeting, ethnicity, national origin or religion are an unsuitable and ineffective, and therefore a disproportionate, means of countering terrorism and organised crime: they affect thousands of innocent people, without producing concrete results. (...) Moreover, even if the classifications underlying these methods did correspond to a higher risk posed by some categories of persons, this would still not mean that their use is justified. Some infringements of fundamental rights are unjustifiable irrespective of the aim they pursue and their effectiveness. (...) Any mass profiling using stereotypical assumptions based on racial or religious criteria should be conceived as unjustifiable.

(2009: 11)

This danger seems to be all but hypothetical, given that the draft explicitly states its purpose as proactively pin-pointing potential terrorists (Art. 3(3)(a)). While authorities tend to present this type of profiling on the basis of intelligence as less intrusive than more straight forward racial profiling, in practice there may further be little difference:

Targeting people because they fit a particular basic stereotype - being a

young, practising Muslim, and having at some time travelled to Pakistan, for instance - is ethnic-racial-religious 'profiling'.

(Council of Europe, 2008)

Furthermore, the only restrictions on transfer of this data to third countries contained in Article 8 is that (a) the authorities of the third country shall only use the data for the purpose of preventing and fighting terrorist offences and organized crime and (b) such third countries shall not transfer the data to another third country without express consent of the Member State. As Keyder (2008) summarizes the current developments,

this is a far cry from the recognition, a mere 15 years ago, that entities, including states, collecting too much data have tended to abuse the data at the expense of individuals and fundamental rights. It is a far cry from Directive 95/46, which allocates competence to collect data for the purpose of state security, etc. to the full sovereignty of the member states

4.3. *The Right to Access to Information*⁶⁸

The public right to access to information held by public authority has increasingly come to be seen as a standard of international human rights law. A recent development that attests to its recognition of European nation-states is the adoption in 2008 of a *Convention on Access to Official Documents* in the framework of the Council of Europe. The main instrument laying down rules concerning public access to documents held by EU institutions is the 2001 *Regulation 1049/2001*⁶⁹, which in Article 2(1) reaffirms the principled right of “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State” a right to “access to documents of the institutions”.

The Regulation contains a number of laudable features, such as provisions for a list of exemptions from the rule, which are all subject to a harm test; the provision for an internal review of any refusal to provide access as well as appeal to the Court or the Ombudsman respectively. Also the obligation to set up a public register of documents must be applauded (Article 11).

However, there has been criticism regarding for example the incomplete nature of public registers (see *inter alia* EU Network of Independent Experts, 2004). Also the fact that some key exceptions are not subject to a “public interest override” or the possibility for Member States to prohibit the disclosure of information without their prior authorisation have sparked concern (Mendel, 2003: 22). Also the Regulation provides that access to

documents created for “internal use” or received by an institution where a decision has not been taken will be refused if revelation “would seriously undermine the institution’s decision-making process” – “unless there is an overriding public interest in disclosure” (Article 4 (3)). As long as an applicant cannot access the documents, the question whether there is an “overriding public interest” in disclosure or a “serious” undermining of internal decision-making, an evaluation of the respective documents will remain subject to the judgment of the institution holding them. Further, the Regulation provides for exemption from disclosure even *after* the decision has been taken if “opinions for internal use” (Article 4 (3)) are included in the document. From the start, the treatment of “sensitive documents” has been hotly debated and led to one of the least encouraging moments for European democracy, when shortly before the adoption of the Regulation, Javier Solana (then Secretary-General of the European Union and High Representative for Common Foreign and Security Policy) controversially changed the Council's rules of procedure to accommodate NATO concerns. Finally, the definition of “sensitive documents” that entered into the Regulation is yet broader than in the initial Solana decision to include classified documents in all areas of activity of the EU. In addition, third parties such as NATO or non-EU countries can veto the disclosure of sensitive documents drawn up with their cooperation.

The fact that the Regulation takes precedence over national (sometimes more liberal) policies on freedom of information creates the paradox situation, wherein citizens’ access to public documents may be more complicated despite national legal provisions for disclosure. The ongoing review of the Regulation is unlikely to bring revolutionary advances. On the contrary, many observers, including the European Ombudsman, have expressed concerns that the end result may in fact make fewer documents accessible to the public instead of more.⁷⁰ The most controversial Commission proposal in this context has been to change the definition of what constitutes a “document” which may drastically limit the scope of application of the Regulation (Nikiforos Diamandouros, 2008). Finally, it should be pointed out that the EU's access regime is far from being a freedom of information regime – thus institutions are not obliged to draw up documents or to locate documents relevant for a general request for information made by an applicant.

Regarding attempts to enhance the transparency of EU decision-making procedures more generally, another development should be noted that has fundamentally altered the relationship between the European Parliament and the Council since the introduction of the

co-decision procedure in 1999. In order to speed up the legislative decision-making process, the European Parliament and the Council have developed a pre-conciliation procedure, which consists of a number of informal meetings between the relevant EP committee and the Council Secretariat that enables early mutual consensus, making a second reading in the EP unnecessary (Héritier, 2003: 826). This increased “effectiveness” in relation to the time frame between drafting and adopting legislation has simultaneously decreased the number of conciliation procedures as well as opportunities for a variety of external actors to be consulted, take part in the deliberation period and eventually influence the course of decision-making. As Héritier concludes, “considering that co-decision was introduced to reduce the democratic deficit, it is counterproductive that informal early agreements are introduced that again imply less openness” (2003: 827).

In 2001, the *White Paper on Governance* had presented the goal of greater openness as a means of achieving more democracy. More recently, in 2005, the Commission launched its so-called *Transparency Initiative*, which centered on increasing the financial accountability of EU funding⁷¹, the personal integrity and independence of EU institutions and control on lobbying activities. The latter included the adoption of a code of conduct⁷² regulating lobbyists' behavior and the launch of a voluntary lobbyist register by the Commission in 2008. Since 2006, the Council has adopted a transparency policy under which it is now holding public sessions under the co-decision procedure, which marks a substantial increase. It has also pledged to organize public debates on important issues not debated within the framework of co-decision.⁷³ Within the context of the *Transparency Initiative*, the Commission has also set up a public register of expert groups helping the Commission when preparing legislative proposals and policy initiatives. In a critical report on this issue in 2008, ALTER-EU had argued that industry is in control of several of the most controversial expert groups such as regarding “biotechnology”, “clean coal” and “car emissions”.

Another issue that is closely related to the access to information and participation more generally is language. Within the EU context claims of cultural imperialism towards the United States are put forward on a frequent basis – especially when it comes to imports of television programmes and the North American dominance of the film industry. The issue of cultural imperialism, however, is by no means solely an external one. Also *within* the European Union, there is more than English, Spanish, French and German. After accession of the new Member States, there are currently twenty-three official languages operating at the

level of the EU. However, when it comes to the internally used working languages in EU institutions, they are largely limited to English and French taking a share of 98% of languages in use (Aziz, 2004: 287). Thus, effectively there already exists a “*lingua franca* of deliberation” (Idem: 290), which constitutes an effectual consolidation of power structures within the structure of the Union. This problem was also mirrored in a Special Report of the European Ombudsman when he considered a complaint against the languages used for the Internet presentations of the EU Presidency (European Ombudsman, 2006).

Another aspect of hegemony within those discourses concerns the use of élite codes and jargon that is proliferated in official documents, laws and policies and which results in closed communication between experts, excluding the supposed addressees of EU deliberation and decision-making – its citizens. Surely, a certain degree of expert language is inevitable and possibly needed for high level technical discussions – the sole reliance on jargon and the reproduction of that jargon in public documents, however, is a hindrance to effective communication in the public sphere. As Aziz (2004) concludes, compared to the cultural aspect of language, the components of clarity and effectiveness of communicative processes have not been sufficiently addressed by European Union policy-making. Obviously, though, the accessibility of language to citizens must be seen as a component of legitimacy and transparency of decision-making processes and outcomes. Finally, mechanisms of exclusion can take yet more subtle forms:

Whereas the European Convention is to be commended in providing greater visibility of its debates and for ensuring a greater degree of participation of civil society through its *Futurum* website, it is argued that this falls short of safeguarding democratic legitimacy for a wider section of society given the working assumption that all those affected are (a) computer literate, (b) able to locate documents in the maze of hyperlinks, and (c) persevere where most others have failed, which can be particularly arduous when the advice which one receives from EU officials is, ‘It’s all on the web’.

(Aziz, 2004: 290)

In other words, it cannot be regarded satisfactory to provide access to extensive amounts of data on the Internet and subsequently rely on the self-sufficiency of citizens. The potential swamping of people who are less familiar or at ease with information technology or simply not used to researching that kind of databases is also recognized by Kurpas, Meyer and Gialoglou (2004: 3). In fact, merely making all documents produced by EU institutions accessible online may add to the confusion rather than increase public access to relevant

information, they conclude.

4.4. Regulatory Framework for Media Governance

When it comes to media policy, a noteworthy development has taken place during the past decades. While initially the EU was seen to have competence only in economic matters, it has come to deal with an increasing number of issues relevant to culture and media, therefore also becoming increasingly important for the development and enforcement of communication rights standards. Nonetheless, a large degree of sovereignty over media and cultural policy remains at the nation-state level and the principle of subsidiarity keeps the unifying capacity of Union-wide policies limited.⁷⁴

Within the Commission there is a complex web of decision-making processes and competencies to be untangled. The different Directorate-Generals (DGs) in turn all have rather different approaches to the media and communication and naturally pursue sometimes diverging interests, which can lead to conflict and internal competition between these *loci* of power.⁷⁵ The European Parliament has a special Committee that deals with issues referring to media and information called the Committee on Culture, Youth, Education, the Media and Sport. As Sarikakis (2005) summarizes the EP's record in this regard, its position towards issues concerning media and communication has tended to emphasize public service ideals such as plurality, universal access and “cultural exemption”.

Media and cultural policies have gained an increasingly important place on the EU agenda, even though the process of their recognition as important EU policy fields has mirrored conflicting visions on the rationale of integration and the issue of jurisdiction remains complex and contested (Sarikakis, 2007: 14).⁷⁶ Whereas the Treaties that establish the EU do not confer explicit competence when it comes to the media, the mandate to bring about a single market has meant that the EU has also issued legislation concerning the European trade in services and goods, including media. This way, according to Peters' (2008) count, in the meanwhile the EU has adopted more than one hundred instruments that affect how media operate. As Sarikakis (2007: 19) has pointed out, however, while the issue of a European communicative space is clearly being realized in its relevance for the realization of European citizenship (*inter alia* Kaitatzi-Whitlock, 2006; Ward, 2004; Harcourt, 2004; Terzis, 2008) research of relevant European policies has generally tended to be “fragmented, largely addressing specific policy ‘moments’ [that] cannot provide an analysis of the bigger picture

and map the trajectory of policy development". None of the few monographs addressing the issue has put forward an analysis from the perspective of communication rights.

There are a number of key instruments that have given shape to these emerging policy fields that must be mentioned here.⁷⁷ Arguably the most researched and directly relevant media-related instrument is the *TWF Directive* (1989/1997), which was established in parallel to the Council of Europe *Convention on Transfrontier Television*. As the name implies, the 1989 Directive introduced a minimum standardization of national law on certain aspects of broadcasting, such as advertising or the protection of minors, which was meant to reduce barriers within the internal market of television services. Broadcasters are governed by the laws of the country of establishment – the country of origin principle – rather than the country where the service is received.⁷⁸ So, a measure that stands in conflict with the minimum harmonization provisions of the Directive will now only stand, if it is applied exclusively to broadcasters within the Member State's jurisdiction.⁷⁹ This approach, however, may easily lead to a "race to the bottom", since it is hard to imagine a Member State imposing rules that may damage the country's media industry's competitiveness *vis-à-vis* those of other Member States. Further, it makes it especially hard for Member States to maintain a high standard in programming since there is little it can do to cover all broadcasters that potentially have access to its viewers, in case the broadcaster in question falls under the jurisdiction of another Member State and fulfills the minimum requirements of the Directive.⁸⁰

During the materialization of the actual Directive the issue of the quota system had sparked a prolonged debate. Mainly due to French insistence, it was finally imposed on broadcasters to reserve a majority of overall airtime for European programs (Ward, 2004: 58). The *TWF Directive* directly refers to Article 10 ECHR, which recognizes that broadcasting is to be seen as the exercise of the right to freedom of expression. On the other hand, it has been doubted whether the quota rules are in fact legitimately interfering with this freedom since its proportionality could be questioned (Asscher, 2002: 144). A key loophole that rendered the provision rather toothless was introduced into the Directive under pressure of the UK and the US with the additional phrase "where practicable and by appropriate means" complementing the requirement to dedicate a majority of airtime to European works (Ward, 2004: 59; Sarikakis, 2002: 86).

The revision of the Directive, scheduled in the original Directive to take place after

five years, led to a clash between the European Parliament and the Council that eventually required a Conciliation Committee. While the Commission agreed to a compromise text with the Council, a “gamut of amendments” was proposed by the European Parliament, including the fortification of the quota system, its extension to new services, media ownership and the recognition of the special role of public service broadcasting in clear distinction to the commercial sector (Ward, 2004: 62). The only significant amendment, which eventually made it through the co-decision process, was to allow Member States to put up a list of events considered to have national importance, which would subsequently have to be available on free-to-air television. In the end, the EP’s effort to enhance the value and enforceability of the major policy instrument of the Union in the field of the audio-visual sector was backed off due to significant resistance on the side of the Member States. So while without the Parliament’s work there would be even less of a counterweight to a gradual commercialization of the media (Sarikakis, 2005), this shift once more underlines the overall swing in the Parliament’s approach to audiovisual services and its role in the European project.

While in the 1980s, the potential of a pan-European institution such as mass media to create closer bonds between its citizens and facilitate greater legitimacy through a transnational public sphere was recognized, the approach mirrored by the debate around the *Television Without Frontiers Directive* was coined by proposals for the protection of national markets and identities against foreign imports. Also, the focus moved away from the initial idea of a pan-European public service broadcasting structure to the commercial sector to provide for a potentially transnational sphere. Thus, in the following years, the notion of competitiveness toward the US industry became of central concern in the European approach to media policy and largely replaced concerns about increasing democratic legitimacy.

The so-called Bangemann Report of 1994 is to be placed into the context of this discourse, as it advocates the inseparability of economic growth, liberalization and deregulation, especially when it comes to the (tele-)communication sector (Commission of the European Communities, 1994a). In the period of increased liberalization and deregulation, the focus of European media policy has thus experienced a change in priorities, as it seems, away from the active promotion of citizen rights and freedoms with state intervention for the public good towards the protection of private interests (Sarikakis, 2002:

83). This approach, however, neglects the fact that communication cannot be separated from political questions of citizenship rights, the expression of public opinion and political participation (Venturelli, 1998). Accordingly, EU rules that affect the media are made focusing on the economic elements of the internal market, the starting point of EU policy today being the aim to increase competitiveness in the global market and ensure jobs (Terzis, 2008).

During the 1990s the possibility of digital compression put an end to spectrum scarcity and blurred the boundaries between the traditional telecommunications and media sector. The most recent revision of the *TWF Directive* has resulted in the *AVMS Directive* (2007), which is to update the Directive in the face of convergence to include so-called “non-linear” services (such as on-demand video or Internet services) in the framework of the broader *i2010* program⁸¹ (for a detailed legal analysis see Castendyk, Dommering & Scheuer, 2008). The most emphasized characteristics of this emerging regulatory framework seem to be an increasing reliance on industry self-regulation (also referred to as “soft governance”) (Peters, 2008) and committee governance (Terzis, 2008).⁸² So, for example, content and advertising requirements have been decreased, allowing new forms of and more advertising and dropping restrictions on tele-shopping (Idem).⁸³

4.5. Media pluralism and ownership concentration

International human rights law makes no explicit reference to the regulation of ownership of information and communication institutions. Nevertheless, there is a variety of provisions that imply the reasonable conclusion that due to their specific role in democratic societies, media should not be considered mere consumer goods, neglecting their symbolic and cultural value. Thus, even though neither the ECJ nor the ECtHR has so far imposed an explicit obligation on States to take positive measures in the area of media pluralism, the respect for freedom of expression may in principle be interpreted to mandate the adoption of certain positive measures (EU Network of Independent Experts, 2004: 71).

Media pluralism can mean many things, such as (1) the multiplicity of providers (external pluralism), (2) access of all political and social movements or (3) the diversity of content (internal pluralism) (Dommering, 2008: 22). Surprisingly, the data on media ownership concentration and specifically on the effects on pluralism and independence are rather scarce (see for example OSCE, 2003). Nevertheless, it seems reasonable to assume that

content in a media environment dominated by transnational media owners will most likely become less local, less controversial, less investigative and less informative. The public watchdog function of the media will be reduced, the knowledge and attention towards local issues likewise.

(Council of Europe, 2004a: 5)

Usually, public service broadcasting is seen as a means to achieve internal pluralism, the quantity of private media outlets is regulated by means of concentration control to ensure a degree of external domestic pluralism at the national level. Thereby, competition in the economic sense may be protected, while at the same time this competition may not automatically translate into pluralism of opinions, since the abuse of economic or political power can hardly be prevented effectively. The Council of Europe has accordingly recognized that “merger control and other competition policy instruments are not sufficient in themselves to guarantee media pluralism” and that negative protection should be complemented with “specific measures to protect and promote media pluralism” (Council of Europe, 2004b). In a 2007 Recommendation, the Committee of Ministers again affirmed that

in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed.⁸⁴

At EU level, the media sector is viewed as part of the service industry and thus subject to the rules of the internal market while national regulations aimed at maintaining media pluralism are subsequently viewed as potential obstructions to its realization (OSCE, 2003: 37).⁸⁵ So, while the media industry is within the scope of EU competition law, there is today still no legislation that would be tailored more specifically to the issue of concentration of media ownership (as opposed to laws existing in many Member States) (Peters, 2008).

In 1992, the European Parliament requested the Commission to publish a *Green Paper on Pluralism and Media Concentration in the Internal Market* in order to spark debate on the need and potential for Community intervention (Commission of the European Communities, 1992). The Green Paper recognized legal uncertainty created by a wide variation of media ownership rules on the national level as a major disincentive for broadcasters to expand into other European markets.⁸⁶ On the other hand it also recognized

the loopholes established by the *Television Without Frontiers Directive* that allowed broadcasters to circumvent national media ownership rules when it stated that “protection of pluralism stops at borders, increasingly media do not” (Commission of the European Communities, 1992: 38). Also, the Commission pointed out the limited capabilities of competition policy in dealing with the preservation of media pluralism, while maintaining its inability to get involved in promoting internal pluralism since this is seen to be the exclusive right of the Member States. In the follow-up to the Green Paper, a Communication from the Commission was published by the DG Internal Market (Commission of the European Communities, 1994b) and a draft discussion paper in 1998, which built forth on the ideas of the Green Paper, detailing measures to be taken at Community level. Despite a rather flexible approach that allowed Member States to retain the right to monitor and develop policies to secure internal pluralism, the proposal was rejected by the Council (Peters, 2008).

In 1996 and 1997 another initiative to draw up a draft *Directive on Media Concentration*, including restrictions on cross-media ownership did not get beyond the drawing board. Mainly, it was the lack of competences that was brought forward against Community action and again, the Council rejected the proposals. In 2003, eleven years after the first Green Paper, the Commission decided to launch another *Green Paper on Services of General Interest* and called for further comments on the issue of European media ownership controls (Commission of the European Communities, 2003). As may have been expected, the initiative was warmly greeted by journalists and NGOs focusing on issues related to communication rights, while media owners “attacked [the proposal] vigorously” (Peters, 2008: 186). Again, the Commission's efforts remained inconsequential.

The Commission has to date not been able to gain sufficient Member State support for any coherent, legally binding instrument to regulate media ownership. Still, doubts remain about whether the EU has in fact the competence to legislate on this issue. Thus, the Commission has approached issues of pluralism and diversity by means of the *Merger Regulation* (1989), leaving European-wide regulation of the audiovisual sector a purely structural business.⁸⁷ Under this legislation the Commission is meant to prevent danger for competition in the common market by checking mergers of a certain magnitude. So, clearly, the objectives of this branch of law are economic.

The usefulness of the Regulation has been challenged *inter alia* by the European Federation of Journalists (2005: 8), who have pointed out that vertical concentration, which is

of special importance within the media sector, cannot be dealt with adequately by means of competition law. Also, the purely quantitative assessment of mergers to decide whether they fall within the scope of the Regulation is seen as inadequate. By the definition of markets for media products, the Commission has further generally understood the national market as the relevant arena within which pluralism of actors is to be preserved, which translates into a rather permissive attitude towards European-wide mergers and alliances (such as between Kirch Pay TV/BSkyB or Telefónica/Endemol), whereas mergers between two national undertakings that operate in the same market are seen as a threat to competition (Ward, 2004: 79). This approach can be interpreted as another indication that the idea of a (future) European-wide public sphere is not something the Commission sees as anywhere close to feasible. In practice, the economic potential of the “European champions” envisaged as a great opportunity for economic growth and employment, seems to have won it from idealistic ideas on a public service based transnational communicative space to enhance public deliberation.

It should also be noted that leaving the task of limiting media concentration to the Member States means generating policies based on the objective of strengthening existing national powerhouses in order to ensure jobs and fiscal revenues and to keep media ownership in national hands, often resulting in policies that allow degrees of concentration that are in “open contrast with European guidelines and principles” concerning media pluralism (OSCE, 2003: 38).⁸⁸

The Commission has operated on a case-to-case basis in deciding on permissible degrees of concentration at the national level to contain a certain degree of competition that it considers sufficient in the common market of commercial broadcasting. This way, DG Competition has come to play a prominent role effectively regulating media pluralism, while any meaningful legislation concerning media ownership has failed to achieve the necessary support from Member States (Ward, 2004: 73).

Most recently, Commissioner Reding (Information Society and Media) and Vice-President of the Commission Wallström have once more taken steps to reinvigorate the debate on media pluralism by putting forward a *Commission Staff Working Paper on Media Pluralism* (Commission of the European Communities, 2007a), a Communication and commissioning a large scale study aiming at the development of indicators to measure media pluralism in Europe. This new approach does not seem to aim at bringing about European

legislation, but is rather based on monitoring. Results of the initial study are expected to be published in 2009, which will probably be followed up by a public consultation and a policy paper.

4.6. Public Service Broadcasting

*“The idea of public service is (still) central to the democratisation of the media, particularly broadcasting media; moreover, it is a 'natural' setting for the realisation of citizens' right to communicate”
(Splichal, 2002: 17)*

The importance of non-commercial actors in the media landscape has been recognized by many European countries effecting in dual media systems with Public Service Broadcasters (PSBs) with varying market shares and organizational structures. This way, affirmative action is taken recognizing the impossibility of certain media channels, which are essential to a balanced public sphere, to survive under the laws of the free market. This is an essential function of the PSB system, since it ensures the greatest degree of participation of groups that are not included in viable target groups under commercial considerations. The function of PSB is gaining importance especially under current circumstances, wherein increased commercialization of the media result in closer links between the “independent watchdog” and other market actors; wherein advertising revenues have become simply too important for journalists as to resolutely ignore the underlying interests of advertisers; wherein a “hire-and-fire” culture is moving into media enterprises and effect a trend towards more sensational, market-oriented reporting and away from expensive, investigative journalism (Hamelink, 2004: 41).

The need to safeguard pluralism in the media has been recognized as a legitimate reason that may justify limitations of the freedom of expression by ECrtHR.⁸⁹ Also the ECJ has recognized the pluralism of the media as a goal important enough to restrict the free movement of goods⁹⁰ and services⁹¹. In this reasoning, the public interest becomes a paramount societal goal which is acknowledged to be important enough for the functioning of democratic societies to accept market distortion in the form of government subsidies or other forms of assistance (Tsourvakas, 2003).

In 1998 the ECJ ruled that, albeit proportional and the least invasive measure available, fundamental rights can constitute a legitimate basis beyond the Treaties to limit

the exercise of economic freedoms.⁹² In cases where the ECJ has recognized individual communication rights, however, it has consistently done so on the basis of the freedom of movement rather than the rights of the Convention (Asscher, 2002: 140). Especially concerning the development of commercial broadcasting the ECJ has issued some important judgments, in which limitations on access and transmission were seen as a violation of the freedom of services, which has clearly broadened the opportunities of commercial broadcasters (Idem). On the other hand, European competition law has considerably narrowed the space for maneuver for Public Service Broadcasters (Mortensen, 2006).

The ECJ has defined broadcasting as a service for the purposes of Article 49 TEC.⁹³ So, the media sector, like any other, is subject to the European rules on competition (for more detail on the application of Articles 81, 82, 87 in the audiovisual field see Mayer-Robitaille, 2005). Thus, it has been argued, the financial support of PSB ought to be seen as state aid, violating Article 87(1) TEC. During the 1990s a number of commercial broadcasters lodged complaints with the Commission against aid paid to PSBs.⁹⁴ Also the question whether the public service mandate of public service broadcasters justifies the expansion of their services to include new digital services, such as the Internet or an increased number of special interest channels in digital broadcasting networks is a point of debate (Ward, 2004; Mayer-Robitaille, 2005).

At EU level the *Protocol on Public Broadcasting Services* annexed to the *Treaty of Amsterdam* (1997) recognized the public service broadcasting system as “directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”. The Protocol further states that the Commission is to supervise the national financing regimes of PSB, which will be tolerated as long as it is proportional and related to the public service remit. Seemingly in conclusive extension to the freedom of expression granted in Article 11 (1) of the European Charter, Article 11 (2) states that “the freedom and pluralism of the media shall be respected”.

In 2001, DG Competition issued a *Communication on the application of State aid rules to public service broadcasting*⁹⁵, in which it stated PSB's importance for maintaining pluralism. The Commission here pointed to the importance of Article 86(2) TEC, which provides for the justification of state aid as long as it provides for the provision of a service of general economic interest and does not affect trade contrary to the common interest. It thereby recognized that it was a prerogative of the respective Member State to define a

service of general economic interest and the obligations attached to it, thus recognizing the right of Member States to support PSBs.⁹⁶ The Commission required three criteria for the legitimacy of national public service broadcasting: (a) a definition of activities, (b) an official act entrusting the tasks to a specific body and (c) a system of proportionality assessment (Ward, 2004: 104). As a result of this approach, the Commission has subsequently focused on the two questions of whether (a) the definition of the public service remit was sufficiently clear and (b) the granted funds stood in proportional relation to this definition. In November 2008, the Commission opened consultations on a new draft of a Broadcasting Communication meant to further consolidate its policy.⁹⁷

The ECJ has so far not interpreted the scope of competition law when it comes to public service broadcasting specifically. However, it has taken two decisions which allow a number of inferences. In its 2001 *Ferring* decision, the ECJ seems to have excluded virtually any public service funding agreement from the scope of Article 87 on state aid in general.⁹⁸ This is a positive development for PSBs, since it means that not every case of state aid is necessarily exposed to the Commission's scrutiny. In the logic applied by the Court, any state funding can be seen as a compensation for the provision of a public service. This logic was maintained in *Altmark*, where it was reasoned that the provision of state funding "does not have the effect of putting them [the recipients] in a more favorable competitive position" since on the other side of the balance sheet, *in casu*, they had to meet public service obligations.⁹⁹ However, the *Altmark* decision also established four criteria which would have to be met when considering whether state funding would escape the classification as state aid: (1) the recipient undertaking must actually have public service obligations which must have been clearly defined; (2) the parameters on the basis of which the compensation is calculated must have been established in advance in an objective and transparent manner; (3) the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations; (4) where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking would have incurred in discharging those obligations.

The new potential conflict area between the Commission and Member States is thus likely to become the question whether the public service obligations assigned to PSBs are

sufficiently defined and the funding proportional to those obligations rather than the previous issue of whether or not the funding constituted state aid in the sense of the Treaty. This is especially contentious when it comes to PSB's move to expand their activities online. Accordingly, in more than 20 cases the Commission has inquired, the most contested issue has mostly been whether public money may be used to fund new Internet activities of PSBs which are not TV programs (Beat Graber, 2009: 15). A case in point was the 2005 announcement by EU Competition Commissioner Neelie Kroes to launch formal investigations into the compatibility of the funding of PSBs in Germany, the Netherlands and Ireland in response to complaints from broadcasters about using public service fees for their online services.¹⁰⁰ While the Commission did not *a priori* exclude the possibility of online services to be part of the public service remit, for example Germany was required to clarify this remit further and to set conditions for new Internet activities. More specifically, those activities must now be subjected to a test to determine their “contribution to editorial competition”, which may be considered the Commissions’ approach to test the proportionality when PSBs expand their services into the Internet (Idem).¹⁰¹ Also, PSBs proposals for such activities will have to be formally adopted by the German *Länder* whereas commercial activities are excluded from benefiting from any state aid. This is likely also the course that will be taken in future cases on the issue. While it is not entirely clear, what are the exact parameters of the proposed test, only in 2008, Neelie Kroes made clear that, for example, when it comes to online games which have been used by PSBs to attract young audiences, “it is certainly [not] obvious to the naked eye or the taxpayer why public broadcasters should be using state money to run on-line video games”.¹⁰²

5. Process

5.1. Information and communication policy

The meaning of what is often referred to as “transparency” and the related concept of “accountability” in EU policy documents as well as scholarly literature varies depending on the author and sometimes remains implicit. However, at the heart of the arguments is a search for legitimacy of a political system that has grown beyond international cooperation but which has not yet equaled its factual impact on people’s lives with a corresponding degree of democratic control. The function of recognizing a right to access to information is clearly of special importance in a system like the EU, in which policy and law-making have

altered the way democratic values can be effectuated.¹⁰³ Such a right to information would imply also a positive obligation to make available information that is relevant for the active exercise of citizenship (Bovens, 2003). This has also been recognized by the Commission in its *White Paper on Governance*, where it acknowledged that “providing more information and more effective communication are a precondition for generating a sense of belonging to Europe” (Commission of the European Communities, 2001: 11). This way, as a complement to transparency, concrete rights of participation as a means to increase the input side of the EU's legitimacy have gained incremental recognition (Curtin, 2004: 8).

Information – or how it is recently being re-framed – communication policy is mostly the domain of the European Commission. It is, however, only recently being moved from rhetoric into practice, while it continues to be conditioned by limited competences, a lack of staff and budgetary constraints¹⁰⁴ (Brüggemann, De Clerck-Sachsse & Kurpas, 2006). Also, its normative underpinnings are still not entirely clear so far. Up until 2002, the EU had been “deliberately refraining from any action” in the field of information policy (Brüggemann, 2005: 65).¹⁰⁵ The ratification problems of the *Maastricht Treaty* seem to have been the first time that information policy really became an important policy area within the EU. The subsequent De Clercq Report of 1993 was met with suspicion by many journalists. Its reliance on marketing techniques to “ingrain in people's minds” the “good product” of European identity (1993: 2) as well as its suggestions that journalists should be a primary target group of such efforts (1993: 25) was rejected as a propagandistic exercise in “selling Europe” (Brüggemann, 2005: 66). While follow-up action implementing the report was not very significant, during the 1990s a plethora of measures have been taken on the basis of mixed strategies. These include the elaboration of an extensive information network by the Commission including the voluntary spokespersons of “Team Europe”, the Commission's Representations in the Member States, “Info Points Europe” in over 140 countries and the telephone service “Europe Direct” (for more details see Kurpas, De Clerck-Sachsse & Brüggemann, 2006).

None of these initiatives, however, actively reaches out to those citizens who are not yet interested. This has begun to change with the introduction of the so-called PRINCE programs during the second half of the 1990s to create awareness and explain benefits of specific EU projects such as the introduction of the Euro. The latter campaign marked the first time the EU had freed a considerable amount of funds to inform the general public

(Mak, 2001, as cited in Brüggemann, 2005: 67). Still, the campaigns can hardly be called dialogical (even though the rhetoric of dialogue is discernible in most EU documents on the issue) since they explicitly aim at convincing citizens of the benefits of policies or projects, which have, more importantly, already been decided on anyway. The first serious effort to change this approach has been the “Future of Europe” campaign, with the *Futurum* website as one of its centerpieces.

An important drawback in the Commission's moves towards more open and proactive information policy was represented by the 1999 corruption scandal and its communicative mismanagement (Brüggemann, 2005: 68). After replacing DG X with DG Press, it took three years before a new communication strategy was formulated in 2002, which was still very much characterized by a reliance on persuasive communication strategy (Commission of the European Communities, 2002). Still, the 2002 strategy marked a renewed interest in information and communication policy and by the end of 2004, finally, there came a Commissioner responsible exclusively for this policy area.

Commission 2004-2009: shaping a new European communication policy?

Surely, talk of the “democratic deficit” had been on the agenda before the most recent drawbacks of the ratification process. Prominently, the *White Paper on European Governance* (Commission of the European Communities, 2001) had triggered much controversy and discussion on the future path of European democracy. Following the rejection of the draft EU *Constitutional Treaty* by French and Dutch voters in 2005 and the *Lisbon Treaty* by Irish voters in 2008, information and communication policy has gained yet more momentum. After the referenda in France and the Netherlands a series of three documents specifically relating to communication processes was issued as a contribution to the “period of reflection”: the *Action Plan to Improve Communicating Europe by the Commission* (2005b), the so-called *Plan D for Democracy, Dialogue and Debate* (2005c) and, most recently, the *White Paper on a European Communication Policy* (2006). The latter will be subject of closer analysis given that it spells out the main underlying principles to guide EU efforts in the near future.

What citizenship implies

The White Paper mirrors the realization of communication as a two-way process (Commission of the European Communities 2006: 7), emphasizes the need to listen (as already stated in the Action Plan) and even goes another step further to introduce a “citizens’ right to communicate” (though limited to the meaning of multi-lingualism, realizing the right of the citizen to having their institutions talk and listen to them in their own language). In its conclusion, the White Paper states the citizens’ rights to information, expression and “to be heard” (Idem: 13). Rather than specifying the implications of those rights for policy- and law-making, however, the White Paper suffices with reference to more general principles such as inclusiveness, diversity and participation that are put forward as guidelines for future policy (Idem: 5). While these are worthy and largely undisputed principles, it remains an unfortunate fact that there are already countless declarations and documents to be found in which the commitment to many laudable principles can easily be found throughout the levels of European authority, while it remains the lack of enforcement mechanisms that often leaves them toothless.

So, in the White Paper the citizens’ rights to information and freedom of expression are clearly recognized in their relation to democracy. However, while stressing the need for communicating *with* and not *to* citizens as well as the lack of communication among citizens, the corresponding entitlements that would cover these processes are not included.

The aims of “communicating Europe”

Facing the problem of the future of a European Constitution, the EU found itself at a crossroad. Despite a long history of attempts to inform the public, reach out to citizens and “citizenship”-rhetoric incessantly repeated, the fact that a large amount of citizens remains politically inactive concerning the Union, bases their opinions on unfounded beliefs and is ill-informed may be tempting EU decision-makers to further rely on strategic political communication aiming at emotional resonance and persuasion rather than empowering citizens and enabling them to engage in deliberation, thus eventually creating a “deeper” form of supranational democracy.

However, when communication is understood as a way of empowering citizens who are not able to impact decision-making sufficiently via traditional means of voting and who lack the intermediary of a common public sphere, “communicating Europe” becomes an essentially

political activity, where democracy is at stake and “selling” the idea of enlargement or specific policies cannot be a legitimate, strategic aim. After all, the EU is not a “branded product” that has to be advertised and sold to citizens, but aspires to be a pluralistic democratic enterprise, which ought to be a product of its citizens’ will to build a community beyond the nation-state which “citizens may decide *not* to like, even if they are properly informed” (Kurpas et al. 2004: 3, *emphasis added*).

Instead of advertising the added value of existing EU policies or campaigning to gain the benevolence of citizens before accession referenda, the aim of communication then ought to be stimulating deliberations about the very content and nature of integration, its underlying logic and aims. This means not presupposing any *finalité* of the process and considering options that may not be tabled in current discourse, which may result in a fundamental redefinition of what the EU should be. While in Plan D “explaining the added value of EU policies” could still be found throughout the document, the White Paper seems to have moved beyond the idea that promoting the integrationist movement ought to be the aim of communication.¹⁰⁶ The discourse of “explaining” has been largely substituted by that of “listening”, whereas the proposals remain largely familiar from prior public relations efforts to create a shared “toolbox” and fall short of providing inspiration for viable ways to implement the shift from explaining to listening.

The means chosen

The White Paper chiefly relies on opinion polls to better understand and the Internet to reach out to its citizens. Getting to know more about the attitude of European citizens would certainly be helpful, but can by no means replace genuine communication. The prime feedback channel for the consultation process relating to the White Paper as well as for more general debate on Europe remains the Internet.¹⁰⁷ Making efficient use of available new media is most certainly to be applauded, relying on them to facilitate inclusive and diverse communication, however, is a known mistake. Just some months earlier, the ministers of 34 European countries had endorsed the *Riga Ministerial Declaration*¹⁰⁸ setting out targets to tackle the problem of *eInclusion* (see above). In 2006, a lack of affordability, access, skills and motivation was still keeping between 30 per cent and 40 per cent (50 per cent according to some estimates) of Europeans from taking advantage of the Internet. Not only is the Internet not reaching all Europeans, it also leaves behind those who are more vulnerable to social and

political exclusion in the first place. So while the special Internet site, which had been developed for Plan D, received thousands of contributions, Commissioner Wallström conceded that 80–90 per cent of those had been posted by young men.¹⁰⁹ Also, when compared with traditional mass media, Splichal points out that the Internet enables

dialogical communication that can hardly be restricted [...] but at the same time it can hardly assure any response [and therefore] without the traditional mass media, the public sphere would be lacking of the most effective channel correlating the public(s) with power actors appearing before the public and deriving their legitimacy from it.

(2002: 19)

In a 2006 study evaluating the Commission's communication policy, Brüggemann, De Clerck-Sachsse and Kurpas identify a number of actions that have been developed between 2000 and 2005 which reach out to those citizens that are not already knowledgeable in EU policy-making and also clearly advocate a concentration on media-related activities as the most promising to reach the general public. In a 2007 Communication, the Commission further elaborated on media-related efforts to build a European public sphere by extending audiovisual services and the co-financing of radio and TV programs (2007d: 11). Still, the Internet remains the “main medium (...) for enabling feedback from and discussion among users” and the “principal medium of cross-border debate”, so further improving the EUROPA website to increase user-friendliness remain high on the agenda (Idem: 11).¹¹⁰ More recent initiatives that have been undertaken include the establishment of a network of radio stations (April 2008) and proposals of a network of TV stations.¹¹¹

In continuation of the earlier PRINCE campaign on the Euro in its current plans, the Commission is emphasizing the responsibility of Member States to communicate EU policies. This move to “go local” is complemented with the intention to coordinate joint “communication priorities” and monitor efforts. To this end, so-called management partnerships are introduced with Member States (Germany, Hungary and Slovenia have already concluded such a partnership at the time of writing). To enhance cooperation between EU institutions, an inter-institutional agreement between the Commission, the Parliament and the Council was proposed *inter alia* in order to “achieve a convergence of views on the main communication priorities of the European Union as a whole” (Commission of the European Communities, 2007e: 3). In short, it could be said, the Commission is trying to get everyone “on message”.

Notably, again here, mention is made of “the main principles and rights to be upheld in communicating Europe” including the “principles of inclusiveness, pluralism and participation [that] should form the basis of any action to communicate Europe” (2007d: 15). Once more, no further elaboration is made what this would mean in practice and how it should be achieved.

6. Conclusion

“International human rights stress the importance of people’s participation in political processes which from the perspective of communication rights implies the right to have one’s views taken into account.”
(Hamelink, 2003)

Considering the implications of a deliberative democratic approach and a broad understanding of the relevance of communication rights for their realization, it becomes clear that there is not only a duty of public authority to refrain from interference, but to ensure the effective exercise of those rights, protect them from interference by other citizens or entities and promote their exercise through long-term policy. The EU is by no means the only actor affecting the social, political and legal environment of communicative processes among its citizenry. Many competences are still firmly in the hands of national governments while at the same time, other international bodies such as the Council of Europe, UNESCO or the WTO are co-designing the rules and boundaries of the evolving “information society”. Nonetheless, as has been shown above, the activities undertaken to bring about a European internal market are by no means inconsequential to the nature of national media landscapes or the exercise of individual communication rights in Europe today, nor has the reach of broader EU law been limited to this domain. Particularly, in light of the importance of communication processes for the further legitimation of European integration, it will be important to monitor the combined impact on those processes by rules adopted in the framework of the EU.

Especially when one chooses to look at these processes through the prism of ideals such as human rights and deliberative democracy, the EC is at least an ambivalent object of analysis, since it embodies an inherent paradox when faced with the limited arsenal of internal market law in the pursuit of regulating for more political or social goals. While it can interfere with national media policy by enforcing its law on economic freedoms (for more

detail see Asscher, 2002), initiatives to liberalize the telecommunication market and to harmonize broadcasting have also been accompanied with efforts to protect specific rights such as privacy.

By now, the protection of fundamental rights has also become part of EU policy and has found its explicit incorporation in the 2001 Charter. At the same time, with the establishment and expansion of the Second and Third Pillar, a range of measures have been adopted into the body of European law - "soft" and "hard" - which have directly impacted citizens' rights while decision-making procedures under its auspices as well as judicial control of their legality are still very limited in comparison (Peers, 2007). In this context, it is noteworthy that when it comes to some "single issue" initiatives such as related to "cybercrime", often more far-reaching limitations of rights are envisaged than in other fora, leading Asscher (2002: 152) to conclude that new initiatives concerning criminal law in the information society tend to override the protection of individual rights. This has but been aggravated by developments in the aftermath of a declaration of a "war against terrorism" which seems to have brought about a sea change in the political climate that has enabled the adoption of measures that would have hardly been thinkable before. In addition, the EU's actions in this context have also often been perceived to be yet more controversial than those of other international bodies since they are rather strong considering their enforceability by bringing infringement proceedings or cases to the ECJ while the process of their adoption is often marked by a lack of transparency (Banisar, 2008: 10).

The three domains infrastructure, content and process that were chosen here to structure analysis are all being touched and co-shaped by European law and policy. When it comes to the freedom of expression, European instruments such as the *AVMS Directive* and the *e-commerce Directive* contain provisions to counter racism and xenophobia on- and offline that have introduced a degree of minimum harmonization across the EU. Most recently, the *Framework decision on combating racism and xenophobia* introduced obligations to criminalize speech amounting to public incitement to violence or hatred against certain groups.

Also when it comes to the protection of minors, minimum harmonization has been employed concerning the provision of potentially harmful content and advertisements, while the protection of children's rights to access information or privacy are not always adequately addressed in current measures.

The international commitment to fight terrorism seems to have become the banner under which established rights are currently being undermined. While in March 2009, the Human Rights Council of the United Nations adopted *Resolution 10/22 on Combating Defamation of Religions* calling on governments to criminalize religious blasphemy, the EU's *Framework Decision on combating terrorism* has introduced new criminal offences such as the “provocation to commit terrorist offences”, which are potentially detrimental to maintaining an open critical debate by narrowing the scope of acceptable political expressions.

Also in the sphere of personal data protection and the confidentiality of communication, the so-called “war against terrorism” has served as the trigger from some major changes. As the EU Network of Independent Experts on Fundamental Rights pointed out already in its 2004 report on the situation of fundamental rights in the European Union, “the current pursuit of increased security has cleared the way for initiatives which in a different context would undoubtedly have given rise to more objections and more thorough consideration” (57). It concludes that “a proactive approach” is becoming widespread in law enforcement authorities, which leads to pre-emptive gathering, and storage of personal data in order to develop “profiles” of people assumed to be likely to engage in criminal acts even *before* any offence is committed (Idem). This trend has but accelerated with the increasingly institutionalized and seemingly permanent exchange of passenger name records which is *de facto* being used for profiling that may be in violation of established human rights principles.¹¹² The increase in data sharing between Member States but also beyond the borders of the Union as well as new provisions on data retention are all trends that are likely to intensify with the progression of technological opportunities, while the balance that is struck between a perceived increase in security and human rights seems to be tipping in detriment of the latter. The gradual, silent erosion of data protection in the name of security may turn out to be a very disadvantageous deal trading off individual autonomy and freedom for the placebo of an imagined increase in security. This concern has now also led the European Parliament to support a 2009 report prepared under the auspices of its *Committee on Civil Liberties, Justice and Home Affairs*, which calls for a better balance between a commitment to fight “cybercrime” and the rights of users and on the 27 countries in the European Union and the European Commission to define global standards for data protection, security and freedom of expression.¹¹³ As the chair of the Scientific Committee of

the EU Fundamental Rights Agency recently lamented, it seems that “today nothing is being done to improve the conditions for the democratic functioning of the Internet; the focus is on the security aspects”.¹¹⁴

In the meanwhile, in February 2009, the ECJ has confirmed that the data retention Directive has in fact been rightly passed by the EC under its competences to build a single market, meaning that limits to data protection are currently being taken at the European level without “national constitutional or electoral challenges” (Keynder 2008).

Concerning the right to access information a steady development has set in since the *Maastricht Treaty* that has undoubtedly ameliorated the degree of transparency of the EU. From a political declaration and voluntary self-obligation by institutions we have moved to binding secondary law in the form of a Regulation that has “enshrined” a public right to access to documents. Nonetheless, there is still a long way to go when it comes to the functioning of the public registers while it seems that bureaucratic culture may still contain a reflex towards secrecy. Also, exceptions such as those relating to “sensitive documents”, the broad discretion by third party authors to prevent disclosure of their documents and the lack of a public interest override on some others are still obstacles on the way to an entirely satisfactory state of affairs. Unfortunately the recent moves to effectively narrow the scope of the Regulation by changing the definition of a document do not encourage expectations of major improvements in the short term. Finally, whereas other measures in the aftermath of the stalled *Constitutional Treaty* have addressed a number of issues to improve overall transparency, the complexity of European decision-making procedures and the high degree of expertise required to follow them and understand public documents still pose major obstacles for citizen participation. It may then reasonably be asked whether the EU ought not to be expected to not merely review the existing law on access to documents, but to put in place a full-fledged access to information regime.

Given the lack of European-wide political communication, the promotion of a transnational European public sphere could be seen as a task of pivotal importance, so that mass media would have to be recognized more explicitly in their democratizing potential rather than their economic relevance. When evaluating European-wide initiatives after the ill-fated experiment to set up a pan-European broadcaster in the 1980s, however, it seems that European institutions have become reluctant to actively regulate to that aim and seem complacent to leave the task of building transnational communicative spaces to the private

sector (Ward 2004: vii). Looking at the overall regulatory framework of media governance then, it can be observed that where in the 1980s the discourse around what has become the domain of information society services policy had still been markedly coined by arguments concerning access, exclusion and the public interest, EU policies have been distinctly and increasingly market-oriented. So, while the *i2010* strategy still pays lip service to the social functions of audiovisual media, its aims and means are thoroughly geared towards the free-market and consumer choice. There are then currently two strands of liberalization visible: one concerning networks, another concerning content. In this vein, the revision of the *AVMS Directive* can be understood as complementing the more general framework of market liberalization in operation by DG Information Society (Terzis, 2008). In addition, this process is increasingly driven by a reliance on self-regulation, which is particularly worrisome considering its lack of enforceability, transparency and democratic control of this crucial policy area. While this development has been greeted by media owners and advertisers, organizations such as the European Federation of Journalists have voiced serious doubts concerning the effectiveness of self-regulatory mechanisms to ensure minimum standards in areas such as advertising (Peters, 2008: 185).¹¹⁵

When it comes to the issue of media pluralism and the regulation of ownership concentration, the European Parliament remains the stronghold of claims to change this competition policy bias in audiovisual policy, giving voice to the interests of European citizens (Sarikakis, 2005; Doyle, 2007).¹¹⁶ So far, though, every attempt to establish a Directive specifically addressing media diversity and ownership has met with considerable opposition from Member States, supported by the large commercial media companies that have an obvious interest in preventing pan-European restrictions of ownership. So, whereas competition law has been used occasionally to adjust an overly dominant position of providers (to ensure external pluralism), the Commission has largely limited its initiatives to support programs for the European audiovisual industry, such as the MEDIA program (fostering internal pluralism) (Peters, 2008). As Dommerings points out, however,

following some timid attempts in the late 1980s the Community has had to leave pluralism in the second sense [access of all political and social movements] to the Member States, with the result that there is no European 'public debate' in the European media. The opinion-forming process and public service broadcasting have remained overly restricted by the national borders drawn in the 19th century.

(2008:23)

Thus, this crucial aspect of regulation remains under firm control of the Member States.¹¹⁷ This is an unfortunate situation, especially considering that national authorities may find there to be a conflict of interest when trying to find a balance between the need to foster domestic economies and ensuring pluralism (European Federation of Journalists, 2005: 9). To what extent recent efforts of Commissioners Wallström and Reding to reinvigorate the debate on the issue will bare fruits remains to be seen. In the meanwhile, the Association of European Journalists has presented its first survey of media freedom across Europe, in which it *inter alia* expressed concerns about commercial pressure and over-concentration in mainstream media in Member States such as France or Italy (Association of European Journalists, 2007).

Also the future of public service broadcasting in the EU is far from effectively secured. While there is a general recognition of the legitimacy and relevance of the existence of public financing schemes to ensure the provision of high-quality public service, the compatibility of PSBs' transition into the age of convergence with European competition law is by no means settled. Even though formal investigations may ultimately provide no evidence of irregularities or a breach of EU competition law, the procedure alone may trigger preemptive self-regulation by broadcasters.¹¹⁸ Overall, there has been a remarkable shift when compared with the idea of the 1980s that some kind of public service television structure could be established at the Community level (Ward, 2004). At the same time enlargement has resulted in yet more pluriformity within, which has led to a more pronounced juxtaposition between the "European" tradition of public service and a culture of increasing privatization (Sarikakis, 2007). Today's EU approach to PSB is then in stark contrast to the approach of the Council of Europe, whereas for the former PSB is "part of many problems, primarily to do with protection of competition, and is usually considered only from this point of view, for the Council of Europe [it] is part of the solution to many problems" (Jakubowicz, 2007: 21). While PSB has always been "a square peg in a round hole" when it comes to the audiovisual policy of the EU, it is also in this area where the Commission has taken the most ambiguous stand so far (Jakubowicz, 2007: 22).¹¹⁹ Thus, in Jakubowicz' analysis, a continued application of state aid rules as put forward by the Commission may effectively "be closing the door to PSB's modernization and adaptation to the realities of the information society, and thus to its future existence" (Idem). In order to prevent an overly restrictive conception of what public service *broadcasting* ought to be in an era of convergence, it has been suggested to adapt our

outdated vocabulary and speak of public service *media* instead, thereby also explicitly recognizing the participatory potential which comes with the new digital services (Ferrell Lowe, 2007).

At the level of infrastructure and accessibility, including citizens when it comes to the opportunities of the use of new technologies - especially the Internet - has gained increasing importance on the EU policy agenda, if framed primarily in terms of competitiveness and profitability. Policies directed towards ethnic minorities and people with disabilities, however, seem to still suffer from a lack of targeted monitoring. Clearly, while it is the preferred tool of EU institutions to reach out to its citizens, the Internet is still far from being a “silver bullet” to remedy the problem of inclusion in European policy-making and thereby alleviate its democratic deficit anytime soon.

Evaluating the developments in the field of information and communication policy during the last decades on the basis of their democratic credentials, Brüggemann (2005) concludes that there has been at least the beginning of a paradigm shift from “arcane politics” characterized by secrecy and propagandistic information policies to more transparency after the corruption scandal that had hit the Commission in 1999. Nonetheless, he points out that “the primary goal [...] remains outspokenly persuasive communication” and “‘dialogue’ is rather used in the sense of an interactive form of persuasive communication” (Idem: 68). In the 2006 *White Paper on a European Communication Policy* a rights-perspective on citizenship of the European Union is clearly discernible, while at the same time, those rights remain narrow and undefined. The introduction of a “right to be heard”, even if seemingly *en passant* nonetheless constitutes a broadening of the understanding of communication in respect to earlier Commission documents, while its undoubtedly far-reaching implications have so far been left implicit.

The elaboration of more media-related efforts as well as the commitment to improve the user friendliness of online information portals are certainly laudable initiatives with the potential to create more informed citizens. It will, however, be an intensified collaboration among the EU institutions with the national and local levels of public authority which may prove to be the most promising change, albeit running the risk to degenerate in yet another, if better managed and executed, exercise in political marketing. For 2009, a political agreement was concluded which defined the communication priorities to be climate change, the European Parliament elections and significant anniversaries of the reunited Europe (the

latter clearly echoing earlier political marketing efforts as described by Brüggemann, 2005).¹²⁰ At the same time, suspicion against the newly intensified efforts of the Commission have not disappeared. So, for example, in December 2008, the Commission was accused of employing biased information policies “to justify its own existence and, crucially, to cement the European Commission’s view that continued European integration is the best, or even the only, future path for progress” (Open Europe: 1).

In order to break the vicious circle of ever declining turnouts, also the EP has chosen for more coordination to be “on message”: instead of different campaigns, this year was going to see a "single campaign with a single message about choice" said European Parliament Vice-President in charge of communication Alejo Vidal-Quadras.¹²¹ In the meanwhile, on 17 September 2008, the European Parliament has launched its own WebTV channel, called *EuroparlTV*¹²², which will also be used in the framework of the 2009 election campaign (designed by prominent agency Scholz & Friends) to broadcast selected recordings of the 36 “Choice Boxes”; mobile multimedia studios that will be installed across Europe for the use of citizens to voice their views. In sum, the implementation of the aims of informing and getting everybody “on message” seems to be much more concrete and advanced than that of listening and translating core principles of inclusiveness, diversity and participation into practice.

When it comes to the notion of empowering European citizens there is another related challenge which is also similar to problems facing most modern nation-states, but even more severely present at EU level: there is a degree of political apathy and mal-information among citizens about the EU that amounts to a civic deficit that makes any attempt to improve democracy through purely institutional reform seem utterly futile. This cannot be simply blamed on unfavourable or lacking media coverage and will not be solved by producing better media material, coaching politicians and educating journalists, but will have to include a broader effort in civic education. As Splichal (2002: 9) notes, the creation of a public “spirit” inclined to rational discussion as has been claimed as condition for deliberative democracy, depends on education in order to develop the human ability and need to communicate. Indeed, the 2006 White Paper’s proposals mirror this, but have no alternative but to leave this task to the Member States.¹²³ Again, in its “Communicating Europe in partnership” proposal, the Commission emphasized the importance of civic education and announced a number of efforts to provide more information on best practices

and exchanges, while it had to rely on the Member States' responsibility for “education and training for active citizenship” (2007*d*: 8) and thus their willingness to implement any of its proposals. It went on to point out that at this point, rights and duties that come with European citizenship are part of the school curriculum in less than half of the EU Member States, while its history has a place in 20 Member States.

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¹ It should be noted here, however, that there is no guarantee that judges in Luxembourg will advance a similar interpretation of the law to that of judges in Strasbourg (Asscher, 2002: 138). This divergence could be remedied would the EU become a signatory to the ECHR.

² The difference and overlap between the terms “right to communicate” and “communication rights” has been explained elsewhere (Hamelink & Hoffmann, 2009). Below, the term communication rights will be used, since it better reflects the nature of the current discourse and the author’s usage of the concept as an interconnected set of entitlements rather than a single, legal right.

³ Communication then refers to all processes of information exchange, both one-way and two-way, irrespective of the medium in use. This definition includes the channels of mass media, but does not stop there, since communication is understood to extend to include processes such as accessing, sharing, receiving or protecting information between individuals and institutions. Thus, communication is used as an overarching concept to include a variety of societal processes. The term media is often employed to refer to audio-visual media. Since processes of convergence increasingly make it pointless to clearly distinguish between “traditional” and “new” media, the term is used here to include both kinds of services.

⁴ If one compares the above with earlier work on the issue (see for example CRIS, 2005), it is clear that there are a number of issues, which cannot be found back here. Most prominently, this concerns references to culture and knowledge. This limitation is a deliberate choice, motivated primarily by considerations of conceptual clarity. While the relevance of cultural rights as human rights is not disputed here, most of those rights do not directly relate to the communication processes as understood here and are thus not directly relevant for the present purpose. A similar consideration prevents the consideration of the sharing of knowledge and the impact of legal arrangements such as intellectual property rights on the accessibility and free flow of knowledge.

⁵ It should be noted here that a comprehensive analysis on important influences on communication rights within the EU would also have to take into account the growing importance of international regimes that are negotiated within fora such as the WTO, ITU or UNESCO. In the present study, these will not be included for reasons of scope.

⁶ Another factor, pointed out by Ward is the lack of willingness on the side of major public service broadcasters such as the BBC to participate in the project.

⁷ See online: (http://ec.europa.eu/information_society/eeurope/2002/index_en.htm). [Retrieved on 13 March 2009].

- ⁸ See online: (http://ec.europa.eu/information_society/eeurope/i2010/strategy/index_en.htm). [Retrieved on 13 March 2009]. Unlike the earlier e-Europe initiative, i2010 also comes with a budget. For more details please see: (http://ec.europa.eu/information_society/europe/i2010/financing/index_en.htm). [Retrieved on 13 March 2009].
- ⁹ In a 2007 Commission Staff Working Document, *eInclusion* was defined as referring to: “the extent to which information and communication technologies help to equalize and promote participation in society at all levels by enhancing social relationships, facilitating economic opportunities for work and entrepreneurship, developing cultural aspects of society, encouraging civic participation” (Commission of the European Communities, 2007b: 3).
- ¹⁰ It should be noted that data was still lacking especially when it comes to Internet use by ethnic minorities. So, concerning the Riga commitment to fostering cultural and linguistic diversity and promote the participation of immigrants and ethnic minorities in the information society, not much monitoring has been done so far.
- ¹¹ *Handyside v United Kingdom* (Appl no 5493/72) 7 December 1976, para. 49.
- ¹² *Castells v Spain* (App no 11798/85) 23 April 1992, para. 43.
- ¹³ The limitations of free speech in the ECHR are quite extensive and, worse, rather elastic since essential criteria for limitations are not explicitly defined (for example public safety, health or morals). This can be explained by the Court's function as a last safety net in the case that national legal systems have failed to extent sufficient protection. As such, the Convention could be understood as a common minimum standard.
- ¹⁴ In this respect “necessary” does not mean indispensable, but neither does it extend to “reasonable” or “desirable” in the Court’s interpretation. *Sunday Times v United Kingdom* (App no 6538/74) 6 November 1980. If an individual wants to claim her or his right before the ECtHR, the logic applied is that the plaintiff is first to establish that her or his complaint falls within the scope of Article 10(1) and that there has been an interference with this right. In case the Court agrees, the burden shifts to the respective state to justify its actions. Thereby, it must be shown that the applied measure restricting the right to freedom of expression was (a) prescribed by law, (b) justified by one of the aims recognized in the European Convention, (c) necessary in a democratic society and (d) non-discriminatory (Dommering, 2000: 94).
- ¹⁵ For example, the Court has stated that the government’s margin of appreciation in matters of national security is not without boundaries: “In view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse”. *Leander v Sweden* (App no 9248/81) 17 May 1985, para. 60. Also, this margin had been used too widely according to the Court in the well-known *Spycatcher* cases where the prohibition of publication of information from a book (the memoirs of a former intelligence officer titled “The Spycatcher”) was claimed necessary by the government of the United Kingdom on grounds of national security (even after the book had already been published in the United States and several other countries). The argument was found inadequate by the Court, among other things because the material had already become part of the public sphere anyway. *The Observer and Guardian v United Kingdom* (App no 13585/88) 26 November 1991. Another more recent case to be noted is *Çetin and others v Turkey*, which reiterates the Court’s reluctance to accept bans on the printed word, even in emergency situations. The *Çetin* case is noteworthy not least because of the severe restrictions in human rights introduced by

many states – including Council of Europe members – in the name of the fight against terrorism, despite frequent plaintiff appeals regarding the need to respect human rights. *Çetin and others v Turkey* (App nos. 40153/98 and 40160/98) 13 February 2003.

- ¹⁶ Defamation laws have historically often been abused by governments as tools to censor critical voices and protect powerful interests from public exposure. In the application of this limitation to Article 10, journalistic freedom and the public interest must be balanced against the individual rights to the protection of privacy and reputation. The reputation of individuals is specifically protected in Article 10(2) and Article 8 of the European Convention. In accordance to the duties and responsibilities referred to in Article 10(2), journalists are expected by the Court to act according to the ethics of their profession. The landmark *Lingens v Austria* case established the rule that politicians must tolerate a more intense level of criticism than private individuals. *Lingens v Austria* (App no 9815/82) 08 July 1986, para. Moreover, in the *Castells* case, the Court stated that criticism against governments enjoys even more far-reaching protection than criticism against individual politicians, while elected representatives are entitled to enhanced protection when they voice criticism concerning political matters. *Castells v Spain* (App no 11798/85) 23 April 1992.
- ¹⁷ The issue of extremist or racist information and opinions spread by traditional or new media is a highly debated one which has led to “legislative proposals (...) that amount to threats to the right to free speech” (Hamelink, 2004: 40). The fact that laws criminalizing so-called hate speech and incitement to violence and crimes may pose a danger to freedom of expression mandates a high degree of sensitivity when making and implementing such laws, since they might have a chilling effect on freedom of expression. That is, they may impose a form of indirect censorship. From an absolutist understanding of freedom of expression one would argue that the best way to fight hate speech is through public and open discussion in an unrestricted “marketplace of ideas” – an idea that can be found back in the First Amendment of the US constitution and subsequent Supreme Court decisions (Huffman & Trauth, 2002). That point of view, however, can be argued to present a contradiction to the reality of most European countries and the spirit of the *European Convention*. Thus, while the *European Convention* does not contain an express prohibition of hate speech as other human rights instruments do, Article 10 of the European Convention is nonetheless interpreted to include mechanisms to limit the freedom of expression of those who take advantage of that right to spread hatred and violence. As was established in the *Incal* case it is not sufficient to justify the restriction of speech in order to prevent disorder or crime because the speech in question could be construed as permitting the incitement to violence. In the Court’s view, there must be a direct link between the expression and the intended violence to justify restrictions to the freedom of expression. Supplementary factors to be considered are the size of the target audience and the medium used. *Incal v Turkey* (App no 22678/93) 09 June 1998.
- ¹⁸ In the 1970s, the publishers of the “Little Red Schoolbook” were convicted by a UK court because their book was targeted at an adolescent readership and encouraged those readers to take on liberal attitudes towards sexual activity and drug use. The Court held that there had been no violation of Article 10 of the Convention since there is no European-wide norm to establish what constitutes sound morals (Dommering, 2000: 100). As the Court noted in the *Handyside* case, “it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals” – this point was confirmed again in *Müller v Switzerland* more than ten years later, where the confiscation of several paintings was considered as within the margin of appreciation of Swiss authorities and could be viewed as “necessary in a democratic society”, thus not constituting a violation of Art. 10. *Handyside v United Kingdom* (App no 5493/72) 7 December 1976, para. 48; *Müller v Switzerland* (App no 41202/98) 5 November 2002. Nonetheless, as Nowlin (2002) points out, the Court did imply that “traditional” moral values were a worthwhile consideration in the analysis of the case, thereby constructing a notion of the “good life”, which

may seem rather intuitive for many people when it concerns the moral well-being of children. However, the constitutional concern at stake should have been that children generally are not yet capable to decide what is in their own best interest and must therefore be protected from such potentially harmful influences rather than implying that it was generally preferable for them to be encouraged to prefer one “traditional” morality or another. If this had been the implication of the English obscenity law when it refers to the “corruption” of morals, Nowlin argues, “then the obscenity law should not be enforceable simply to preserve the preferred morality” (2002: 280).

- ¹⁹ So it has for example established that the protection given under the Article does not hold in cases where the “cruelties of the Nazis had been justified in a publication or if the Holocaust would have been denied” (Hamelink, 2004: 53). Any measure taken under Article 17 must be proportionate to the threat to the rights of others. In *Garaudy v France*, the Strasbourg Court found no violation of the Convention following the six months imprisonment of the applicant who had written a book entitled “The Founding Myths of Modern Israel”. Article 17 was applied. *Garaudy v France* (App no 65831/01) 24 June 2003. However, in *Lehideux and Isorni v France*, which concerned an attempt to reconsider the role of Marshall Petin in French history, the Court held that the applicants did have Article 10 protection. Speech can therefore be banned or limited where such speech has anti-democratic motives. *Lehideux and Isorni v France* (App no 24662/94) 23 September 1998.
- ²⁰ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 of 17.10.1989. Amended by Directive 97/36/EC, OJ L 202 of 30.07.1997.
- ²¹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332 of 18.12.2007.
- ²² Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity. It provides guidelines for national legislation covering all electronic media and asks television broadcasters to try out new digital methods of parental control (such as personal codes, filtering software or control chips), as well as Internet Service Providers (ISPs) to develop codes of good conduct so as to better apply and clarify current legislation.
- ²³ Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ L 378, 27.12.2006. The fact that the competitiveness of the European industries marks the occasion for the Recommendation is quite indicative of a general focus on the alleged threat to the European industries posed primarily by US exports. Again, it seems that the nature of EU competences distorts the relevance and aims of such policies to the detriment of the underlying human rights perspective.
- ²⁴ Council Directive 2000/31/EC of 8 June 2000, On Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, in the Internal Market, OJ L 178, 17.7.2000, 1.
- ²⁵ This does not preclude action in a Member State to have a provider discontinue a certain service in accordance with national law.

²⁶ Nonetheless, French and Belgian courts seem not to have applied this provision this way. In a decision of June 19, 2008, the French Supreme Court confirmed that main French ISPs can be forced, for an indefinite period of time, to block access to the content of a website - leaving open the option that the content could move to another website under its control which implies a possible duty to actively monitor. *Cour de Cassation, 19 June 2008, D 07-12.244*. In contrast, in a decision of July 31, 2008, the Belgian Court of Commerce did not impose a permanent obligation to monitor its websites for fake Lancôme perfumes on Ebay. Brussels Court of Commerce, July 31, 2008, A/07/06032. The German Supreme Court had held in 2004 and again in 2008, however, that trademark holders could require online auction providers to come up with a solution to prevent fake products to be sold, even if not currently being advertised, again implying a duty to actively monitor. For more detail see: (<http://www.crowell.com/NewsEvents/Newsletter.aspx?id=951#mediaisp2>). [Retrieved on 03 May 2009].

²⁷ Recently, concern has been expressed referring to the consequences for Internet users of a draft Regulation on the Law Applicable to non-contractual Obligations (Commission Proposal for Regulation on the law applicable to non- contractual obligations 22 July 2003 (“Rome II”) *COM(2003)0427*). While the aim of the Directive to diminish legal uncertainty was welcomed by organizations such as the European Federation of Journalists, some of its shortcomings have also been pointed out repeatedly (see for example online: <http://europe.ifj.org/en/articles/opinion-of-the-efj-on-the-rome-ii-regulation-on-the-law-applicable-to-non-contractual-obligations>). [Retrieved on 13 March 2009]. In its proposed form, the Regulation provided for cases to be heard according to the law of the jurisdiction in which the damage occurred. In case of defamation that is where distribution occurred, regardless of where the case is filed. The draft regulation does provide an exception to this, so that courts are not required to apply defamation laws that would breach their own freedom of expression rules. Concerns remain that this regulation may unduly restrict the freedom of expression of Internet publishers since distribution in the case of the Internet may well be understood as including any place the material has been downloaded, thus exposing the publishers to extensive liability of defamation laws in any Member State. Those concerns also apply for the broadcasting media, since the freedom of expression granted to them in European countries would not be protected in other countries, where the broadcast is received. The legal uncertainty that would be created could ultimately have a chilling effect on freedom of expression of the media. Eventually the provisions concerning defamation proved to be too controversial and had to be dropped from the Regulation, which was adopted in 2007 and came into force in January of 2009. Nonetheless, it seems unlikely that this issue will disappear from the European agenda. Certainly, a remaining problematic issue remains how the above mentioned Directives and the country of origin standard introduced by the *Television Without Frontiers Directive*, will be interpreted to relate to the approach taken by “Rome II” (Van Eechoud, 2006).

²⁸ In 1996, a Joint Action concerning action to combat racism and xenophobia was adopted on the basis of Article K.3 of the *Treaty on European Union*. In 2001, the European Commission put forward a Proposal for a *Council Framework Decision on combating racism and xenophobia*.

²⁹ In 1997, the Council of Europe began drafting an international treaty entitled the *Convention on Cybercrime*, which entered into force in 2004. It requires countries that ratify it to criminalize four categories of computer-related crimes: fraud and forgery, child pornography, copyright infringements and security breaches (such as hacking, illegal data interception and spreading viruses) in their domestic law. It does not extend to hate speech or incitement to violence. This is due to pressure from the US delegation, which made clear that such a regulation would contravene the First Amendment of their Constitution and prevent them from signing the treaty.

As a compromise, it was decided to make these controversial provisions subject to an additional Protocol which concerns racist and xenophobic acts and obliges the parties to criminalize “distributing or otherwise making available racist and xenophobic material to the public through a computer system” (Article 3). The provision has given rise to concerns about the danger of pre-emptive censorship by Internet Service Providers (ISPs) (Index on Censorship, 2002). However, as McGonagle (2006) has pointed out, the Protocol also contains a basic requirement of criminal law, *mens rea*, which means that ISPs should not be criminally liable in cases where they merely act as conduits, cache or host for such content. More controversially, however, Art. 5 envisages criminalization of “*insulting* publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics” (emphasis added by the author). Clearly, lowering the limits of free speech to the level of an “insult” leaves much room for abuse and may be at odds with established jurisprudence of the ECtHR (McGonagle, 2007).

³⁰ In its 2005 Opinion, the EU Network of Independent Experts on Fundamental Rights had considered the prohibition of disseminating ideas based on racial superiority or hatred is compatible with the right to freedom of opinion and expression as it is contained in various human rights instruments, including the ECHR and the European Charter. It thereby pointed out that the national law of all Member States contained provisions prohibiting racist or xenophobic behaviors, albeit to a varying degree, while striking a balance between the freedom of expression and the repression of racist behavior is mostly left to judges.

³¹ There is an option for Member States only to punish conduct, “which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting” (Article 1(2)).

³² Case C-176/03 *Commission v Council* ECR I-7879 and C-440/05 *Commission v Council* ECR I-9097.

³³ Council of European Union Framework Decision on Combating Terrorism of 13 June 2002, (2002/475/JHA). OJ 2002 L 164, 22.06.2002, 3.

³⁴ (2008/919/JHA) of 28 November 2008. OJ L 330, 9.12.2008, 21.

³⁵ Also the EP was obviously concerned about this and in September 2008 voted overwhelmingly in favor of replacing “public provocation” with “public incitement”. Since it was merely being “consulted” on the issue, however, the vote was not binding on the Council.

³⁶ As a safeguard clause, the original Framework Decision had already stated that it “shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”. In its revised version, recitals refer to the Union's commitment to ECHR and the Charter (13) and specifically note the *mens rea* requirement of the offenses contained in the Framework Decision which preclude the restriction of “the dissemination of information for scientific, academic or reporting purposes” and explicitly excludes from its scope “the expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism” (14). In its main text, it further states in Article 2 that it does not require Member States “to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability”. As Banisar notes, however, problems remain since many of the protections concern non-binding declarations while issues such as freedom of association and the freedom of speech in the religious context have

been ignored (2008: 10). Peers (2009: 19) has further noted in his comparative analysis concerning the issue of jurisdiction: “It should be noted that, as regards the Convention, the territorial jurisdiction will apply to the place where the *linked* offence was committed, which may be separate from the place where the *main* offence would be committed (...) Arguably the same rule is true of the Framework Decision. So, for example, a 'public provocation' in France to commit a 'terrorist' act in Iraq would be covered by the measures. If the reverse situation occurred (a 'public provocation' in Iraq to commit a 'terrorist' act in France), Member States would have to take jurisdiction under the Framework Decision (...), but not necessarily under the Convention, where 'passive personality' jurisdiction is merely optional (Article 14(2)(a) of the Convention)”.

³⁷ Within the Council of Europe, a *Convention on Data Protection* was issued in 1981. In addition, a protocol concerning supervisory authorities and transborder data flows has entered into force on July 1, 2004. Also the Council of Europe's Cybercrime Convention of 1997 has to be mentioned in this context.

³⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23. 11.1995, 31.

³⁹ As Asscher (2002) points out, whereas it explicitly refers to the ECHR, it also prohibits limitations of the free movement of information on the basis of the protection of privacy (Art. 1(2)). Since the Directive contains minimum harmonization, Member States will however be able to apply stricter rules. Art. 9 and recital 37 further explicitly refer to the freedom of information and the right to receive and transmit information as contained in Art. 10 ECHR.

⁴⁰ Basic principles in the Directive include the right to know where data originated; the right to have inaccurate data rectified; the right of recourse if data is processed unlawfully and the right to withhold permission to use data under certain circumstances. Further, sensitive personal data such as information about health or sexual orientation, are protected against commercial or government use without the “explicit and unambiguous” consent of the data subject.

⁴¹ The relatively far-reaching protection of personal data is a welcome effort. The extensive scope of the Directive, however, has also sparked criticism of the fact that virtually any publication of data on the Internet without prior consent of the subject is included. This, in turn, may result in undue interference with the right to free speech. It is argued that this limitation poses a serious obstacle to civil society organizations that want to exercise their control function (one cited example being the prohibition by the Swedish Data Inspection Board of a list of fur producers, published on the Internet by an animal rights organization) (Palme, 2001).

⁴² Joint Cases C-465/00, C-138/01 and C-139/01, *Österreichisches Rundfunk*, Judgement [2003] ECR I-4989.

⁴³ Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, OJ L 24, 30.1.1998, 1.

⁴⁴ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, 37.

⁴⁵ See online (http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2008/wp154_en.pdf),

- (http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2008/wp147_en.pdf) respectively. [Retrieved on 14 March 2009].
- ⁴⁶ Hague Programme on strengthening freedom, security and justice in the European Union, adopted by the European Council on 4 November 2004. See also the 2005 Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union.
- ⁴⁷ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, 60.
- ⁴⁸ See Press Release online at (http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2008/EDPS-2008-11_DPFEN.pdf). [Retrieved on 02 March 2009].
- ⁴⁹ Austria, Belgium, France, Germany, Luxembourg, Spain and the Netherlands.
- ⁵⁰ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. OJ L210, 06.08.2008, 1.
- ⁵¹ See online at: (<http://www.allbusiness.com/crime-law/law-biometrics-fingerprinting/89173971.html>). [Retrieved on 04 April 2009].
- ⁵² *S. and Marper v the United Kingdom* (App nos 30562/04 and 30566/04) 04 December 2008.
- ⁵³ Proposed Directive (COD/2007/0247) to amend the Access Directive (2002/19/EC), Authorisation Directive (2002/20/EC) and Framework Directive (2002/21/EC). Secondly, proposed Directive (COD/2007/0248) to amend the Universal Service Directive (2002/22/EC), Personal Data and Protection of Privacy Directive (ePrivacy) (2002/58/EC). And lastly, the proposed Regulation creating a new European Electronic Communications Market Authority (COD/2007/0249). For a number of critical observations please see: (<http://www.laquadrature.net/en>). [Retrieved on 05 May 2009].
- ⁵⁴ For updates on issues concerning data retention within the EU see: (<http://www.statewatch.org/eu-data-retention.htm>). [Retrieved on 13 March 2009].
- ⁵⁵ In October 2001, in a letter US President Bush asked the EU to “revise draft privacy directives that call for mandatory destruction to permit the retention of critical data for a reasonable period”. See: (<http://www.statewatch.org/news/2001/nov/06Ausalet.htm>). [Retrieved on 01 February 2009].
- ⁵⁶ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, 37.
- ⁵⁷ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, 54.

- ⁵⁸ Case C-301/06, *Ireland v Parliament and Council* (10 February 2009). See also the submission of a coalition of NGOs asking the Court to find the Directive in violation of Articles 8 and 10 of the ECHR. Available online at: (<http://www.statewatch.org/news/2008/apr/eu-datret-ecj-brief.pdf>) [Retrieved on 13 March 2009].
- ⁵⁹ Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, OJ L 024 , 30/01/1998, 1. A narrow exception allowed Member States to depart from this standard for the sake of national security and to prosecute criminal offences.
- ⁶⁰ The main points that were criticized are: a) Insufficient transparency and comprehensibility of notices or privacy policies b) Lack (of clarity) of choice given to the data subject c) Ambiguity about the status of mentioned “third parties” when it comes to onward transfer of data d) Deficiencies with respect to the adoption of security measures e) Difficulties to determine the relevance of the data for the intended use f) Weakness of implementation of the principle of access. Further, the report pointed out, as a result of new US legislation, European-origin health information, employee data, and data relating to communications services could be “exempt from the protection of SH principles and risk, accordingly, being given a lower level of protection than provided by those principles” (Dhont, Pérez Asinari & Pouillet, 2004: 107).
- ⁶¹ (2004/535/EC) Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States’ Bureau of Customs and Border Protection (notified under document number C(2004) 1914), OJ L 235, 06.07.2004, 11.
- ⁶² Joined Cases C-317/04 and C-318/04 *European Parliament v Council and Commission* (30 May 2006).
- ⁶³ An interim agreement with the United States had been in place between 19 October 2006 and 31 July 2007.
- ⁶⁴ So, for example, the filtering of sensitive data continues to be done by the Department of Homeland Security, which “in exceptional cases” now may even use this data. Also, the period of retention has been prolonged, the onward transfer to foreign agencies is now easier and no longer subject to the contained data protection standards and no mention is made of independent data protection authorities when it comes to the joint review mechanism envisaged. In fact, the report published in December 2008 concerning the working of the agreement was drawn up internally by the Privacy Office of the Department of Homeland Security without any involvement of EU representatives. Further, no dispute settlement procedure is made explicit, while in exceptional cases the Department of Homeland Security is allowed to retrieve data other than those listed (while it remains unclear how it will access this data) and the agreement seems to risk changes in US legislation may directly affect the level of data protection envisaged in the agreement.
- ⁶⁵ See note of the Council of 19 March 2009. Available online at: (<http://www.statewatch.org/news/2009/mar/eu-usa-pnr-data-state-of-play-5311-rev1-09.pdf>). [Retrieved on 20 March 2009].
- ⁶⁶ Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record Data, OJ L 82, 21.3.2006, 15. In respect of Australia see OJ 8.8.2008.

- ⁶⁷ Proposal for a Council framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes. *COM (2007) 654final*. Brussels, 06. 11. 2007.
- ⁶⁸ For the sake of the scope of this paper, the issue of copyright and intellectual property has been left out of the analysis, although it is certainly a critical aspect of the participatory potential of the regulation of content and information. Certainly since there is a trend in European Union legislation to move to stricter regulation favoring intellectual property rights over concepts such as universal access to information and communal “fair use” of knowledge (Hamelink, 1999: 160).
- ⁶⁹ Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, 43.
- ⁷⁰ See Press Release of 11 March 2009 at: (<http://www.ombudsman.europa.eu/press/release.faces/en/3838/html>). [Retrieved on 13 April 2009].
- ⁷¹ See for example the new website: (http://ec.europa.eu/beneficiaries/fts/index_en.htm). [Retrieved on 20 March 2009].
- ⁷² Communication from the Commission. European Transparency Initiative. A framework for relations with interest representatives (Register and Code of Conduct). *COM(2008) 323 final*, Brussels, 27 May.
- ⁷³ See Council website on legislative transparency: (http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1281&lang=EN&mode=g). [Retrieved on 20 March 2009].
- ⁷⁴ The principle of subsidiarity is expressed in the *EC Treaty* in Article 5. It is important to mention that the principle of subsidiarity only covers those areas in which the Community does not have exclusive competence. It determines whether it is the Community or the Member States that should take measures in an area where competence is shared. This means that only decisions in those areas that have been explicitly subsumed under its exclusive competence tend to be taken at Community level. According to this principle, large areas of cultural policy-making remain in the exclusive realm of the Member States, whereas overarching provisions are made at Union level, which nevertheless indirectly impact the national space to maneuver in those areas.
- ⁷⁵ The Directorate responsible for audiovisual policy is the Directorate General (DG) for Education and Culture. However, there are several other DGs that at one point or another have become involved through responsibilities relating to communication. These are the DG for External Relations, the DG for Enterprise, the DG for Competition, the DG for the Information Society and Media, the DG for Education and Culture, the DG for External Relations and Communication Strategy and the DG for the Internal Market.
- ⁷⁶ So, for example, the legal basis for the *Television Without Frontiers Directive* has been challenged before the ECJ, which found a number of its provisions in violation of European law, such as relating to rules on advertising limitations for tobacco products or alcohol that had were meant to enable national regulators to provide minimum protection for the viewing public (Terzis, 2008: 18). Only with the entry into force of the *Treaty of Maastricht* (1993) and the *Protocol on the system of public service broadcasting* that was adopted with the *Treaty of Amsterdam* (1999) was there a legitimate basis to initiate policy in the area of media and culture (Sarikakis, 2007: 15).
- ⁷⁷ For reasons of scope, it would be impossible to discuss all relevant instruments. For a more detailed overview, see Terzis (2008), which provides an inventory of EU measures that affect media

in an annex of twenty-three pages.

- ⁷⁸ Nonetheless Member States are allowed, according to Article 3(1) of the Directive, to impose stricter rules provided they do so on a non-discriminatory basis as set out in Article 2(2). The principle of non-discrimination is complemented with the requirement of Member States not to restrict transmission and reception of broadcasters from another Member State, which embodies an application of earlier case law on freedom of movement of goods and services. Exceptions are granted under Article 22, when it comes to the protection of minors and the prohibition of incitement to racial hatred. In those cases, Member States can block transmissions when they violate national laws on the matter.
- ⁷⁹ Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179.
- ⁸⁰ In this context, a specific concern has been how exactly jurisdiction is established. The initial decisions of the ECJ had pointed out that the provision must not be interpreted as a loophole for broadcasters to establish in a Member State with comparatively weaker requirements in order to transmit solely to another Member State. However, recent case law seems to indicate that a Member State is less likely to establish jurisdiction over a broadcaster that is providing services to its jurisdiction, if it broadcasts from another Member State (Varney, 2004: 516). The criterion of lawful establishment is crystallizing as the only test applied to the matter of jurisdiction by the Court. This trend is another indicator for a possible race to the bottom effect concerning advertising restriction following the Directive, since Member States risk the loss of broadcasters, who may favor establishment in more permissive environments. Member States thus may feel compelled to loosen up their advertising legislation in order not to impair their comparative advantage towards other Member States.
- ⁸¹ This initiative also includes the privatization of spectrum management services, the creation of a framework for digital rights management, ensuring more data security and an update of the regulatory framework for electronic communication (Terzis, 2008).
- ⁸² According to Terzis' count (2008), in 2006, DG Information Society operated 72 committees within this policy area. These committees can have great influence by fostering policy consensus and thus keeping far-reaching policy choices largely outside of public debate, as exemplified in Terzis' account of the Radio Spectrum Committee, though which the Commission had proposed a partial privatization of the spectrum.
- ⁸³ A number of other important instruments include the *Open Network Directive* (1990), which opened access to telecommunications services and networks on the basis of non-discrimination and the *Cable Ownership Directive* (1999), requiring divestment by incumbent cable operators at national levels. In 2002, a Regulatory Framework for Electronic Communications and Services (also called *Telecoms Package*) was devised, which consists of six directives and a Regulation, which together are designed to effectuate competition. The framework is currently being under review by the Commission.
- ⁸⁴ Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007.
- ⁸⁵ Maintaining pluralism can, however, be an overriding public interest that may for example justify must-carry rules that require cable operators to broadcast television programs transmitted by private broadcasters falling under the public powers of a Member State. Case C-250/06 *United*

Pan-Europe Communications Belgium SA and Others v Belgium ECR I-11135.

- ⁸⁶ Community action in the area of media ownership could be based on Art. 47 (2) and 55 of the *EC Treaty*, which relate to the freedom of establishment and freedom to provide services. Concerning media ownership rules, Community action is thus warranted by the perceived obstacles posed by national media ownership rules to the common market. Again, the economic reasoning applies, overshadowing the underlying political and cultural implications of the issue, largely due to the limited competences of the Community in the area. Still, this indirectly also coins the tone of the discourse about the issues at stake, possibly mudding the waters and at times eclipsing relevant aspects of policy-making.
- ⁸⁷ In the *Merger Regulation* Art. 21 (3) allows for special provisions to be made by Member States to ensure pluralism, including the mass media sector. Since the amendment of 1997, undertakings wishing to merge or enter into joint ventures must notify the Commission if their proposed project has global sales revenues of over €2.5 billion and if their project has a Community dimension. No special turnover thresholds are specified for media mergers. Those benchmarks leave concentration of ownership in national media markets often not intense enough to trigger anti-trust action at Community level. Even if the Commission does authorize two undertakings to join forces prior to their merging, it must be noted, however, that it continues to lie within the competence of the respective Member State to prohibit concentration in the name of media pluralism (E.U. Network of Independent Experts, 2004: 73).
- ⁸⁸ At EU level, however, the media industry is clearly also recognized in its economic potential. In the 1994 Green Paper on Audiovisual Policy (Commission of the European Communities, 1994c), which pointed to linguistic differences alongside the lack of pan-European structures as a major disadvantage compared to the US industry. It saw the audiovisual sector as representing an immense potential for growth, economic advancement and increasing employment, if European production powerhouses were to be nurtured.
- ⁸⁹ *Demuth v Switzerland* (App no 38743/97) [2002] 5 November, 2002.
- ⁹⁰ Case C-368/95 *Familiapress* [1997] ECR I-0000.
- ⁹¹ Case C-353/89 *Commission v Netherlands* [1991] ECR I-04069.
- ⁹² Case C-368/95 *Familiapress* [1997] ECR I-0000.
- ⁹³ Case 155-73 *Sacchi* [1974] ECR 00409.
- ⁹⁴ In 1994 the ECJ held that television falls into the competences of Member States. Thus, Member States are free to adopt rules to ensure pluralism while Art. 87 EC Treaty must be respected when it comes to the financing of PSB. Case C-23/93 *TV10 SA v Commissariaat voor de Media* [1994] ECR I-04795. A Commission Decision on a complaint of Portuguese commercial broadcasters in 1996 holding that the Portuguese measures did not constitute state aid was annulled by the CFI in 2000. Case T-46/97, *SIC - Sociedade Independente de Comunicaçao S.A. v Commission*, ECR II-2125. In 1999 the Commission also instigated formal proceedings against France, Italy and Portugal concerning their aid to PSB.
- ⁹⁵ Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04), OJ C 320, 15.11.2001, 5.
- ⁹⁶ The Competition Directorate General had put forward a Discussion Paper on the issue in 1998, in

order to come to terms with a Union-wide approach to public service broadcasting substituting the *ad hoc* approach of the Commission until then. The guidelines were eventually rejected by the Member States (Ward, 2004).

⁹⁷ See IP/08/1626, 4 November 2008. The draft is available at: (http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm). [Retrieved on 03 March 2009].

⁹⁸ Case C-53/00 *Ferring SA v Agence Centrale des Organismes de Sécurité Sociale* [2001] ECR I-9067. Varney (2004) notes that the decision by the Court to practically exclude all state funding agreements in connection to the provision of public services may have been somewhat exaggerate – certainly when it comes to broadcasting, since the Protocol on Public Service Broadcasting (which was annexed to the Amsterdam Treaty) would have allowed for the Commission to find a justification of state funding under Article 86(2).

⁹⁹ Case C-280/00 *Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, para. 87.

¹⁰⁰ Further concerns raised in the Commission's investigation refer to the provision of such services as e-commerce and mobile telephone services via the Dutch and German broadcasters' websites, as well as irregularities in the practices of purchase of sports rights by the German and Irish broadcasters.

¹⁰¹ This test will be administered by the KOF (Commission for the Determination of the Financial Needs of Public Service Broadcasters in Germany) and by the Court of Auditors.

¹⁰² Speech at Medienforum, Cologne, 9 June 2008. Available online at: (<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/313>). [Retrieved on 12 January 2009].

¹⁰³ Van Bijsterveld (2004: 23) points to three elementary changes, which make transparency a paramount constitutional principle, especially when it comes to the EU: (1) the traditional *trias politica* cannot find the same expression at the EU level, (2) there is a (EU-induced) shift of "public tasks" towards the private sector and (3) the new modes of governance, such as "co-decision" or the "method of open co-ordination", which do not embody the traditional constitutional guarantees, force us to find new expressions of the values of democracy and the rule of law. So, for example, in an attempt to evaluate the degree of transparency of EU institutions, Settembri (2005: 652) proposes as the yardstick for the EU to question whether "EU institutions make available to citizens all the information necessary to hold them accountable for their legislative decisions".

¹⁰⁴ In their analysis Kurpas, De Clerck-Sachsee and Brüggemann (2006) point out that the introduction of the new Financial Regulation in 2003 has limited the budgetary flexibility needed for an effective information policy.

¹⁰⁵ In fact, as Gramberger (as cited in Brüggemann, 2005: 65) concludes, information policy from Monnet until Santer had rather been coined by an effort to silence the public, which was rather successful.

¹⁰⁶ The change in names from the initial title of the White Paper on a European "communication strategy" to "communication policy" may indicate a deeper than merely nominal development, while the DG continues to be called Institutional Relations and Communication Strategy.

- ¹⁰⁷ On 27 March 2006 the online forum "Debate Europe" was launched. See: (http://europa.eu/debateeurope/index_nl.htm). [Retrieved on 13 June 2009].
- ¹⁰⁸ Memo/06/237, Brussel, 12 June 2006. Available online at: (<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/237&format=HTML&aged=0&language=EN&guiLanguage=fr>). [Retrieved on 11 June 2009].
- ¹⁰⁹ See online at: (<http://www.euractiv.com/en/constitution/future-eu-conference-involvement-civil-society-needed/article-156073>). [Retrieved on 12 June 2009].
- ¹¹⁰ More detailed information in the Commission's audiovisual and Internet strategy are included in two Communications (SEC(2008)506/2; SEC(2007)1742).
- ¹¹¹ See Press release online at: (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/640&format=HTML&aged=0&language=EN&guiLanguage=en>). [Retrieved on 13 March 2009]. This latter initiative may be seen as an alternative to the initial idea contained in an earlier version of the White Paper to convert Europe by Satellite into a European news agency to enhance media coverage of the European policy-making process. However, this proposal was met with such severe opposition that it had to be dropped in the final version. Even though, during the presentation of the White Paper to the press, Commissioner Wallström saw herself faced with a continuous stream of questions on the Commission's intentions underlying the wish to set up such a service. Clearly, suspicions and concerns about European propaganda efforts are shared by many journalists and other observers and have not been countered convincingly as yet. Whereas the noble intentions of the White Paper seem to have gotten caught up in "just anger" and suspicion of propaganda on the side of professional journalism, the factual reality and aims of strategic communication efforts as exemplified in various pre-accession campaigns in the new Member States remain outside the debate.
- ¹¹² From a general human rights perspective, any measure of the degree of invasiveness of the European regime for data retention would have to answer to a set of criteria in order to be acceptable. Firstly, it would have to be of a temporary nature. Secondly, its effectiveness would have to be proven beyond the doubt and thirdly, it would have to meet the conditions of subsidiarity and proportionality (Hamelink, 2004). The criterion of efficiency is one of the major criticisms towards the extensive data retention proposals, since linking an individual to a set of actions through checking logs is at best a feeble link and may result in the conviction of innocents. Further, it is questionable if data retention can at all make a contribution to improved law enforcement that could not be achieved by subsidiary, less intrusive means. Further – considering the content of Article 8 of the European Convention, which protects the right to a private life – the *indiscriminate* collection of traffic data is in violation of a key principle of the rule of law. Citizens must at all times be aware of the conditions under which the state may engage in surveillance of their actions, so that they can adapt their behaviour to evade undesired intrusions. In addition, the extensiveness of retention makes it questionable if the measure can be considered proportionate towards its law enforcement objectives, or for that matter would fulfil the criterion of "necessary in a democratic society" as established by the case law of the European Court of Human Rights.
- ¹¹³ One of the central demands in the report is to establish a strict definition of a user's "consent" to share his data in the light of the unequal power balance between users, private companies or governments.
- ¹¹⁴ As cited in Press Release of 06 March 2009 at: (<http://www.europarl.europa.eu/news/expert/Info>

press_page/019-50634-061-03-10-902-20090302IPR50633-02-03-2009-2009false/default_en.htm). [Retrieved on 13 March 2009].

- ¹¹⁵ An up-to-date overview of relevant case law of the Community Courts on matters of audiovisual policy can be found at: (http://ec.europa.eu/avpolicy/info_centre/library/case_law/index_en.htm). [Retrieved on 12 March 2009].
- ¹¹⁶ During its existence, the EP has adopted a number of Recommendations in which it pointed to the need to regulate in order to guarantee pluralism, which were mostly inspired by a concern about cross-media ownership across Europe and concentrations (Doyle, 2007) – it did so again in 2003 in response to the UNESCO initiative concerning cultural diversity.
- ¹¹⁷ Internally, Member States normally rely on combinations of different measures to protect media pluralism, including authorization systems for broadcasting services, rules on diversity of content, rules on media ownership (in particular the setting of thresholds in the form of a maximum audience share, or a maximum share of capital), cross-ownership rules and provisions to make broadcasting time available to independent third-party content providers. In the meantime, Article 11(2) has entered the 2000 Charter of Fundamental Rights of the European Union and states “the freedom and pluralism of the media shall be respected”. It will have to be examined if the provisions of Article 11 (2) of the Charter require an obligation for Member States to use their powers to actively promote media pluralism and to control concentration from the perspective of the requirements of pluralism. To safeguard pluralism of outlets at national level, the Media Division of the Directorate for Human Rights of the Council of Europe has drawn up several recommendations, which, in the absence of a coherent pan European mechanism, could help protect the media landscape from the most dangerous effects of high levels of concentrations and intertwining between media and political power (Council of Europe, 2004a). These include measures such as strengthening community media; including the contribution to pluralism of opinion as an obligatory objective when granting broadcasting licences; enforcing a clear separation between political authorities and the media; increasing the transparency of decision-making; drawing up legislation to strengthen editorial independence as well as an appeal to media organizations themselves to adopt functioning self-regulatory mechanisms to safeguard editorial independence.
- ¹¹⁸ According to Deutsche Welle, both ARD and ZDF were set to scale down their Internet services “as a precautionary measure”, while WDR-director Fritz Pleitgen expressed concerns that this attitude of the Commission towards a narrow interpretation of public service may amount to forcing PSBs into a niche function, excluding it from effectively accessing new platforms such as the Internet (Meier & Mai, 2005).
- ¹¹⁹ Again, the Council of Europe has taken an entirely different approach to this issue (for further detail see Jacubowicz, 2007).
- ¹²⁰ See report online at: (<http://www.euractiv.com/en/opinion/eu-sets-communication-priorities-2009/article-176639>). [Retrieved on 13 June 2009].
- ¹²¹ See report online at: (<http://www.euractiv.com/en/eu-elections/parliament-unveils-choice-campaign-eu-elections/article-180390>). [Retrieved on 13 June 2009].
- ¹²² See: (<http://www.europartv.europa.eu/>). [Retrieved on 13 June 2009].

¹²³ More generally, one may wonder why the White Paper pays so little attention to other governance-related initiatives with which it shares a number of common elements and certainly common problems. The issue at stake is on the one hand so elementary and implies such a large area of policy that warrants a concerted efforts beyond the reach of one DG – indeed beyond the reach of any EU institution – it seems almost like an indication of hubris, if not strong idealism, to issue such a document under the auspices of just one Commissioner. There is a related legal issue that must not be ignored in this context: according to its legal service, the Commission has the right (mind you: not the duty) to inform EU citizens about its activities as a result of its institutional prerogatives (Kurpas et al. 2006: 2). However, such a right is a far cry from a clear mandate to devise a more general policy that comprises all aspects of communication, while at the same time key areas such as civic education and media policy largely remain an exclusive competence of Member States.