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Minority rights and freedom of expression: a dynamic interface

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Chapter 7 – Regulation and facilitation of expression for minorities: media-related pluralism and cultural diversity

- 7.1 Pluralistic tolerance and information- and media-related pluralism
- 7.2 Media-related pluralism: structural and substantive considerations
 - 7.2.1 Conceptual confusion
 - 7.2.2 Structural considerations
 - 7.2.2(i) Source/ownership
 - 7.2.2(ii) Outlet
 - 7.2.3 Substantive considerations
 - 7.2.4 Gauging media-related pluralism
 - 7.2.4(i) State obligations
 - 7.2.4(ii) Media responsibilities
- 7.3 Media-related pluralism: overview of international legal standards
 - 7.3.1 Council of Europe
 - 7.3.2 European Union
 - 7.3.3 FCNM: evaluation
 - 7.3.4 ECRML: evaluation
- 7.4 Cultural diversity
 - 7.4.1 UNESCO Declaration on Cultural Diversity
 - 7.4.2 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
 - 7.4.3 European-level measures for the promotion of cultural diversity
 - 7.4.3(i) Television without Frontiers Directive
 - 7.4.3(ii) Audiovisual Media Services Directive
 - 7.4.3(iii) Public service broadcasting
 - 7.4.3(iv) Must-carry regulations
 - 7.4.4 World Summit on the Information Society

Introduction

This chapter picks up on the theme of pluralistic tolerance, addressed earlier in Chapter 2. It presents two specific applications of the generic principle: media-related pluralism and cultural diversity. Meaningful analysis requires a certain amount of unpackaging of the concept of media-related pluralism. The unpackaging that takes place here distinguishes between structural and substantive aspects of media-related pluralism. The attempt at conceptual clarification is followed by an assessment of relevant legal standards at the international level. The attention then shifts to cultural diversity, which is examined here on the basis of: (i) its relevance to substantive aspects of media-related pluralism/diversity of media content, and (ii) the ability of the media to advance the goal of cultural diversity.

7.1 Pluralistic tolerance and media-related pluralism

The general principle of pluralistic tolerance outlined in Chapter 2 has many offshoots which give rise to specific, idiosyncratic applications of the principle. These specific applications remain connected to the general principle, however, and in the case of freedom of expression, the nodal connection is particularly strong. This is because pluralistic tolerance is only possible when a dialogical relationship exists between various societal groups. The existence

of such a relationship depends in turn on the existence of an adequate number of appropriate fora in which inter-group dialogue can take place. As Peter Dahlgren has pointed out, “pluralistic society should contain many different forms of public discourse, with many registers and inflections”.¹

Groups require expressive opportunities for political and cultural reasons and their existence can prove determinative of whether the right to freedom of expression is real or merely illusory in particular circumstances. These expressive opportunities facilitate participation in political affairs and public life; the articulation and advancement of cultural values and identities and thereby lifestyle validation and cultural transmission. But pluralistic tolerance is not uni-, but multi-directional. A number of corollaries follow from these premises: first of all, that expressive opportunities must be nurtured for all (democracy-beholden) groups.

Secondly, the importance of the right to receive information, especially about other groups, is reinforced. Inter-group or intercultural dialogue and understanding require the presence of communicative intent and the realisation of that intent. Such reasoning underscores “the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”.² This quotation has admittedly been lifted out of its original context here, but justifiably so, because its pairing of “diverse and antagonistic sources” is very instructive for present purposes. In the interest of promoting pluralistic tolerance, it is not enough to merely insist on the availability of a diversity of sources of information – as is the wont of most pertinent international standard-setting documents; the further requirement that at least some of those sources be discordant with one another is also crucial. This argument holds equal validity in the contexts of inter-cultural relations and of public deliberation on matters of general interest. Prejudice, ignorance and Mill’s “dead dogma” are the dangers to be averted here.

Denis McQuail has enumerated the “Main public benefits of diversity” as follows:

- Opening the way for social and cultural change, especially where it takes the form of giving access to new, powerless or marginal voices
- Providing a check on the misuse of freedom (for instance, where the free market leads to concentration of ownership)
- Enabling minorities to maintain their separate existence in a larger society
- Limiting social conflicts by increasing the chances of understanding between potentially opposed groups and interests
- Adding generally to the richness and variety of cultural and social life³

McQuail’s insightful list prompts a number of general remarks. First, taken together, these identified benefits constitute a persuasive argument supporting the view that diversity is a public good. Second, it is clear that minorities stand to benefit significantly from the existence of media-related diversity. Third, the list convincingly demonstrates the umbilical nature of the link between media-related pluralism and access to the media.

In more specific terms, though, the benefit of “Limiting social conflicts by increasing the chances of understanding between potentially opposed groups and interests” is of greatest

¹ Peter Dahlgren, “Enhancing the Civic Ideal in Television Journalism”, in Kees Brants, Joke Hermes & Liesbet van Zoonen, Eds., *The Media in Question: Popular Cultures and Public Interests* (Sage Publications Ltd., London, 1998), pp. 89-100, at p. 92.

² Black, J. (delivering the opinion of the Court), *Associated Press v. United States*, 326 US 1, at 20.

³ Denis McQuail, *McQuail’s Mass Communication Theory* (5th Edition) (Great Britain, Sage Publications Ltd., 2005), p. 197.

immediate interest. This point rests on the intuitive logic that greater dialogical interaction between societal groups is likely to breed greater familiarity between them. In developing a parallel line of thought, Joseph Raz has argued that the expression and portrayal in public of different lifestyles serve the dual functions of validation and familiarisation. He refers to contemporary society's high dependence "on public communication to establish a common understanding of the ways of life, range of experiences, attitudes, and thinking which are common and acceptable in their society."⁴

7.2 Media-related pluralism: structural and substantive considerations

In any consideration of pluralism in the realm of freedom of expression, questions concerning the purpose, design and impact of media pluralism are likely to predominate. These questions arise logically and legitimately from the particularly influential role played by the media in modern democratic society (for a more detailed discussion of relevant matters, see Chapter 2, *supra*). As Thomas Gibbons has put it: "pluralism requires that programming should be distributed so that no particular point of view gains a disproportionate advantage from use of a medium which is pervasive and relatively limited in the variety of channels that it can provide".⁵ This view is couched in terms of distributive or procedural fairness, depending on where the emphasis is laid. The fundamental public-interest rationale being applied here is that no vested interest – whether State, politically-partisan, or sectional third-party (especially corporate) – should be allowed to dictate or distort the range of available information. It is necessary to foreclose the possibility that political and cultural narratives be unduly controlled by factional or even majoritarian interests. The range of available information is, after all, the raw material which human cognitive and emotional faculties process into opinions.

Structural pluralism and substantive or content pluralism are intimately linked. However, as David Ward has stressed in a recent report on content diversity for the Council of Europe, "Although the protection of structural pluralism remains a key policy objective in the media sector its impact on content pluralism in a comparative context has been a neglected field of research".⁶ Here – as in Ward's report – the linkage between both types of pluralism is viewed as essential.

7.2.1 Conceptual confusion

In one of his most famous treatises, the legal theorist Wesley Newcomb Hohfeld remarked that "in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression".⁷ Pluralism in respect of the media could certainly be considered to be such a "chameleon-hued" word. As noted in Chapter 4:

⁴ Joseph Raz, "Free Expression and Personal Identification", 11 *Oxford Journal of Legal Studies* (No. 3, 1991), pp. 303-324, at 312.

⁵ Thomas Gibbons, *Regulating the Media* (Second Edition) (London, Sweet & Maxwell, 1998), p. 98.

⁶ David Ward, Final report on the study on "the assessment of content diversity in newspapers and television in the context of increasing trends towards concentration of media markets", Group of Specialists on Media Diversity (MC-S-MD), Media Division, Directorate General of Human Rights, Council of Europe, 27 February 2006, Doc. No. MC-S-MD (2006) 001, p. 5.

⁷ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (Ed. Walter Wheeler Cook) (USA, Yale University Press, 1919), p. 35. This book comprises Hohfeld's two seminal articles, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning [I]", (1913) 23 *Yale Law Journal*, 16, and "Fundamental Legal Conceptions as Applied in Judicial Reasoning [II]", (1917) 26 *Yale Law Journal*, 710, and other materials.

the use of the term is bedevilled by a lack of definitional precision and consistency across international instruments and academic literature (and notoriously even within international instruments and in the works of individual authors). These inconsistencies and the despairing confusion which they have generated have been well-documented, not least in the context of freedom of expression and information.⁸ Some definitional decortication is therefore in order if we are to disabuse ourselves of prevalent misunderstandings arising from inconsistent applications of this term.

The (perceived) interchangeability of the terms “pluralism” and “diversity” often lies at the source of the aforementioned inconsistencies of usage. Some authors and bodies have clear preferences for one term or the other, whereas some use both terms seemingly indiscriminately.⁹ The absence of any widely-recognised definition of either term in international legal instruments merely exacerbates the conceptual messiness. Some commentators have attempted to painstakingly establish clear distinctions between the two, but their efforts are ultimately unconvincing. In light of the conceptual circularity involved, the approach to definitions and terminology pursued here is purely pragmatic. It does not claim to set out an authoritative, hard-and-fast distinction between “pluralism” and “diversity”, but merely to provide a reasoned frame for further analysis. Thus, as already set out in Chapter 2.¹⁰

Pluralism “is generally taken to refer to issues of media ownership; of choices available to the public between providers of services. Diversity, for its part, is most often taken to refer to the range of programmes and services available to the public. The legal and semantic overlap between pluralism and diversity is unclear, and the terms are frequently used interchangeably, not only by the Court itself, but also by expert commentators.”¹¹

This tentative distinction between pluralism and diversity will now be pruned in order to allow for further analytical growth. Earlier, general references to pluralism relating to the media have tended to be couched as “media-related pluralism”. This term has been chosen advisedly: the usefulness of the qualifier, “media-related”, is that it encapsulates both media pluralism and media diversity. Its usefulness is truly borne out when discussing texts that use both terms interchangeably.

A number of commentators have pointed out the unhelpful but continuing tendency to elide the terms, “media ownership” and “media pluralism”.¹² Dietrich Westphal has correctly suggested that ownership does not convey the same meaning or conceptual complexity as pluralism, but that the terms’ continued elision is due, at least in part, to the predominance of European Union policy developments in this area, which emphasise competition issues and single market objectives.¹³

7.2.2 Structural considerations

⁸ Dietrich Westphal, “Media Pluralism and European Regulation” [2002] EBLR 459-487.

⁹ See, by way of dreadful example: Media diversity in Europe – report prepared by the AP-MD (Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions), Doc. No. H/APMD (2003) 1, December 2002. This report is discussed further, *infra*.

¹⁰ Chapter 2, *supra*, p. 26.

¹¹ See, for example, the writings of Tom Gibbons and Eric Barendt.

¹² David Ward (CoE, 2006), *op. cit.*, p. 5.

¹³ Dietrich Westphal, “Media Pluralism and European Regulation”, *op. cit.*, p. 487.

The thrust of the observations and arguments of the preceding paragraph are rather general in their inclination. They strongly suggest that media pluralism is merely instrumental (to the goal of informational pluralism), but upon closer examination this initial suggestion is broken down and the lines of argumentation finessed. Gibbons, again, has usefully distinguished between three distinct levels of media-related pluralism: content, source and outlet.¹⁴ Of these three levels, content is the most substantive in character and therefore the ultimate end-goal. It is concerned with variety in political and cultural media output, both as regards information and opinion. Source and outlet, by contrast, are instrumental. They are useful means by which the ultimate end-goal may be achieved. However, they are not entirely dispositive as they cannot, of themselves, guarantee the achievement of the ultimate end-goal.

Other analyses also attempt to disaggregate the different levels of “media pluralism”, such as the following example from the Council of Europe’s Committee of Ministers, which states that the notion “should be understood as diversity of media supply, reflected, for example, in the existence of a *plurality of independent and autonomous media* (generally called structural pluralism) as well as a *diversity of media types and contents (views and opinions) made available to the public*”.¹⁵ Again, pride of place is given to media “supply” (or output or content, depending on the preferred terminology). The need to stress the interrelationship between substantive and structural considerations when determining pluralism is also replicated. However, the distinction between the “plurality of independent and autonomous media” and “diversity of media types” is not drawn as a bright shining line. To what extent do these formulations correspond to Gibbons’ neater categories of “source” and “outlet”, respectively? It is also puzzling that instead of bracketing two instrumental aspects of pluralism together and recognising the separateness of the substantive aspect, as rationalised in the previous paragraph, the Committee of Ministers opted instead to consider a “diversity of media types” as more substantive than structural and therefore shack it up with “media contents”.

In light of these puzzles, it is submitted here that the disaggregation carved out by Gibbons is cleaner. One possible shortcoming of his disaggregation, however, is that it is likely to become increasingly difficult to sustain in light of continued trends towards technological convergence and vertical integration (of programme production and distribution). These developments tend to blur distinctions between substantive and structural aspects of the media that have been more obvious in the traditional broadcasting sphere.

7.2.2(i) Source/Ownership

Although it was written over 50 years ago, the seminal publication of the Commission on Freedom of the Press, *A Free and Responsible Press*, contains much wisdom that has managed to retain its relevance in modern times. The Commission warned, in micro terms, that “the first danger to free expression will always be the danger at the source, the timidity of

¹⁴ Thomas Gibbons, “Concentrations of Ownership and Control in a Converging Media Industry”, in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157. This distinction is replicated in the Joint Declaration on Diversity in Broadcasting, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFOM, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 12 December 2007.

¹⁵ (emphasis per original) Explanatory Memorandum to Recommendation No. R (99)1 of the Committee of Ministers to member states on measures to promote media pluralism, adopted on 19 January 1999, para. 3.

the issuer, or his purchasability”.¹⁶ The danger, of course, is considerably amplified when considered in macro terms. Thus, the Commission posited that “[T]hrough concentration of ownership the flow of news and opinion is shaped at the sources; its variety is limited”,¹⁷ and that this “[C]oncentration of power substitutes one controlling policy for many independent policies, lessens the number of major competitors, and renders less operative the claims of potential issuers who have no press.”¹⁸

The entrenchment of the mass media oligopoly dominated by the corporations referred to by Ben Bagdikian – descriptively rather than admiratively – as “the Big Five”¹⁹ is frequently used as an example of how the concentration of media ownership can determine the fundamental course of news and cultural production. Edward S. Herman and Noam Chomsky consider the mass media of the US to be “effective and powerful ideological institutions that carry out a system-supportive propaganda function”.²⁰ Indeed, their propaganda model:

sees the media as serving a “societal purpose,” but not that of enabling the public to assert meaningful control over the political process by providing them with the information needed for the intelligent discharge of political responsibilities. On the contrary, a propaganda model suggests that the “societal purpose” of the media is to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and the state. The media serve this purpose in many ways: through selection of topics, distribution of concerns, framing of issues, filtering of information, emphasis and tone, and by keeping debate within the bounds of acceptable premises.²¹

At least three caveats should be entered here. First, Herman and Chomsky are not known for the timidity of their political opinions. Second, their analysis and criticisms focus on the US media, and third, their analysis is now somewhat dated, having been based on trends up to the late 1980s. Nevertheless, these caveats should not detract unduly from the underlying validity and force of the criticisms made. The meticulous study undertaken by the authors does raise very serious questions about the lack of independence and impartiality of the mass media, which is also significantly compromised by the cosiness of relationships between leading figures in the political and journalistic establishments.²² Moreover, and this is an enduring point that certainly has not been eroded by the passage of time: the mass media dispose of immense power to create and shape news and cultural content. In the quotation above, Herman and Chomsky very usefully disaggregate a number of the different stages in the production chain, each of which presents new opportunities for shaping the informational product before it is finally offered to the public.

The ability of the media to influence the collection, production and presentation of information allows them to exert considerable influence over the formation of public opinion. When media ownership becomes concentrated in the hands of a small elite, the ability to steer public debate and ultimately public opinion becomes similarly concentrated. The danger that arises in such a scenario is evident from the observation that “smoothest road to control of

¹⁶ The Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, Chicago, 1945?), pp. 113-114.

¹⁷ *Ibid.*, p. 124.

¹⁸ *Ibid.*, p. 130.

¹⁹ Ben H. Bagdikian, *The New Media Monopoly* (Boston, Beacon Press, 2004). The five conglomerates in question are: Time Warner, the Walt Disney Company, Rupert Murdoch’s News Corporation, Viacom and Bertelsmann – pp. 3 *et seq.*

²⁰ Edward S. Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Great Britain, Vintage, 1994), p. 306.

²¹ *Ibid.*, p. 298.

²² Anthony Lewis...

political conduct is by control of opinion”.²³ Granted, ability to influence should not automatically be equated with “control”, but the potential danger for the former to grow into the latter is patent.

The US does not have a monopoly on extreme concentrations of media ownership. The most infamous home-grown European example of media ownership concentration is Italy, which has drawn intense scrutiny and stern criticism from a number of international organisations, including the Council of Europe (Parliamentary Assembly,²⁴ Venice Commission²⁵), European Union (Parliament²⁶) and the OSCE Representative on Freedom of the Media.²⁷

The precise concern, as stated in the PACE Resolution on the so-called “Italian anomaly”, is that “concentration of political, commercial and media power” in the hands of the then Italian Prime Minister, Silvio Berlusconi, is jeopardising media pluralism, as guaranteed by Article 10 of the European Convention on Human Rights. This state of affairs has resulted from the collective failure of successive Italian governments to effectively grapple with persistent conflicts between political and media (ownership) interests - by legislative or other means. The nature of the concentration of power is as follows: the Italian television market has in effect become a duopoly as Mediaset, a company owned by the Prime Minister, along with RAI, the public service broadcaster, “command together about 90% of the television audience and over three quarters of resources in the sector”; a situation which gives rise to anti-trust concerns.²⁸ The much-publicised conflict of interests involving the Prime Minister is democratically problematic,²⁹ especially in light of documented political interference with the operations of the RAI. Furthermore, the situation was likely to be exacerbated by the adoption of the Gasparri and Frattini Laws (see further, *infra*).

The entire case for plurality of sources and ownership rests on the premise that there is an assumptive – or perhaps even probabilistic – relationship between source/ownership and

²³ John Dewey, *The Public and its Problems* (Chicago, The Swallow Press, Inc., 1954), p. 182.

²⁴ Monopolisation of the electronic media and possible abuse of power in Italy, Resolution 1387 (2004) (Provisional Edition), Parliamentary Assembly of the Council of Europe, 24 June 2004 and Monopolisation of the electronic media and possible abuse of power in Italy, Report of the Committee on Culture, Science and Education (Rapporteur: Mr. Paschal Mooney), Parliamentary Assembly of the Council of Europe, 3 June 2004, Doc. 10195 (see also the Opinion of the Committee on Legal Affairs and Human Rights, (Rapporteur: Mr. Abdülkadir Ates), 22 June 2004, Doc. 10228). See further: Tarlach McGonagle, “Parliamentary Assembly: New Resolution Critical of Media Concentration in Italy”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2004-7: 3.

²⁵ Opinion on the compatibility of the Laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media (Opinion No. 309/2004), European Commission for Democracy through Law (Venice Commission), 13 June 2005, Doc. No. CDL-AD (2005) 017. See further: Tarlach McGonagle, “Venice Commission: Opinion on Freedom of Expression and Media Pluralism in Italy”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2005-8: 5.

²⁶ Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs (Rapporteur: Johanna L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final). See further: Tarlach McGonagle, “European Parliament: Adoption of Report on Media Independence and Pluralism”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2004-6: 6.

²⁷ “Visit to Italy – The Gasparri Law: Observations and Recommendations”, OSCE Representative on Freedom of the Media, 7 June 2005.

²⁸ Further details of how this duopoly is compounded are provided in para. 5 of the Resolution and in the extensive, identically-titled report on which the Resolution is based: both, *op. cit.*

²⁹ As stated in the OSCE RFOM’s report: “Italy has an ongoing record of control over public-service television by political parties and governments. As the Prime Minister is also the country’s main media entrepreneur, co-owning *Mediaset*, the ‘traditional’ fears of governmental control of *RAI* are aggravated by worries of a general governmental control of the nation’s most important information source, television” –*op. cit.*, p. 14.

content. As noted, for instance, by the Recommendation No. R (99) 1 of the Committee of Ministers of the Council of Europe on measures to promote media pluralism, “the existence of a multiplicity of autonomous and independent media outlets at the national, regional and local levels *generally enhances* pluralism and democracy”.³⁰ The foregoing discussion of US and Italian examples weighs very heavily in support of that crucial premise, but that does not mean that its veracity can be taken for granted (hence the italicisation of “generally enhances” in the foregoing citation). According to Toby Mendel:

A highly concentrated media market may offer enormous choice in terms of number of broadcast channels and even of topics and styles. However, it is also susceptible of political and/or owner interference with the result that the coverage of certain important political issues may be suppressed or limited, undermining the quality of information made available to the public.³¹

On a similar tack, many scholars have cautioned against equating plurality of source/ownership or indeed outlets with diversity of media content. The former is primarily quantitative, whereas the latter, which is best gauged by media performance, is primarily qualitative. As Jan van Cuilenburg has put it: “highly competitive media markets may still result in excessive sameness of media contents, whereas one should at least theoretically not exclude the possibility of media oligopolies or even monopolies to produce a highly diverse supply of media content”.³² Indeed, such caution is not just theoretical: some recent empirical data suggests that there is not always a “a strong link between concentration of markets and the diversity of content” and that even “[M]arkets that are strongly concentrated can demonstrate similar levels of content diversity as markets that are less concentrated”.³³

Relevant assumptions about linkage between ownership and content also apply, *mutatis mutandis*, to minority ownership and minority content. In the US, for example, it has been a longstanding view of the Federal Communications Commission (FCC) that “ownership is a prime determinant of the range of programming available”.³⁴ Consistent with that view, it has further concluded that there is an “empirical nexus between minority ownership and greater diversity”.³⁵ The well-known *Metro Broadcasting* case provides detailed judicial treatment of that empirical nexus and merits some consideration here.³⁶ Importantly, the FCC and Congress conceded that the empirical assumption in question could not be clinically proven, but they did insist on the careful and protracted enquiry, study and reflection that preceded the

³⁰ (emphasis added). Recital 4, Recommendation No. R (99) 1 of the Committee of Ministers to Member States on measures to promote media pluralism, adopted on 19 January 1999 at the 656th meeting of the Ministers’ Deputies.

³¹ Toby Mendel, “Restrictions on Political Expression”, in Susanne Nikoltchev, Ed., *Political Debate and the Role of the Media: The Fragility of Free Speech, IRIS Special* (Strasbourg, European Audiovisual Observatory, 2004), pp. 41-50, at 44.

³² Jan van Cuilenburg, “Diversity Revisited: Towards a Critical Rational Model of Media Diversity”, in Kees Brants, Joke Hermes & Liesbet van Zoonen, Eds., *The Media in Question: Popular Cultures and Public Interests* (Sage Publications Ltd., London, 1998), pp. 38-49, at 41.

³³ David Ward, CoE 2006, *op. cit.*, p. 2.

³⁴ *Metro Broadcasting, Inc., v. Federal Communications Commission, et al.*, 497 US 547, at 549.

³⁵ *Ibid.*

³⁶ The Supreme Court’s judgment in *Metro Broadcasting* was later overturned by its subsequent judgment in *Adarand Constructors, Inc. v. Peña*, 515 US 200, on the grounds that the wrong standard of scrutiny had been applied by the Court in the former case. In short, the Court in *Metro Broadcasting* had held that congressionally mandated “benign” racial classifications only had to satisfy “intermediate scrutiny”. As such, it departed from earlier judicial precedents to which the Court returned in *Adarand*, viz. that strict scrutiny of governmental racial classifications is essential due to the difficulty of determining whether such a classification is in fact “benign”. This, however, should not detract from the interest/relevance of the FCC’s rationales for its minority ownership provisions, as quoted.

conclusion that such linkage did in fact exist. The following passage from the Supreme Court’s judgment reveals the thinking behind the FCC’s minority ownership provisions:

Neither Congress nor the FCC assumes that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete “minority viewpoint” on the airwaves. Nor do they pretend that all programming that appeals to minorities can be labeled “minority” or that programming that might be so described does not appeal to nonminorities. Rather, they maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. This judgment is corroborated by a host of empirical evidence suggesting that an owner’s minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities, and has a special impact on the way in which images of minorities are presented. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies. [...] ³⁷

7.2.2(ii) Outlet

The existence of a range of media outlets is similarly an important, but of itself, insufficient safeguard for the preservation of media-related pluralism. More specifically, it plays an assumptively instrumental role in ensuring diversity of media output. Having said that, the primary freedom of expression interest in maintaining a plurality of media outlets in society is that such plurality implies at least the potential for more extensive access to expressive opportunities. In a roundabout way, extensive access for diverse groups in society should enhance the availability of diverse media output.

The argument from pluralism is not the strongest argument that could be furnished for the importance of maintaining a wide range of media outlets in society. A more persuasive argument is that a variety of outlets should, on the balance of probabilities or law of averages, lead to the possibility of individuals and groups having more effective expressive opportunities. As is evident from the discussion of media functionality (s. 4.3.1, *supra*), different types of media outlet are more suitable than others for the dissemination of particular types of media content. Thus, the more plurality in available media outlets, the greater the likelihood that there will be suitable channels for various kinds of media content to be transmitted. Moreover, the plurality of outlets should also extend to geographical reach, linguistic competences, technological capacities, etc. To illustrate the point: the contribution of a wide selection of national newspapers to overall diversity in media output may be limited, if the newspaper titles are not distributed throughout the country. Similarly, if all broadcasting stations transmit content exclusively in the State language, that will also be to the detriment of overall diversity in media output. An abundance of diverse content on digital television may be irrelevant to minorities due to the prohibitive cost of acquiring the technology needed to view that content. These practical examples all demonstrate the need for a variety of qualitatively different media outlets to be fostered if media-related pluralism is to be guaranteed at all geographical levels and for all sections of society.

A further, consumer-oriented, argument is that a pluralistic offer of media outlets enables individuals to choose the means by which they receive their information and ideas in accordance with their own consumption preferences and habits. This argument could also be described as autonomy-based, or even as a variant sub-element of the democratic-participation theory (eg. to the extent that one is more receptive to information and ideas

³⁷ *Ibid.*, p. 549; 579-582.

communicated in a way or format with which one is familiar, thereby increasing the ease of intelligibility and ultimate effectiveness of the communication). The argument gains in significance in the context of increasingly converged and multifunctional media. In this technological context, access to a wide range of media platforms is an essential (but not necessarily sufficient) requirement for access to truly diverse content and services. It is therefore important that different types of content-providers, especially (different types of) broadcasters have equitable access, to and are able to operate on, different distribution platforms.³⁸ In this connection, it has been urged that the digital dividend (i.e., the “radio spectrum freed as a result of the switchover from analogue to digital broadcasting”³⁹) be used for the advancement of diversity in broadcasting.⁴⁰

Opinions are divided on how external pluralism (i.e., pluralism across the entire media sector),⁴¹ can best be achieved. Some scholars hold out that the objective is best-served by (State-induced) encouragement of “a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a far preferable course of action”.⁴² The latter model is that of internal pluralism, which is usually reserved for public service broadcasters. This proposition is, however, sometimes regarded as inadequate, as “the mere increase in the number of channels which will be brought about by digital television is not sufficient in itself to guarantee media pluralism”.⁴³ Other additional criteria, such as the determination of relevant markets and shares of relevant markets, remain important for assessing whether sufficient pluralism can be achieved.

7.2.3 Substantive considerations

The interrelationship and interdependence between structure and substance in respect of media-related pluralism has already been underscored. Structural factors are often perceived primarily in instrumentalist terms, in view of their impact on substantive matters. The focus of this subsection will be on media content/output/production and it will accordingly draw on the instrumentalist perception of structural considerations. It will therefore lean in the direction of constructivist or post-critical theories concerning the generation and acquisition of knowledge. Thus, in contradistinction to objectivist theories, it will be assumed that information (and, *a fortiori*, ideas) presented by the media is always refracted through a miscellany of vested interests. Moreover, information-gathering processes also affect the manner in which information is finally presented to the public. In epistemological terms, then, information is invariably relativised by a range of contextualities and contingencies. Sue Curry Jansen has developed this point, stating *inter alia* that “the new sociology or anthropology of knowledge assumes that knowledge, truth, and facts are social constructions,

³⁸ This point is made, *inter alia*, in the Joint Declaration on Diversity in Broadcasting, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFOM, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 12 December 2007.

³⁹ Declaration of the Committee of Ministers on the allocation and management of the digital dividend and the public interest, 20 February 2008.

⁴⁰ *Ibid.*; Joint Declaration on Diversity in Broadcasting, *op. cit.*

⁴¹ See further, Eric Barendt, *Broadcasting Law*, *op. cit.*, pp. 96-97.

⁴² Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970), p. 671.

⁴³ European Commission for Democracy through Law (Venice Commission), Opinion on the compatibility of the Laws “Gasparri” and “Frattini” of Italy in the field of freedom of expression and pluralism of the media, June 2005, Opinion No. 309/2004, para. 264; see also, PACE: discussion of Italian Gasparri Law, *op. cit.*

artifacts of communication, community, and culture”.⁴⁴ How information is then processed into knowledge depends on other, subjective epistemological criteria, such as “perceptual and interactional strategies”,⁴⁵ again, as Curry Jansen has claimed, “we *always* approach knowledge through the portals of our interests”.⁴⁶

The ability to access a wide range of media content is crucial for persons belonging to minorities for a number of reasons. The existence of diverse media content has a direct bearing on their informational and expressive rights, as well as their cultural and linguistic rights. Consequently, it affects their ability to participate effectively in public life. The particular relevance for minorities of theories relating to these substantive matters is explored throughout Chapter 4, *infra*.

7.2.4 Gauging media-related pluralism

When it comes to gauging media-related pluralism, important distinctions have to be drawn between State obligations and media responsibilities. Here, perceived conceptual differences between pluralism and diversity acquire a practical significance which can often be glossed over in other analytical frameworks. On the one hand, State obligations tend towards pluralism of source and outlet, and owing to the complex juridical nature of the State obligations in this respect, a separate analytical framework will be proposed. On the other hand, media responsibilities essentially concern diversity of content and are thus evaluated on the basis of performative criteria. Each will now be considered in turn.

7.2.4(i) State obligations

The importance of States’ positive obligations to safeguard pluralism and access has already been adumbrated in s. 5.1.3, *supra*. In order to attempt to properly ascertain the nature and extent of State obligations to uphold media-related pluralism, the relationship between the right to freedom of expression and media-related pluralism must first be explored. Various conceptions of that relationship have been advanced.

According to one conception, pluralism is a prerequisite for true freedom of expression. For instance, in a recent Motion for a European Parliament Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (discussed, *supra*), one of the starting points was the postulation that “a free and pluralist media is an essential requirement for the full respect of the right of freedom of expression and information [...]”.⁴⁷ In other words, it sets out media-related pluralism as logically prior to freedom of expression and as an enabling condition for the exercise of that right.

An opposing conception of the relationship between freedom of expression and media-related pluralism casts the former as being instrumental to the achievement of the latter. In other words, the right to freedom of expression is viewed, not as a constitutive right, but as a

⁴⁴ Sue Curry Jansen, *Censorship: The Knot That Binds Power and Knowledge* (New York, Oxford University Press, 1991), p. 182.

⁴⁵ *Ibid.*, p. 182.

⁴⁶ (Emphasis per original) *ibid.*, p. 183.

⁴⁷ *Op. cit.*, p. 7.

functionalist one. One of its main purposes is therefore to advance the objective of media-related pluralism.

A third conception, favoured by Barendt, wisely avoids being drawn on the above “chicken-and-egg” debate.⁴⁸ It stresses that freedom of expression both “reflects and reinforces pluralism”⁴⁹ and its “values of diversity and variety”.⁵⁰ Barendt has neatly described media-related pluralism as “the objective of ensuring the access of citizens to a wide variety of opinion and sources of information”.⁵¹

As discussed in greater detail, *infra*, the European Court of Human Rights has held that the State is the “ultimate guarantor” of pluralism, especially “in relation to audio-visual media, whose programmes are often broadcast very widely”.⁵² This places the State under a positive obligation to uphold pluralism, in particular in the broadcasting sector. Again, as shown below, the Court has not explicated what this positive State obligation entails. In order to try to fill this theoretical lacuna in the Court’s jurisprudence, consideration will now be given to the meaning and implications of that obligation.

A pertinent point of departure to this discussion is provided by Onora O’Neill, who has convincingly argued that the “communicative obligations of any democratic society” entail both perfect and imperfect obligations.⁵³ She cites non-coercion and non-deception as examples of “perfect communicative obligations”. Media-related pluralism and access to expressive opportunities, on the other hand, would more aptly be considered to be imperfect communicative obligations. The essence of such obligations is that they “are not owed to specified others so have no correlative rights, yet must be met if public communication in a democracy is to be possible”.⁵⁴

This is certainly an interesting articulation of media-related pluralism, but *prima facie*, it sits somewhat uneasily with Hohfeld’s schematization of jural relations as opposites and correlatives.⁵⁵ One of the essential elements of the Hohfeldian scheme is that “a duty is the invariable correlative of that legal relation which is most properly called a right or claim”.⁵⁶ This begs the question whether the existence of a right to media-related pluralism can legitimately be asserted (at least on a Hohfeldian model of rights). Perhaps one way to give an affirmative answer to the question, without rejecting O’Neill’s consideration of “imperfect communicative obligations”, would be to invoke the notion of collective rights, already discussed in Chapter 1, *supra*.

⁴⁸ However, he does consider media freedom (as a particular subset of freedom of expression) to be an instrumental freedom, “rather than a primary or fundamental human right”. He continues: “Press claims to special privileges and immunities should only be recognized insofar as they promote the values of freedom of speech, in particular the public interest in pluralism in its sources of information.”: Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 422. See also in this connection, *ibid.*, p. 430.

⁴⁹ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 34.

⁵⁰ *Ibid.*, p. 35.

⁵¹ *Ibid.*, p. 430.

⁵² *Informationsverein Lentia & Others v. Austria*, Judgment of the European Court of Human Rights of 28 October 1993, para. 38.

⁵³ Onora O’Neill, “Practices of toleration”, in Judith Lichtenberg, Ed., *Democracy and the mass media* (USA, Cambridge University Press, 1990), pp. 155-185, at p. 170.

⁵⁴ *Ibid.*, p. 171. See also, *ibid.*, p. 173.

⁵⁵ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, *op. cit.*, pp. 36 *et seq.*

⁵⁶ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, *op. cit.*, p. 39.

According to Joseph Raz, three conditions must be satisfied before the existence of a collective right can be recognised:

First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.⁵⁷

To summarise the foregoing, then: the European Court of Human Rights has repeatedly held that the State is the ultimate guarantor of pluralism, particularly in the audiovisual sector. However, neither the theoretical underpinnings of this finding, nor its likely implications, have been spelt out by the Court. As such, a State obligation to guarantee media-related pluralism has been identified, without expressly stating that that obligation flows from a specific right to media-related pluralism. Assuming, *pace* Hohfeld, that the existence of an obligation is predicated on the existence of a correlative right, the nature of that right must be inferred. Given that media-related pluralism can uncontroversially be regarded as a public good, it appears largely unproblematic to consider the right in question, if it does indeed exist, to be collective in nature. This postulation is further supported by the view that the State obligation to guarantee media-related pluralism can at best be considered an imperfect communicative obligation as it lacks a specific object.

The next question to be addressed concerns how to measure the discharge of State obligations to guarantee media-related pluralism in less theoretical and more concrete terms.

It is useful to recall at this stage that the right to freedom of expression is doubly amalgamative: first, it amalgamates the right to freedom of opinion, expression and information,⁵⁸ and second, it amalgamates the rights and interests of speakers, listeners and the public in general.⁵⁹ A restriction on any of these constituent conceptual elements of the right to freedom of expression can ordinarily be considered to be a restriction on the right proper. However self-evident this point may seem, it is imperative that it be reiterated here because doctrinal patterns tend to emphasise an apparent primacy of the right to impart information, or, in other words, the *expressive* rights of *speakers*. However, no relevant provision of international law seeks to establish any kind of hierarchy between the amalgamated rights involved. Indeed, in the *travaux préparatoires* of the ICCPR, it is explicitly recorded that “no definite understanding appeared to have been established” in respect of the question “whether freedom to seek and freedom to receive information should be subject to the same restrictions as freedom to impart information, and whether they should be subject to any restrictions at all”.⁶⁰

In order for a State to effectively guarantee media-related pluralism and (thereby enhance freedom of expression), it is most likely that protective *and* promotional measures will be required. Toby Mendel advances several examples of the latter: rules requiring “broadcasters to carry minimum quotas of local content”; broadcast licensing “to ensure orderly use of frequencies in the public interest”; “Rules designed to prevent undue concentration of media

⁵⁷ Joseph Raz, *The Morality of Freedom*, *op. cit.*, p. 208.

⁵⁸ Chapter 2, p. 2.

⁵⁹ Chapter 4, p. .

⁶⁰ Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 393.

ownership”, and “rules limiting private political advertising during election periods”.⁶¹ However, he rejects the appellation, “positive measures”, as “both inappropriate and inadequate”.⁶² He reasons that: “such a classification fails to capture the rationale for these measures”, which “are not designed to promote more expression, however that may be defined, but rather to enhance the quality of the expression that is available”. On initial consideration, this observation may seem a little too hasty. The ultimate, longer-term objective of such measures is usually to promote the free flow of certain kinds of expression. There is, as Mendel points out, concern for the quality of the expression that is available, but also for the quality and quantity of types of expression that are not (sufficiently) available. Even if the measures listed above have the immediate aim and impact of restricting certain types of expression, that aim is instrumental (and secondary) to the achievement of their more fundamental aim, *viz.* the promotion of certain types of expression on the grounds that they will enhance the quality of public discussion. These quibbles aside, the subsequent development of Mendel’s reasoning is highly instructive:

It is submitted that the measures noted above, rather than being positive in nature, are better understood as promoting the right to receive, rather than to impart, information and ideas. It may be noted that, in many cases, these measures actually limit the right to impart information and ideas. As such, they pit the speaker against the listener, a private rights model of freedom of expression against one which seeks to preserve public expressive space, a traditional, non-interference, paradigm against one which calls for regulation to protect the right to receive.

In most cases, restrictions on freedom of expression are specifically designed to promote other social interests, such as privacy, public order or the administration of justice. The measures noted above, in contrast, are designed to promote freedom of expression, albeit one aspect, perhaps one conception, of this right and frequently at the expense of another. This does not mean that such measures may not, if they do also restrict another aspect, or perhaps another conception of, freedom of expression, be deemed to be in breach of this right.⁶³

Mendel then continues by pondering how courts should assess the legitimacy of these measures and determine whether they are consistent with or in conflict with freedom of expression, thereby following through on the likely practical implications of his theoretical distinctions. He argues that the three-part test traditionally applied under national law (prescribed by law; serving a legitimate purpose; necessity in a democratic society – see further, Chapter 2) usually turns on the necessity criterion, which entails a “presumption in favour of protecting the right to freedom of expression”.⁶⁴ Such a presumption is not appropriate, however, “when the legitimate interest being served is actually a human right and particularly when that right is freedom of expression”, he contends.⁶⁵ “In other words, it is not appropriate to apply an analysis that automatically accords one conception of freedom of expression priority over another”.⁶⁶ A more satisfying approach, both philosophically and practically, he argues, would be for courts “to start by assessing whether, taking all of the circumstances into account, the impugned measures do, on balance, restrict freedom of expression”.⁶⁷ The idea that the overall “enrichment of public debate”⁶⁸ should be the

⁶¹ Toby Mendel, “Restrictions on Political Expression”, in Susanne Nikoltchev, Ed., *Political Debate and the Role of the Media: The Fragility of Free Speech, IRIS Special* (Strasbourg, European Audiovisual Observatory, 2004), pp. 41-50, at 43.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 44.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Owen M. Fiss, “Free Speech and Social Structure”, 71 *Iowa Law Review* 1405 (1986), at 1416.

“touchstone”⁶⁹ for judicial analysis has also met with approval in other contexts (eg. the permissibility of State regulation of expression under the First Amendment of the US Constitution⁷⁰ and the resolution of conflicts within a media organisation⁷¹). Intuitively, such an approach would seem to pave the way for a consequentialist assessment of the impugned measures, their impact on the different sets of values underlying different stake-holder interests in freedom of expression and the comparative restrictiveness of alternative measures.⁷²

Needless to say, the foregoing discussion does not plead for an outright *volte-face* from the predominance of speaker-oriented balancing exercises by the judiciary. It is, for example, equally difficult to accept Justice White’s famous dictum in the *Red Lion* case, “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount”.⁷³ White’s assertion is simply too sweeping, too cut-and-dry. What *is* recommended is a judicial approach that is more sensitive to the various and often competing interests of speakers, listeners/viewers and the wider public, than is currently the case. As already noted, the key evaluative criterion should be the overall impact of an impugned measure on (the quality of) public debate.

To conclude, then, concerns for media-related pluralism (and specifically for diversity in media content) and the quality of public debate are primarily concerns that relate to the right to receive information. This holds true under various justificatory theories of freedom of expression, especially the truth-finding theory and the democratic-participation theory. In trends towards homogeneity and conventionalism, the first casualties are always minority and unorthodox perspectives. Despite an apparent hesitancy on the part of courts to weigh different constitutive elements, or competing conceptions, of freedom of expression, it is likely that in the future, they will increasingly be confronted with the challenge of doing so.⁷⁴ The reluctance of courts to engage with and judicially enforce media-related pluralism, especially as regards diversity of content, is perhaps understandable. Rachael Craufurd Smith has suggested that “There are so many different ways of achieving pluralism, and so many different gradations of achievement, that the strong subjective element in programme policy is likely, and not without good reason, to deter judicial evaluation in all but the clearest cases of failure”.⁷⁵ Her remarks are indeed borne out in practice, as will become apparent from the discussion of the jurisprudence of the European Court of Human Rights in s. 7.3.2, *infra*.

For the moment, though, a further reason why pluralism does not easily lend itself to justiciability needs to be examined. It is widely accepted that the State is under a duty to ensure that the media “provide a wide variety of programmes and present all relevant strands of political and social opinion”⁷⁶ – without encroaching unduly on their autonomy, of course.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Barendt has argued that: “Hard cases concerning the resolution of free speech conflicts within a media organization can most satisfactorily be resolved by the court determining which result enhances the values of freedom of expression, in particular, the public interest in the dissemination of information of political or social significance and the values of pluralism – the diversity of sources of information and the range of opinion available to the public” - Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 444.

⁷² T.M. Scanlon, “Content regulation reconsidered”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 151-168, at 166-167.

⁷³ *Red Lion Broadcasting Co., Inc., v. Federal Communications Commission*, 395 US 367 (1969), at 390.

⁷⁴ Toby Mendel, “Restrictions on Political Expression”, *op. cit.*, at 44-45.

⁷⁵ Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford, Clarendon Press, 1997), pp. 169-170.

⁷⁶ Eric Barendt, *Broadcasting Law*, *op. cit.*, p. 105.

The State usually seeks to discharge this duty by means of legislative impositions on broadcasters requiring them to provide a balanced range of programming and to uphold certain qualitative standards such as impartiality, objectivity, etc. Such obligations usually bind public service broadcasters in a more stringent way than their private-sector counterparts. Although such impositions have the *de facto* effect of trammelling the editorial autonomy of broadcasters, the measures are designed to ultimately enrich the quality of broadcasting output (see further, *supra*), to the benefit of the (viewing or listening) public. Whatever the reach of this principle, or how far its motivation will travel in practice, it does not in any sense confer a right on viewers or listeners “to determine what is contained in the broadcasting schedules”.⁷⁷ Nor can it be construed as founding a right for individuals to receive particular types of content. At a theoretical level, it does not stretch beyond the basis for a claim for diversity of political and cultural content; more specific entailments can only be established at the regulatory level (and not as part of the general, abstract right). These points reinforce the observation made earlier that pluralism is an essentially imprescriptible obligation.

7.2.4(ii) Media responsibilities

Media sociology offers a choice of methodological approaches to measuring the diversity of media content. First, though, it is useful to identify the main features of such content diversity. McQuail has prioritised the following:

- a wide range of choice for audiences, on all conceivable dimensions of interest and preference;
- many and different opportunities for access by voices and sources in society;
- a true or sufficient reflection in media of the varied reality of experience in society.⁷⁸

Second, given the difficulty of measuring these features in the abstract, suitable external standards have to be selected, against which specific media output can be measured. As McQuail has observed, “Lack of diversity can be established only by identifying sources, references, events, types of content, and so on, which are missing or under-represented”.⁷⁹ The diversity of media content should therefore be seen as relative and not absolute. Furthermore, it is clear from McQuail’s prioritisation of characteristic features of content diversity that he does not regard the notion as self-contained or hermetic. Instead, its relationship of qualified dependence on “many and different opportunities for access [...]” for a broadly representative cross-section of society is emphasised. Audiences are implicitly differentiated and the element of choice regarding interests and preferences is also foregrounded.

According to Jan van Cuilenburg, the diversity of media content has traditionally been measured under two main normative frameworks (or variants or combinations thereof). These frameworks, prioritising “reflection” (of diversity in society) and “openness” (striving for *perfect* equality of access for all persons and ideas in society). Both have their drawbacks: the former tends to favour conventionalism and homogeneity; the latter can lead to disproportionate distribution of expressive opportunities and informational offers (to the advantage of unrepresentative factions). Van Cuilenburg takes the view that in the future, a framework combining contextual and procedural aspects, will prevail when it comes to measuring the diversity of media content. As to the contextual aspects: a suitable “enabling

⁷⁷ *Ibid.*, p. 42.

⁷⁸ Denis McQuail, *McQuail’s Mass Communication Theory* (5th Edition), *op. cit.*, p. 355.

⁷⁹ *Ibid.*

environment”⁸⁰ must first exist to secure media freedom. As to the procedural: governmental regulation is countenanced in order to ensure and enhance certain process values relating to freedom of expression. Such a model would therefore attribute greater weighting to “openness” (in Van Cuilenburg’s sense of the term) than to “reflection” or representativeness (in media output). While he is certainly correct to insist on the interdependence of contextual and procedural considerations, his arguments peter out in a series of non-sequiturs.

For instance, he writes: “From the perspective of democratic truth-finding and political and cultural innovation it is particularly the confrontation of ideas that is important, aside from whether social support is large or small. Mainstream should have no more opportunity to manifest itself than the unorthodox minority”.⁸¹ These postulations are problematic. First, societal support for ideas *does* matter – much more than Van Cuilenburg seems prepared to acknowledge. Non-propositional elements of ideas are important because they are often very good indicators of the intensity with which ideas are endorsed or rejected and they also contribute to the prioritisation of ideas in public debate. Aside from “democratic truth-finding” (an unusual formulation) and “political and cultural innovation”, the ability to gauge levels of support for particular ideas (as reflected, *inter alia*, by the exposure they are given in the media) is of crucial importance for participation in democratic politics and society. It is not enough to be aware of the existence of an idea: it must also be possible to test its theoretical mettle in the arena of public opinion.

Second, the demand that mainstream and minority elements of society should have perfectly equal opportunities to express themselves also seems poorly thought-out, at least insofar as it could lead to a corruption of some of the most basic precepts of democracy. It has been argued in previous chapters that society should continually guard against tyranny of the majority, but that minority diktat is also a menace to democratic society. Both are perversions of what democracy is most fundamentally about: majority rule that provides adequate accommodation for the effective participation of non-majority factions. Under such a model of democracy, results cannot and must not be pre-ordained. Rather, the emphasis must be on procedural values and the facilitation of opportunities to achieve results. Moreover, to pre-determine that all ideas should be given equal airing in public (regardless of their representativeness) could lead to contrived focuses for debate and also damage the agenda-setting autonomy of majority and minority sections of society alike. Both of these arguments are of particular relevance for the media.

7.3 Media-related pluralism: overview of international legal standards

Given the conceptual salience of pluralistic tolerance and media-related pluralism to various theories of freedom of expression, outlined above, it is perhaps puzzling that relevant notions (however styled) have not found more direct expression in positive international law. Most international texts refer only to the right to freedom of information and ideas in whatever form. Arguably, such references do encompass the notion of pluralism, but the absence of explicit references means that such arguments are not fully conclusive. Indeed, the drafting

⁸⁰ See generally: Monroe Price & Peter Krug, *The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance*, Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, US Agency for International Development (Occasional Papers Series, January 2002).

⁸¹ Jan van Cuilenburg, “Diversity Revisited: Towards a Critical Rational Model of Media Diversity”, in Kees Brants, Joke Hermes & Liesbet van Zoonen, Eds., *The Media in Question: Popular Cultures and Public Interests* (Sage Publications Ltd., London, 1998), pp. 38-49, at p. 48.

histories of many leading international human rights treaties reveal that pluralism has tended to play a surprisingly low-key role.

Another plausible explanation for the apparent muffling of pluralism in international law-making is that it can be readily subsumed into other, broader, more traditional rationales for the protection of freedom of expression. On such a theoretical level, Frederick Schauer aligns his (independent) “argument from diversity” very closely with the more time-honoured “argument from truth”.⁸² Similarly, Eric Barendt, who consistently emphasises the special importance of pluralism in terms of freedom of expression, also adverts to the congruent features of pluralism and free expression theories based on the discovery of truth and democratic participation.⁸³ The converse to the main argument of this paragraph is that the dangers posed by the absence of media-related pluralism could also be countered by a variety of specific (consequentialist) measures that would impose certain limitations on the media (in particular).

Pluralism, as a value, can be said (at best) to be implicitly recognised by Article 19, ICCPR. The drafting history of that article shows an acute awareness on the part of the drafters that freedom of expression is simultaneously a “precious heritage” and a “dangerous instrument”.⁸⁴ Although the drafters conceded that the free flow of information could be obstructed by licensing,⁸⁵ governmental interference⁸⁶ and other factors,⁸⁷ the focus of their proposed limitations to the exercise of the right to freedom of expression was primarily negative. They do not appear to have given any serious consideration to more positive and pre-emptive measures such as the safeguarding of media-related pluralism. Thus, the point that small, poor countries, with underdeveloped media systems would be at a competitive disadvantage transnationally, although raised,⁸⁸ failed to generate sufficient concern for media-related pluralism to be prioritised in a meaningful textual or other manner.

Even in the thematically more specific and detailed UN Draft Convention on Freedom of Information, notions of pluralism were neither prevalent nor prominent. The first early and significant draft contained no express reference whatever to either pluralism or diversity.⁸⁹ Nor did it stress any congruent notions into which pluralism or diversity could plausibly be subsumed. By 1959, however, tentative efforts had been made to bring pluralism in from the conceptual cold. The Preamble to the draft Convention included some references that touched on pluralism:

Considering that the free interchange of accurate, objective and comprehensive information and of opinions, both in the national and in the international spheres, is essential to the cause of democracy and peace and for the achievement of political, social, cultural and economic progress,
Considering that freedom of information implies respect for the right of everyone to form an opinion through the fullest possible knowledge of the facts,
[...]
Recognizing that in order to achieve these aims the media of information should be free from pressure or dictation, but that these media, by virtue of their power for influencing public opinion,

⁸² Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, pp. 66-67.

⁸³ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 25.

⁸⁴ Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 386.

⁸⁵ *Ibid.*, p. 383.

⁸⁶ *Ibid.*, p. 385.

⁸⁷ *Ibid.*, p. 396/7.

⁸⁸ *Ibid.*, p. 393.

⁸⁹ UN Ybk 47/8, p. 593.

bear to the peoples of the world a great responsibility, and have [214] the duty to respect the truth and to promote understanding among nations,

Much more importantly, though, one aspect of media-related pluralism was significantly upgraded in the substantive part of the draft Convention. Article 1(a) read as follows: “Each Contracting State undertakes to respect and protect the right of every person to have at his disposal diverse sources of information”.⁹⁰ The introduction of this provision was made at the behest of France, which is perhaps unsurprising, given the importance attached to the value of pluralism in the French Constitution.⁹¹

The Convention on the Rights of the Child (CRC) represents a high water-mark of sorts in terms of the explicit recognition of media-related pluralism in UN treaties. Article 17, CRC, emphatically underscores the conceptual centrality of pluralism (or at least the plurality of sources) in respect of freedom of expression:

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

The remainder of Article 17, comprising five subsections, addresses how those objectives should be realised, i.e., by encouraging: (a) “the mass media to disseminate information and material of social and cultural benefit to the child [...]”; (b) “international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources”; (c) “the production and dissemination of children’s books”; (d) “the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous”; (e) “the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being [...]”. Thus, it can be concluded that Article 17 is concerned with pluralism as regards content/output (“information and material of social and cultural benefit” – s-s. (a); language – s-s. (d)); sources (s-s. (b)); genres within the mass media (eg. the emphasis on books in s-s. (c)). These concerns correspond to Gibbons’ triumvirate categories of content, source and outlet, discussed *supra*.

7.3.1 Council of Europe

Deep concerns for the maintenance of pluralism in the media sector inform debates on whether States should pro-actively support the media in financial and logistical terms. The European Court of Human Rights has offered some interpretative guidance concerning States’ obligations specifically to promote pluralism in terms of freedom of expression. This guidance – such as it is – is gleaned primarily from a cluster of cases involving disputes arising out of the allocation of broadcasting licences.

⁹⁰ Article 1 (as a whole and as amended) was adopted by the Third Committee on 7 December 1959, by 41 votes to 4, with 21 abstentions.

⁹¹ Article 11, Declaration des droits de l’homme et du citoyen, 1789, case-law and Barendt and Craufurd-Smith, *Broadcasting Law and Fundamental Rights*, *op. cit.*, pp. 162 *et seq.*

In *Groppera Radio AG & others v. Switzerland*, the Court subjected the third sentence of Article 10(1)⁹² – and relevant discussions recorded in the *travaux préparatoires* of the ECHR⁹³ – to careful scrutiny. On the basis of this scrutiny, the Court concluded that “States are permitted to control by a licensing system the way in which broadcasting is operated in their territories, particularly in its technical aspects”, subject to the requirements of Article 10(2).⁹⁴ The Court later expanded the scope of that finding in the *Informationsverein Lentia & Others v. Austria* case, when it made the seminal pronouncement:

Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.

This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.⁹⁵

This reasoning paved the way for the next crucial pronouncement made by the Court in the *Lentia* case, i.e., that in a democratic society, freedom of expression allows the press to impart information and ideas which the public is moreover entitled to receive and:

Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.⁹⁶

This is the clearest statement in the jurisprudence of the European Court of Human Rights concerning the obligation on States to uphold pluralism in the context of freedom of expression. Although the principle seems rather unequivocal, fault has been found with the choice of wording used by the Court on account of its terseness. Rachael Craufurd Smith, for instance, notes that “the Court in *Lentia* did not hold that the state, as ‘guarantor’ of the communication of information and ideas to the public, was also under a legal obligation to ensure its provision”.⁹⁷ This criticism is, however, misplaced and captious. First, it is misplaced because the Court designates the State as the ultimate guarantor of the principle of pluralism – not of “the communication of information and ideas to the public”. To dwell on the distinction between both formulations is not to split hairs. Without further qualification, the responsibility of a State to guarantee “the communication of information and ideas to the public” is simply too vague to be meaningful. Granted, pluralism is also a rather vague notion, but not in the same order. Second, her criticism is captious because in legal terms, to be the guarantor of something plainly creates a legal obligation to uphold it and ensure its existence.

⁹² “This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

⁹³ Paras. 60-61. In the latter paragraph of the judgment, Article 19, ICCPR, and the drafting process from which it emerged were similarly scrutinised. This demarche was criticised by

⁹⁴ Para. 61. See also, *Autronic AG v. Switzerland*, Judgment of the European Court of Human Rights of 24 April 1990, para. 52 of which affirmed that the final sentence of Article 10(1) is subject to Article 10(2), as well as *Informationsverein Lentia & Others v. Austria*, Judgment of the European Court of Human Rights of 28 October 1993, ditto, in para. 29.

⁹⁵ Para. 32.

⁹⁶ Para. 38; *VgT Verein gegen Tierfabriken v. Switzerland*, Judgment of the European Court of Human Rights (Second Section) of 28 June 2001, para. 73.

⁹⁷ Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford, Clarendon Press, 1997), p. 182.

A more valid criticism could, however, be extracted from the essence of Craufurd Smith's concerns. Neither in *Lentia*, nor on any subsequent occasion, did the Court endeavour to develop criteria or indicators for measuring the extent to which States effectively discharge their responsibility to safeguard pluralism. While the Court's failure to develop such criteria is regrettable from the point of view of predicting future doctrinal development, it is perhaps unsurprising for two main reasons. First, as the Court has repeatedly held, it is not its task "to indicate which means a State should utilise in order to perform its obligations under the Convention".⁹⁸ Indeed, this inherent restriction on judicial powers is by no means unique to the European Court of Human Rights. The tenet has general validity and applicability. As posited by J.M. Balkin:

Where affirmative liberties are at stake, the most that courts can do is define a range of alternatives for the political branches to pick from, or direct the political branches to propose their own alternatives and then accept them if they appear reasonably calculated to succeed. In other words, the effective protection of affirmative liberties requires considerably more judicial restraint than the protection of negative liberties.⁹⁹

It should also be borne in mind that the margin of appreciation doctrine exerts a further restraining influence on the Court in respect of the level of activism it may legitimately pursue. In consequence, the Court has always been very reluctant to usurp in any way the fact-finding or evaluative functions of the national courts – sometimes, it must be said, with unfortunate conservatism.¹⁰⁰

A second possible explanation as to why the Court's jurisprudence on media-related pluralism is somewhat lacking in explanatory power can be found by scrutinising and relativising the broader doctrinal picture. As has been argued in a different context, it is only over the stretch of time and experience, with the repetition of patterns and the accumulation of case-law that suitable evaluative criteria are developed by the judiciary.¹⁰¹ In keeping with this logic, the development of a clearer understanding of the nature of positive State obligations in this regard will be gradual.

Nevertheless, some fragmentary elements of this understanding have already been put in place. In the *Lentia* case itself, the Court accepted that the "monopoly system operated in Austria is capable of contributing to the quality and balance of programmes, through the supervisory powers over the media thereby conferred on the authorities".¹⁰² However, it cautioned that of all the means of ensuring respect for pluralism:

a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.¹⁰³

⁹⁸ *VgT Verein gegen Tierfabriken v. Switzerland*, *op. cit.*, para. 78.

⁹⁹ J.M. Balkin, "Some Realism about Pluralism: Legal Realist Approaches to the First Amendment", 1990 Duke L.J. 375, at 413.

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¹⁰¹ Tarlach McGonagle, "Workshop Report: The Changing Hues of Political Expression in the Media", in Susanne Nikoltchev, Ed., *IRIS Special: Political Debate and the Role of the Media – The Fragility of Free Speech* (Strasbourg, European Audiovisual Observatory, 2004), pp. 1-30, at p. 29.

¹⁰² Para. 33.

¹⁰³ Para. 39.

Technological progress, the development of transfrontier broadcasting and comparative practices in other States have all contributed to divesting the so-called “scarcity argument” for maintaining State broadcasting monopolies of its earlier persuasiveness. In consequence, notwithstanding the potential for internal pluralism within State monopoly structures, such structures are presumptively deemed to be contrary to the safeguarding of pluralism. This line of reasoning has consistently been applied by the Court in relevant cases since *Lentia*, such as *Radio ABC v. Austria*¹⁰⁴ and *Tele 1 Privatfernsehgesellschaft Mbh v. Austria*.¹⁰⁵

In *Demuth v. Switzerland*,¹⁰⁶ the Court reiterated that the pursuit of pluralism in broadcasting is a legitimate public policy goal for States, subject to the proportionality of the measure used for that purpose.¹⁰⁷ The Court balanced “the legitimate need for the quality and balance of programs in general” and the applicant’s right to impart information and ideas. It referred to the potential of audiovisual media for wide diffusion and concluded that “In view of their strong impact on the public, domestic authorities may aim at preventing a one-sided range of commercial television programs on offer.” On the facts of the instant case, this reasoning was unsatisfactory. First of all, the impact of the partisan television output would have been limited by the proposed duration of the broadcast – “two hours, to be repeated during 24 hours and to be renewed once a week” (although it was planned to extend its duration “later”). Secondly, notwithstanding the Court’s reluctance to interfere with the respondent State’s margin of appreciation in broadcasting matters, it could usefully have dwelt further on the likelihood that CAR TV’s broadcasts would jeopardise the overall pluralism of the Swiss broadcasting sector.

Generally-speaking, the Court’s deliberations on safeguarding pluralism in the media have been informed by the need to make efficient use of scarce frequencies.¹⁰⁸ However, with the proliferation of new technological possibilities for broadcasting, the persuasiveness of the scarcity argument has been in steady decline. Despite an obvious tendency for the synchronous deployment of arguments from scarcity and for pluralism, rumours of the demise of the latter have been greatly exaggerated.¹⁰⁹ Rather, technological advances have given rise to new types of concerns for pluralism in the media, eg. prominence on EPGs, digital switch-over strategies and reservation of multiplex capacity for particular public-interest purposes.¹¹⁰

Despite the relative paucity of case-law dealing specifically with pluralism and freedom of expression, its importance cannot be gainsaid. The symbiotic relationship between the two is examined in a number of texts adopted, *inter alia*, by the Committee of Ministers of the Council of Europe (see further, *infra*). First and foremost among those texts is the Declaration on the freedom of expression and information (1982), which provides that States “should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions”.¹¹¹ To this end, the Declaration sets for States the objective of achieving “the existence of a wide variety of

¹⁰⁴ Judgment of the European Court of Human Rights of 20 October 1997.

¹⁰⁵ Judgment of the European Court of Human Rights of 21 September 2000.

¹⁰⁶ Judgment of the European Court of Human Rights (Second Section) of 5 November 2002.

¹⁰⁷ Paras. 43 and 44.

¹⁰⁸ See, for example, *Hins & Hugenholtz v. the Netherlands*, Application No. 25987/94, Decision of inadmissibility of the European Commission of Human Rights of 7 March 1996.

¹⁰⁹ Paraphrasal of Mark Twain...

¹¹⁰ See further, Chapter 4.5, *supra*, and Joint Declaration on Diversity in Broadcasting, December 2007.

¹¹¹ Committee of Ministers’ Declaration on the Freedom of Expression and Information, 29 April 1982, para. 6.

independent and autonomous media, permitting the reflection of diversity of ideas and opinions”.¹¹²

The importance attached to this objective in the 1982 Declaration achieved an elevated status when a new provision, “Media pluralism”, was incorporated into the ECTT by its Amending Protocol in 1997.¹¹³ It reads:

Article 10bis – Media pluralism

The Parties, in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction, within the meaning of Article 3, endanger media pluralism.

However, this provision – despite the symbolic importance of its inclusion – disappoints in many respects. It is little more than a perfunctory genuflection towards media pluralism. It does not impose any specific obligations on States and it is devoid of explanatory value. Furthermore, the terse corresponding entry in the Explanatory Report to the ECTT is also sorely wanting in terms of its ability to elucidate the notion or the full significance of its inclusion in the Convention.¹¹⁴

Article 10bis, ECTT, also seems to be viewed with a certain amount of dissatisfaction within the Council of Europe, including in the Standing Committee on Transfrontier Television and the CDMC. Against the background of the proposed modernisation of the EU’s “Television without Frontiers” Directive, the Standing Committee and CDMC considered that the best option for any re-assessment of the ECTT’s future development would be “modernising the ECTT in close alignment with the new TWF Directive, and possibly adding some new issues”.¹¹⁵ Subsequently, the Secretariat submitted a number of proposals for new human rights-related issues to be introduced into the ECTT – including media pluralism – to the Standing Committee for its consideration. The proposals were not accepted, *inter alia*, because some members of the Standing Committee were of the view that media pluralism would be better regulated at the national (as opposed to the international) level.

Notwithstanding the foregoing, it would appear that *if* the inclusion of particular new issues or focuses in the ECTT would indeed distinguish its scope from that of the new Directive, a possible adjustment of the ECTT might be examined more concretely. One question in respect of media pluralism, currently before the Standing Committee, is whether, “In view of its very general characters, should Article 10bis be amplified so as to distinguish clearly between the question of diversity of content and that of media concentration, each concerned by the very general concept of media pluralism”.¹¹⁶ Such a clarifying amendment would surely be welcome. However, on the basis of the theoretical discussion in s. 5.3, *supra*, it is clear that a proposed amendment to explain the interlinkage between important discrete components of the notion of media pluralism could and should go much further than simply distinguishing between diversity of content and concentration of media ownership.

¹¹² *Ibid.*, Section II, *d*.

¹¹³ ETS No. 171, entry into force: 1 March 2002.

¹¹⁴ Explanatory Report to the European Convention on Transfrontier Television, as amended by the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002, para. 204.

¹¹⁵ Karol Jakubowicz, “Implementation and Monitoring: Upholding Human Rights and Cultural Values”, in Susanne Nikoltchev, Ed., *Implementing the Regulation of Transfrontier Audiovisual Media Services* (Strasbourg, European Audiovisual Observatory, forthcoming – 2006) (p. 5 of draft paper).

¹¹⁶ *Ibid.*, p. 8 of draft paper.

A more serious attempt by the Council of Europe to engage with the details and difficulties – conceptual and practical – involved in (media) pluralism, came in the form of a Recommendation addressed by the Committee of Ministers to Member States: Recommendation No. R (99) 1 on measures to promote media pluralism. That text has, however, since been superseded by the very detailed and expansive approach taken by Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content¹¹⁷ and Declaration on protecting the role of the media in democracy in the context of media concentration.¹¹⁸ Rec(2007)2 recognises the importance of distinguishing between structural pluralism and diversity of content and addresses both in a way that reflects the specificities of new technologies. It also shows keen awareness of the importance of relevant capacity-building measures to ensure the effective use of media technologies and singles out the particular needs of minorities and other groups in this connection.

Public debate and the duty of the media to inform

One of the central premises of Recommendation (2004) 16 on the right of reply in the new media environment is that the corrective potential of such a right helps to further “the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information”.¹¹⁹ This thinking underscores the important role of the media in providing information to the public – a critical step in the opinion-formation process of members of the public. Similar ideals and visions are promoted, specifically as regards political affairs, in the Declaration on freedom of political debate in the media (2004). In the even more specific context of media coverage of electoral campaigns, “regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media”.¹²⁰ Issues of balance and impartiality are very much to the fore in media coverage of elections, and again, policies and practices aiming to ensure balanced coverage can safeguard diverse opinions.

The objective of ensuring that the media keep the public adequately informed on matters of general interest has also been stated to apply in cyberspace. For example, the Preamble to the Declaration on freedom of communication on the Internet (2003), refers to the need to guarantee “the right of users to access pluralistic content from a variety of domestic and foreign sources”.

It should be noted as well that a veritable *leitmotif* of the Committee of Ministers’ texts is the belief that public service broadcasting has a very special role to play in the advancement of cultural and linguistic diversity. This role is dealt with in greatest detail in Recommendation (96) 10 on the guarantee of the independence of public service broadcasting; Recommendation (99) 1 on measures to promote media pluralism, and Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting. However, it is also emphasised in numerous other Recommendations and Declarations by the Committee of Ministers and in numerous texts adopted by the Parliamentary Assembly of the Council of Europe.

¹¹⁷ Adopted by the Committee of Ministers on 31 January 2007.

¹¹⁸ Adopted by the Committee of Ministers on 31 January 2007.

¹¹⁹ Preamble to the Recommendation.

¹²⁰ Recommendation (99) 15 on measures concerning media coverage of election campaigns, Section II.1.

7.3.2 European Union

The symbiosis between freedom of expression and media pluralism has also been enshrined as a central concept in Article 11 (Freedom of expression and information) of the Nice Charter, which reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

The direct and succinct formulation leaves no doubt that the drafters plainly sought to attach importance to media pluralism. This is attested to by the Explanatory Note, which explains that Article 11(2) “spells out the consequences of paragraph 1 regarding freedom of the media”.¹²¹ However, there are good grounds for fearing that the importance of the explicit reference to media pluralism is more symbolic than real. Pending the outcome of the stalled European Constitution, the Nice Charter remains a document that is merely politically- (and not legally-) binding on EU Member States. Moreover, even that symbolic importance is questionable, because, first of all, “respected” is a significantly weaker formulation than, for example, “guaranteed” or “secured” (even if it is preceded by “shall”). As such, it involves a considerably lighter commitment for States. Second, the Explanatory Note does not spell out the essence or scope of media pluralism, which suggests a non-committal attitude to – or wariness of – its actual or potential implications. Such attitudes could plausibly be explained by the political contentiousness of the issue of media pluralism within the EU institutions (see further, *infra*).

Article 11 of the Nice Charter has a dual objective. First, it seeks to provide a modernised articulation of Article 10 ECHR, which would implicitly crystallise and incorporate the body of case-law developed by the European Court of Human Rights over the years.¹²² It is also intended to reflect – or at least not depart from – the central principles of the relevant case-law of the Court of Justice of the European Communities (ECJ). The Explanatory Note confirms that Article 11(2) is indeed based on relevant ECJ case-law regarding television – especially the case *Stichting Gouda*, discussed *infra*, as well as the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty and the Television without Frontiers Directive – especially its Recital No. 17.¹²³

Recital No. 17 reads as follows:

Whereas this Directive, being confined specifically to television broadcasting rules, is without prejudice to existing or future Community acts of harmonization, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition;

¹²¹ Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, 11 October 2000, CHARTE 4473/00, p. 14.

¹²² See further: Paul Mahoney, “The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention”, 23 *Human Rights Law Journal* 300-303 (2002).

¹²³ Note from the Praesidium, *op. cit.*, p. 14.

It seems odd, however, that the (Explanatory) Note from the Praesidium should refer to Recital No. 17 in this connection, but not to Recital No. 16, which appears to be of even greater relevance:

Whereas it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole;

The issue of media pluralism arises in several ECJ cases, but again, the judicial interpretation offered generally fails to provide much additional elucidation of the precise scope of the principle.

One of the ECJ's earliest cases dealing with media-related pluralism was *Bond van Adverteerders & others v. The Netherlands*.¹²⁴ The background to the case involved the statutory advertising monopoly that existed in the Netherlands at the operative time. Under that monopoly, only one organisation - the STER - was allowed to broadcast advertisements.¹²⁵ The STER's task was to organise the transmission of advertising prepared by third parties, to which it sold airtime.¹²⁶ The STER was bound by statute to transfer its receipts to the State, which used them to subsidise national broadcasters and the press.¹²⁷ Pursuant to relevant statutory provisions, there was a prohibition on the distribution by cable of programmes transmitted by broadcasters established in other Member States that contained advertising intended specifically for the Netherlands. The Dutch authorities explained that the use of revenues generated by the STER for the purpose of funding national broadcasters and the press was to enable them to preserve their non-commercial character. They maintained, additionally, that "a pluralistic broadcasting system is conceivable only if the *Omroeporganisaties* [i.e., broadcasters] are non-commercial in character".¹²⁸

The Court found that the distribution by cable of programmes transmitted by broadcasters established in other Member States did constitute a transfrontier service under Articles 59 and 60 of the Treaty.¹²⁹ It also found the Dutch statutory prohibition on the same to be discriminatory as national broadcasters were not subject to the same restriction on their right to freedom to provide services.¹³⁰ It pointed out that the only permissible derogation in a case such as this would be one grounded in a justification of public policy.¹³¹ However, it insisted that "economic aims, such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the member state in question, cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty".¹³² The Dutch authorities, for their part, argued that "in the final analysis, the prohibitions of advertising and subtitling have a non-economic objective, namely that of maintaining the non-commercial and, thereby, pluralistic nature of the Netherlands broadcasting system".¹³³

¹²⁴ Case 352/85, Judgment of the Court of Justice of the European Communities of 26 April 1988, ECR 1988, p. 2085. It should be noted that this judgment predated the adoption of the 'Television without Frontiers' Directive.

¹²⁵ *Ibid.*, para. 3.

¹²⁶ *Ibid.*, para. 25.

¹²⁷ *Ibid.*, paras. 3 & 35.

¹²⁸ *Ibid.*, para. 35. At the relevant time, the Dutch broadcasting system was characterised by its "pillarised" structure, under which each pillar was expected to contribute to the overall pluralism of the system.

¹²⁹ *Ibid.*, paras. 12-17.

¹³⁰ *Ibid.*, paras. 26-27; 29-30.

¹³¹ *Ibid.*, paras. 32-33.

¹³² *Ibid.*, para. 34.

¹³³ *Ibid.*, para. 35.

Ultimately, the Court found the impugned measures to be disproportionate and contrary to relevant Treaty provisions. In reaching its decision, it adverted to the fact that the Dutch authorities themselves had conceded that less restrictive, non-discriminatory measures could have been adopted in order to achieve the intended objectives.¹³⁴

A very interesting question, raised formally by the Dutch national court in the *Bond van Adverteerders* case but left unanswered by the Court, read as follows:

Can the generally accepted principles of Community law (in particular the principle of proportionality) and the fundamental rights enshrined in Community law (in particular the freedom of expression and freedom to receive information) impose directly applicable obligations on the Member States in the light of which national rules such as those concerned here must be assessed, regardless of whether or not any written provisions of Community law are applicable thereto?¹³⁵

The Court interpreted this question as referring to the principle of proportionality and the scope of Article 10, ECHR.¹³⁶ However, it ultimately regarded the question as redundant, stating that the answers it had given to the earlier questions would enable the national court to “resolve the dispute before it in light of those answers alone”.¹³⁷ To this day, neither the ECJ nor the European Court of Human Rights has squared up fully to this question and answered it in a detailed and definitive way.

In *Stichting Gouda v. CVDM*,¹³⁸ the ECJ accepted that a cultural policy aimed at safeguarding freedom of expression for diverse societal groups “may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services.”¹³⁹ It also pointed out, however, that there is no necessary connection between such national cultural policies and conditions relating to the structures of foreign broadcasters; nor did it see any need for national cultural policies to concern itself with the latter.¹⁴⁰ The same cultural policy was also examined in *Commission v. The Netherlands*.¹⁴¹ In that case, the ECJ pointed out the connection between pluralism and the guarantee of freedom of expression enshrined in Article 10, ECHR,¹⁴² but also found that the goal of pluralism in the audio-visual sector did not require a prohibition on national broadcasters from using production services of broadcasters in other jurisdictions.¹⁴³

The Court upheld these findings concerning the preservation of pluralism in the media in *Commission v. Belgium*,¹⁴⁴ a case in which Belgium was found to be in breach of its

¹³⁴ *Ibid.*, para. 37. See also para. 36.

¹³⁵ *Ibid.*, para. 10.

¹³⁶ *Ibid.*, para. 40.

¹³⁷ *Ibid.*, para. 41.

¹³⁸ Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de media* [1991], Judgment of the Court of Justice of the European Communities of 25 July 1991, ECR I-4007.

¹³⁹ *Ibid.*, para. 23. See also paras. 22, 24.

¹⁴⁰ *Ibid.*, para. 24.

¹⁴¹ Case C-353/89, *Commission of the European Communities v. Kingdom of the Netherlands* [1991], Judgment of the Court of Justice of the European Communities of 25 July 1991, ECR I-4069.

¹⁴² *Ibid.*, para. 30. See also *Stichting Gouda, op. cit.*, para. 23; Case C-260/89, *Ellinki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991], Judgment of the Court of Justice of the European Communities of 18 June 1991, ECR I-2925, para. 45; *TV10 SA v. Commissariaat voor de media* [1994], Judgment of the Court of Justice of the European Communities (Fifth Chamber) of 5 October 1994, ECR I-4795, para. 25.

¹⁴³ *Commission v. the Netherlands, op. cit.*, para. 31.

¹⁴⁴ Case C-11/95, *Commission v. Belgium* [1996], Judgment of the Court of Justice of the European Communities of 10 September 1996, ECR I-4115, para. 54.

obligations under Article 2, TWF, on account of a system of prior authorisation for the retransmission by cable of television broadcasts emanating from other Member States. On the facts of the case at hand, the Court held that the Belgian authorities had failed to satisfactorily demonstrate the necessity and proportionality of the contested system of prior authorisation for the protection of “pluralism in the audiovisual field or in the media generally”.¹⁴⁵ The Court also rejected the Belgian Government’s submission that the impugned system was intended to serve certain cultural objectives and was therefore justified “inasmuch as Directive 89/552, and in particular Articles 4 and 5, must be construed in the light of Article 128 of the Treaty [...]”.¹⁴⁶ The Court recalled that the cultural objectives of the TWF Directive are encapsulated in Recitals 17 and 18 of its Preamble and also in its Articles 4 and 5, before stating that Article 128 of the Treaty “does not in any way authorize the receiving State, by way of derogation from the system established by Directive 89/552, to make programmes emanating from another Member State subject to further controls”.¹⁴⁷

In an abstrusely worded sentence in *Vereniging Veronica Omroep v. CVDM*,¹⁴⁸ the ECJ authorises Member States to use legislative means to prohibit broadcasting organisations under its jurisdiction from investing in foreign broadcasting organisations or from providing other forms of assistance to the latter “where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation”.¹⁴⁹

The factual background to the *Familiapress* case¹⁵⁰ involved the distribution in Austria of a German publication offering prizes for crossword competitions; this practice fell foul of a statutory prohibition in Austria on publishers of periodicals inviting consumers to take part in draws. The Austrian Government submitted that the aim of the relevant national legislation

¹⁴⁵ *Ibid.*, para. 55.

¹⁴⁶ *Ibid.*, paras. 46, 47. The reference here is to (former) Article 128 of the Treaty establishing the European Community. That Article has since been repositioned in the consolidated version of the Treaty. The (new) Article 151 reads as follows:

“1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
— improvement of the knowledge and dissemination of the culture and history of the European peoples;
— conservation and safeguarding of cultural heritage of European significance;
— non-commercial cultural exchanges;
— artistic and literary creation, including in the audiovisual sector.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:
— acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251;
— acting unanimously on a proposal from the Commission, shall adopt recommendations.”

¹⁴⁷ *Ibid.*, para. 50.

¹⁴⁸ Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media* [1993], Judgment of 3 February 1993, ECR I-487.

¹⁴⁹ *Ibid.*, para. 15.

¹⁵⁰ Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* [1997], Judgment of 26 June 1997, ECR I-3689.

was to preserve press diversity, and that such a justification could be considered an overriding requirement for the purposes of Article 30. The ECJ, following its earlier judgments in *Commission v. Netherlands* and *Veronica v. CVDM*, re-affirmed that the “[M]aintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods” as “[S]uch diversity helps to safeguard freedom of expression [...]”.¹⁵¹ It reiterated that such overriding requirements must be interpreted “in the light of the general principles of law and in particular of fundamental rights”,¹⁵² including freedom of expression.¹⁵³ The Court found that “[A] prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression”.¹⁵⁴ However, basing its remarks on the *Lentia* judgment of the European Court of Human Rights (s. 5.5.2, *supra*), the ECJ stated that derogations from freedom of expression for the purpose of maintaining press diversity are permissible, as long as they are prescribed by law and necessary in a democratic society.¹⁵⁵

The essential question to be considered by the Court, therefore, was “whether a national prohibition such as that in issue [...] is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression”.¹⁵⁶ It continued:

To that end, it should be determined, first, whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand.

The Court thereby opted to frame its enquiry in terms of the impact of unfair competition; considerations relating directly to freedom of expression simply did not figure. Even the suggestions that “blacking out or removing the page on which the prize competition appears in copies intended for Austria or a statement that readers in Austria do not qualify for the chance to win a prize” were considered uniquely as measures that would be “less restrictive of free movement of goods” than the contested outright prohibition. The fact that such measures would also be less restrictive on freedom of expression is not even adverted to. The competition-centric reasoning employed by the Court is therefore regrettably lop-sided.¹⁵⁷ Thus, it concluded that Article 30 of the Treaty would not preclude legislation such as that which was the focus of the *Familiapress* case, as long as it is “proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means”, and that the above-mentioned assumptions hold true. It added that “the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned

¹⁵¹ *Ibid.*, para. 18.

¹⁵² *Ibid.*, para. 24.

¹⁵³ *Ibid.*, para. 25.

¹⁵⁴ *Ibid.*, para. 26.

¹⁵⁵ *Ibid.*, para. 26.

¹⁵⁶ *Ibid.*, para. 27.

¹⁵⁷ It could be mentioned in passing that this down-playing of freedom of expression interests by the ECJ is consistent with its broader doctrinal patterns. The economic objectives of the EU have unsurprisingly played a determinative role in shaping *its* development of freedom of expression interests. The right to freedom of expression has therefore traditionally been relativised in terms of values associated with the goal of achieving free trade in the context of European economic integration. Attempts by the European Court of Human Rights to balance freedom of expression and public policy objectives such as the prevention of unfair competition and false/misleading advertising have also led to unsatisfactory results.

the opportunity to win a prize”, before concluding that the national court should determine whether the relevant conditions “are satisfied on the basis of a study of the national press market concerned”.¹⁵⁸

In *TV10 SA*, the purpose of safeguarding pluralism was spelt out by the ECJ, drawing explicitly on its earlier *ERT* and *Commission v. Netherlands* judgments, as being “to preserve the diversity of opinions, and hence freedom of expression [...]”.¹⁵⁹ In short, TV 10 was a broadcasting company whose activities (especially the transmission of programming by cable) were directed primarily at the Netherlands, but which had – according to the *Commissariaat voor de media* (the Dutch media regulatory authority) and upheld by the *Raad van State* (Dutch Council of State) – established itself in Luxembourg in order to circumvent national legislation applying to domestic [Dutch] broadcasters. One of the objectives of the legislation in question was to safeguard “the pluralist and non-commercial content of programmes”.¹⁶⁰ The ECJ concluded that “the Treaty provisions on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State”.¹⁶¹

By way of conclusion, we can distil from the brief foregoing overview that the ECJ has recognised the value of pluralism and its potential role in guaranteeing expressive opportunities for discrete societal groups and thereby helping to ensure that diverse opinions remain in circulation. Yet, there is something unsatisfactory about this distillation: its explanatory power as regards the importance of media pluralism for democracy is weak. The ECJ has shown little interest in elaborating a comprehensive theoretical basis for its standpoints on these matters. The largely inconclusive nature of its doctrine to date could be taken as supporting Thomas Gibbons’ suggestion that “media pluralism was not promoted for the purpose of supporting a more democratic role for the media, as might be supposed from its content”, but that “[I]nstead, the idea was adopted as a transitional concept that conveniently assisted a shift from public service dominance to a market approach”.¹⁶²

*Other regulatory measures*¹⁶³

Although “the protection of media pluralism is primarily a task for the Member States”,¹⁶⁴ a number of relevant references and provisions do exist at the EU-level. A major instrument in

¹⁵⁸ *Familiapress*, *op. cit.*, para. 34.

¹⁵⁹ Case C-23/93, *TV 10 SA v. Commissariaat voor de Media* [1994], Judgment of the Court of Justice of the European Communities (Fifth Chamber) of 5 October 1994, ECR I-4795, para. 25.

¹⁶⁰ *Ibid.*, para. 21.

¹⁶¹ *Ibid.*, para. 26.

¹⁶² Thomas Gibbons, “Pluralism, guidance and the new media”, in Christopher T. Marsden, Ed., *Regulating the Global Information Society* (London & New York, Routledge, 2000), pp. 304-315, at 307.

¹⁶³ Treoirilinte teilifise agus teicneolaíochta nua agus abairt no dho chun na hailt a nascadh le cheile.

¹⁶⁴ Commission of the European Communities, Green Paper on Services of General Interest, COM(2003) 270 final, 21 May 2003, para. 74; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions The Future of a European Regulatory Audiovisual Policy, COM(2003) 784 final, 15 December 2003, p. 8. See also: European Commission Staff Working Document, Media pluralism in the Member States of the European Union, SEC(2007) 32, 16 January 2007.

the EU's regulatory approach to media pluralism is the Merger Regulation.¹⁶⁵ Under Article 21(4) of the Merger Regulation, Member States are allowed to “take appropriate measures to protect legitimate interests” (i.e., public security, plurality of the media and prudential rules”, thereby putting them beyond the ordinary purview of the Regulation. Any “appropriate measures” thus adopted must be “compatible with the general principles and other provisions of Community law”.

Furthermore, Article 8.1 of the EU's Framework Directive,¹⁶⁶ states that “National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism”. Similarly, its Radio Spectrum Decision¹⁶⁷ establishes procedures in order to, *inter alia*:

facilitate policy making with regard to the strategic planning and harmonisation of the use of radio spectrum in the Community taking into consideration *inter alia* economic, safety, health, public interest, freedom of expression, cultural, scientific, social and technical aspects of Community policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and of avoiding harmful interference;¹⁶⁸

It should also be mentioned that throughout the 1990s, various initiatives to develop formal regulatory instruments (i.e., directives) to deal specifically with media pluralism were taken, but ultimately shelved, due *inter alia* to their political contentiousness and failures to reach necessary inter-institutional agreement within the EU. Although those various initiatives did not culminate in the adoption of a relevant directive, they were politically very significant for the development of policy approaches to issues relating to media pluralism. However, given that relevant details and debates are only of tangential interest to minority rights, they will only be signalled here, but not explored any further.¹⁶⁹

As already mentioned, plans to develop regulation in this field have merely been shelved – not binned – and they tend to intermittently re-appear on political agendas. One of the most recent reappearances was in 2004 when the European Parliament adopted - at first reading – a report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights).¹⁷⁰ The mainstay of the report is a motion for an identically-titled European Parliament Resolution, which *inter alia* calls on the European Commission to present a proposal for a directive to safeguard media pluralism in Europe.

¹⁶⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1 (29 January 2004).

¹⁶⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/33, 24 April 2002.

¹⁶⁷ Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision), OJ L 108/1, 24 April 2002.

¹⁶⁸ Article 2(a), *ibid.*; see also, in the same connection, Recitals 3 and 8 of the Decision.

¹⁶⁹ It should be noted a wealth of relevant academic literature exists, including: Barendt, Craufurd Smith, Goldberg, Prosser & Verhulst, Ward, Westphal...

¹⁷⁰ Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (Rapporteur: Johanna L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final). See further: Tarlach McGonagle, “European Parliament: Adoption of Report on Media Independence and Pluralism”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2004-6: 6.

The motion stresses that media independence and pluralism are crucial for guaranteeing the right to freedom of expression and information. Relevant issues are subjected to a detailed examination, particularly from the angles of audiovisual policy; public service broadcasting and the commercial media. Due emphasis is laid on the individual and collective impact of arguments from democracy; technological advances and constitutional and competition law considerations.

Attention is drawn to specific problems pertaining in a number of EU Member States: France; Germany; Ireland; the Netherlands; Poland; Spain; Sweden and the United Kingdom. The greatest scrutiny, however, is reserved for Italy, due to persistent concerns over high levels of concentration of ownership in the audiovisual market there, coupled with the prominence of political involvement in the same.

The proposed recommendations were distilled from concerns identified and explored in the body of the motion. For instance, it is stated that EU competence in policy and regulatory matters affecting the media, especially new technological features relating to digital television, should be used for furthering media pluralism and combating “horizontal and vertical media concentration in traditional as well as in new media markets”.

Among the motion’s calls for specific lines of action on the part of the European Commission are:

- (i) the submission of a communication on the state of media pluralism in the EU as soon as possible (the envisaged scope of such a communication is broad, including a *compte rendu* of current measures and practice at the national and EU levels alike; explorations of possible and recommended courses of action, and the relevant mechanics of such action and any consultation procedures that would be involved);
- (ii) the submission of “a proposal for a directive to safeguard media pluralism in Europe in order to complete the regulatory framework [...]”.

Another key recommendation is that “legislation should be adopted at European level to prohibit political figures or candidates from having major economic interests in the media [...] legal instruments should be introduced to prevent any conflict of interest [...]”, and that the Commission should “submit proposals to ensure that members of government are not able to use their media interests for political purposes”. The Commission is also called upon to devise an action plan on measures to promote pluralism in all EU sectors of activity. Twenty points are suggested for inclusion in such an action plan. The substantive recommendations conclude with an invitation to the Italian Parliament to address the aforementioned concentration of media ownership and related problems in Italy.¹⁷¹

¹⁷¹ More specifically, it invited the Italian Parliament to:

- (i) speed up reforms of the national audiovisual sector in keeping with “the recommendations of the Italian constitutional court and the President of the Republic, taking due account of the incompatibility with Community law, as identified by these authorities in the Gasparri Bill”;
- (ii) resolve “the problem of a conflict of interest of the President of the Italian Council of Ministers who also directly controls the principal provider of private and, indirectly, public television, the main advertising franchise holder and many other activities connected with the audiovisual and media sector”, and
- (iii) adopt “measures to ensure the independence of the public service broadcaster”.

7.3.4 Framework Convention for the Protection of National Minorities: evaluation

Article 9(4), FCNM, requires States “to adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism”. The use of the conjunction “and” makes it clear that the requirement to facilitate access for minorities to the media is distinct from, and in no sense conditional on, the other stated objectives of promoting tolerance and permitting cultural pluralism. Nevertheless, the fact that they have been positioned alongside each other, in the same paragraph, is suggestive of a perceived underlying connection between them. It is submitted here, reasonably (the *travaux préparatoires* of the FCNM do not offer any helpful guidance on this point), that these three objectives have been bracketed together on account of the inherent connection between the more general principle of pluralistic tolerance and its specific media-related pluralism, as developed at the very outset of this chapter.

Be that as it may, media-related pluralism has a similar “poor-relation” status under the FCNM to the status it has under many other international human rights treaties (see further, *supra*). It is not mentioned *per se* in Article 9, or anywhere else in the text of the FCNM, either as an objective or even *in passim*. On the whole, Article 9 is preoccupied with the expressive rights (and conditions for the exercise of those rights) of minorities – to the partial neglect of recipient-oriented rights and liberties. The defining, driving logic of the FCNM is that the position of national minorities in society is best protected through the enshrinement and enforcement of a catalogue of negative and positive rights. According to that logic, it may appear that there is nothing untoward about prioritising the advancement of rights that specifically benefit minorities over broader (and perhaps vaguer) societal concerns for media pluralism. However, this line of argument overlooks the essential role played by media pluralism in the furtherance of “a spirit of tolerance and intercultural dialogue” and “mutual respect and understanding and co-operation” at societal level (it will be recalled that these objectives are among those set out in Article 6(1), FCNM) (see further, *supra*, Chapter 5.1). In light of these considerations, it must be concluded that the negligible attention paid to media-related pluralism in the text of the FCNM and in its monitoring process is a regrettable shortcoming of the overall approach. A more rounded assessment of minorities’ freedom of expression rights and interests, i.e., sending *and receiving* information and ideas (and also as third parties affected by the same) – such as the theoretical analysis conducted in s. 7.3, *supra* – would likely have yielded a different, more balanced sense of priorities.¹⁷²

The right of persons belonging to national minorities to receive information and ideas has, however, been the focus of attention in two distinct contexts. The first concerns transfrontier broadcasting and the second, geographical/technical obstacles impeding the reception of broadcasting signals. Consideration of the latter will be delayed until Chapter 8 as the Advisory Committee has tended to class such issues as coming under the rubric of “access”. As will be argued in Chapter 8, this tests the elasticity of access as a concept, and is only really meaningful if a distinction is made between “passive” and “active” access.

7.3.5 European Charter for Regional or Minority Languages: evaluation

The key observation made in the previous section in respect of Article 9, FCNM, *viz.* that the AC’s monitoring work has an indirect but indisputable impact on diversity/pluralism in the

¹⁷² Tagairt dhíreach nó dhó eile ag teastáil anseo.

media, also holds true in respect of Article 11, ECRML. However, the impact is also direct as Article 11(3) reads:

The Parties undertake to ensure that the interests of the users of regional or minority languages are represented or taken into account within such bodies as may be established in accordance with the law with responsibility for guaranteeing the freedom and pluralism of the media.

Although not all States Parties to the ECRML have committed themselves to this undertaking, a significant number have done so¹⁷³ and the Committee of Experts' monitoring of this provision has produced some useful interpretive results. This provision seeks to promote participatory inclusive deliberation, even if it does fall short of guaranteeing actual representation. The clause, "or taken into account" could dilute the impact of the provision as a whole if it were to be interpreted without sufficient rigour. In practice, the Committee of Experts has paid attention to the *effectiveness* of the mechanisms used to ensure that the interests of speakers of regional or minority languages are heard within relevant bodies:

While the implementation of this article does not require that each individual Part III language should have its own representative on the bodies in question, it does require that adequate systems or processes exist to ensure that the interests of speakers of each Part III language are in fact represented or taken into account.¹⁷⁴

It is clear that this goal could be realised by structural or procedural means, but preferably through the "active participation" of speakers of regional or minority languages.¹⁷⁵ It is also clear that the onus is on States Parties which have committed themselves to Article 11(3) to demonstrate the effectiveness of the manner in which the interests of speakers of designated languages are represented or taken into account. For example, the UK committed itself to apply Article 11(3) to the Welsh language, but the Committee of Experts noted in its First Report on the UK that it had not been made aware of any intention to include a representative of regional or minority languages on the board of OFCOM, nor had it been informed of any alternative means by which the objectives of Article 11(3) would be realised.¹⁷⁶ This suggests flexibility as to the means, but firmness as to the goals.

The reference to "bodies [...] with responsibility for guaranteeing the freedom and pluralism of the media" is instinctively suggestive of regulatory authorities in the media sector. On at least one occasion, however, the Committee of Experts takes a more expansive understanding of the provision, i.e., when it appeared to apply the provision to the administrative structures of a PSB. In its Second Report on Finland, the Committee stated that it had not received any information "as to how the interests of the Sami are taken into account in the administration of the Finnish Broadcasting Company or in other bodies as may be established with the responsibility to ensure the freedom and pluralism of the media".¹⁷⁷ The wording used is not, of itself, conclusive as to whether it was indeed the intention of the Committee to extend the application of Article 11(3) in this manner. Moreover, on another occasion when it commented on representation in decision-making structures and bodies responsible for guaranteeing freedom

¹⁷³ Armenia, Croatia, Finland, Hungary, Montenegro, Serbia, Slovakia, Slovenia, Spain, Switzerland, Ukraine, United Kingdom.

¹⁷⁴ Second Report on Croatia, para. 180.

¹⁷⁵ First Report on Croatia, Boxed Comment after para. 100.

¹⁷⁶ First Report on the UK, para. 171. It is noteworthy that in its Second Report on the UK, the Committee of Experts reported that OFCOM had established an office in Wales "with a Welsh representative on the Content Board" and that it had also created an advisory committee for Wales: Second Report on the UK, para. 249.

¹⁷⁷ Second Report on Finland, para. 152.

and pluralism of the media in the same paragraph, it distinguish between them.¹⁷⁸ In any case, even if this extension of Article 11(3) proves to be a once-off occurrence, it must nevertheless be considered presumptively invalid to take this approach because to have responsibility for guaranteeing freedom and pluralism of the media, a body would have to be vested with powers of oversight and sanction. By virtue of its mandate, a PSB may be (and more often than not is) required *to contribute to or promote pluralism in the media*. As held by the European Court of Human Rights in the *Lentia* case, the ultimate responsibility for guaranteeing pluralism in the media rests with States or its (regulatory) organs. Moreover, unless a PSB is in a complete monopoly position, it could at best only guarantee pluralism in respect of its own services, in other words in the PSB sector and not “of” the media generally. The distinction between internal and external pluralism is relevant here.¹⁷⁹

7.4 Cultural diversity

Having considered various aspects of media-related pluralism, the topic of cultural diversity will be treated at this juncture, as it is another specific application of more general principles of pluralism and diversity. Cultural diversity is a major component of overall diversity of media content, but in keeping with the discussion in the foregoing sections, some structural modalities can prove very influential in determining the level of cultural diversity that is assured at the content-level (the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, discussed in s. 7.4.2, *infra*, contains a number of provisions that reflect this realisation). As the media are important vectors of culture, their ability to contribute to the promotion of cultural diversity, especially in terms of media output, should not be underestimated.

7.4.1 UNESCO Universal Declaration on Cultural Diversity¹⁸⁰

As well as attempting to give shape to the notion of cultural diversity, the Preamble to the Declaration seeks to explicate the societal importance of the notion. It notes, for instance, that “culture is at the heart of contemporary debates about identity, social cohesion, and the development of a knowledge-based economy”. It affirms that “respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding, are among the best guarantees of international peace and security”. It also considers that “the process of globalization, facilitated by the rapid development of new information and communication technologies, though representing a challenge for cultural diversity, creates the conditions for renewed dialogue among cultures and civilizations”. These preambular emphases already point towards the relevance of the substantive provisions of the Declaration to the cultural rights, needs and interests of persons belonging to minorities. On a general level, they can be said to collectively address overarching and often overbearing public policy questions, the successful resolution of which necessarily requires the effective participation of persons belonging to minorities. Importantly, the quoted preambular statements also recognise the complex ability of modern media to influence the formal and informal processes involved.

¹⁷⁸ First Report on Switzerland, para. 149.

¹⁷⁹ Second Report on Switzerland, paras. 131-132; Wheatley and Young.

¹⁸⁰ Adopted unanimously by the UNESCO General Conference at its 31st session on 2 November 2001. For a detailed overview of UNESCO’s other standard-setting and activities in the realm of culture, see generally: Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (forthcoming 2008, text on file with author).

As an instrument devoted entirely to cultural diversity, the UNESCO Universal Declaration provides plenty of scope for in-depth exploration of its various component elements. Article 1 of the Declaration recognises that culture is not static and that its development is influenced by temporal and spatial considerations. It describes cultural diversity as “a source of exchange, innovation and creativity” and thus “the common heritage of humanity” which “should be recognized and affirmed for the benefit of present and future generations”. This description, consistent with prevailing international standards, argues against any fly-in-amber style of preserving cultures, including minority cultures. In other words, cultures are organic and diverse and should be celebrated as such. The intergenerational transmission of cultural heritage in viable formats is of particular importance for ailing or endangered cultures.

Article 2, entitled “From cultural diversity to cultural pluralism”, fails to elucidate the conceptual distinction between its two main focuses, but its underlying message is of particular relevance:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.

Article 3 mentions the contribution of cultural diversity to the development of economic and wholistic human capacities, all of which are of relevance for the purposes of personal self-fulfilment/realisation. Article 4 is easily recognisable as an abuse of rights clause: it states that cultural diversity may not be invoked to infringe upon or limit the scope of human rights, as guaranteed by international law. It emphasises that cultural diversity, human dignity and human rights and fundamental freedoms, “in particular the rights of persons belonging to minorities and those of indigenous peoples”, are all bound together.

In the logic of the universality, indivisibility and interdependence of human rights, Article 5, entitled “Cultural rights as an enabling environment for cultural diversity”, states that the full realisation of cultural rights is a prerequisite of cultural diversity. After referring to Article 27, UDHR, and Articles 13 and 15, ICESCR, it states that, “subject to respect for human rights and fundamental freedoms [applicable to whole article or only final ss?]”, all persons have the right to:

- “express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue”;
- [enjoy] “quality education and training that fully respect their cultural identity”;
- “participate in the cultural life of their choice and conduct their own cultural practices”.

Article 6 articulates the importance of access to cultural diversity. It underscores the instrumental role of the media (traditional and new) in this regard: “Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.”

Subsequent Articles draw attention to the potential of cultural heritage for stimulating creativity and furthering intercultural dialogue (Article 7); “the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods” (Article 8); the importance of cultural policies for the creation of “conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level” and the prerogative of States to define and develop their own cultural policies (with due regard for their international obligations) (Article 9). Articles 10 and 11 focus respectively on “Strengthening capacities for creation and dissemination worldwide” and “Building partnerships between the public sector, the private sector and civil society”. Finally, Article 12 outlines the role of UNESCO in respect of the Declaration and its responsibilities arising therefrom.

7.4.2 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹⁸¹

A new high water-mark was arguably reached on 20 October 2005, when the General Conference of UNESCO adopted a Convention on the Protection and Promotion of the Diversity of Cultural Expressions by 148 votes to two, with four abstentions.¹⁸² The Convention represents a new terminological departure and an adjusted conceptual positioning. The shift in terminology – from cultural diversity (as in the eponymous UNESCO Declaration) to the diversity of cultural expressions – is not merely semantic. It was a deliberate ploy by States, adopted at the very outset of the drafting process, to seek to narrow the focus of the proposed Convention.¹⁸³ The shift has been noted with a measure of trepidation by some commentators, who feel that it breaks continuity with a term that had been achieving a certain anchorage in relevant standard-setting and discussions on the international plane.¹⁸⁴ The conceptual repositioning involves greater attention for means than for ends and for the conviction that cultural diversity is instrumental in securing a range of cultural freedoms and exchange, including the free flow of cultural activities, goods and services.¹⁸⁵

The Convention seeks to protect and promote the diversity of cultural expressions and to create an appropriate climate in which cultures can thrive. Other key goals are to strengthen

¹⁸¹ The author is grateful to Yvonne Donders for her helpful suggestions for reading materials about the Convention.

¹⁸² Israel and the USA voted against the Convention and Australia, Honduras, Liberia and Nicaragua abstained. For a more comprehensive overview of the Convention’s scope and provisions, see: Tarlach McGonagle, “UNESCO: New Convention on Diversity of Cultural Expressions”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2005-10: 2; Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *ZaöRV* 66 (2006), 819-862. For details of the background to the adoption of the Convention and a critical analysis of its provisions, see: Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *R.G.D.I.P.* 2007-1, 43-87; Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (forthcoming, 2008) (pre-publication version of chapter on file with author).

¹⁸³ Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, p. 15 of text as submitted for publication.

¹⁸⁴ See, for example, Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, at 831.

¹⁸⁵ Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 53.

awareness of and respect for such diversity at all levels and to encourage intercultural interaction and dialogue. The Convention also aims to stress the linkage “between culture and development for all countries, particularly for developing countries” and to “give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning”. Of particular importance is its reaffirmation of “the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory”. This objective clearly seeks to ensure that States retain control over their own cultural policies in the face of interventionist proclivities exhibited by various IGOs (not least concerning trade agreements). It is revisited in Article 5 of the Convention, where its reaffirmation has been referred to as the “normative heart” of the Convention.¹⁸⁶ As an objective, State sovereignty in cultural matters is an important precondition for the ability to adopt the programmatic measures envisaged under Articles 7 and 8 of the Convention to promote and protect cultural expressions (see further, *infra*). The Convention also aims to strengthen international cooperation and solidarity, especially by “enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions”.

It is useful at this juncture, after having explained the emphasis on State sovereignty and before examining the stated “Guiding Principles” of the Convention, to recall Yvonne Donders’ cautionary observation that the Convention is not and was never intended to be a human rights instrument, *proprement dit*.¹⁸⁷ It focuses on States’ prerogatives (in particular to “introduce culturally motivated measures”¹⁸⁸) as opposed to individual human rights, although the latter are listed among the Convention’s “Guiding Principles”.

Article 2 sets out those “Guiding Principles”: respect for human rights and fundamental freedoms; [State] sovereignty; equal dignity and respect for all cultures; international solidarity and cooperation; the complementarity of economic and cultural aspects of development; sustainable development; equitable access, and openness and balance. It should be noted in passing that the principle of equal dignity and respect for all cultures, as outlined, includes a specific reference to the cultures of persons belonging to minorities and indigenous peoples. It is also noteworthy that the principle of equitable access to a “rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination” is considered an important factor for “enhancing cultural diversity and encouraging mutual understanding”. Here, as in an increasing number of international treaties, the interlinkage between freedom of expression (i.e., to receive and impart ideas and information), cultural diversity and understanding/tolerance, is set out in explicit fashion.

The definitional framework for the Convention is provided in Article 4, which states that cultural diversity “refers to the manifold ways in which the cultures of groups and societies find expression” – both within and among groups and societies. It further points to the possibility that such expression can take place through a variety of activities, means and technologies. This recognition is important in respect of media regulation and is considered in more detail in Chapter 4. “Cultural expressions” are described as “those expressions that

¹⁸⁶ “Le coeur normative de la convention”: Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 71.

¹⁸⁷ Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, p. 16 of pre-publication text of chapter.

¹⁸⁸ Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, 1 *International Journal of Communication* (2007), pp. 24-55.

result from the creativity of individuals, groups and societies, and that have cultural content”. The significance of the focus on cultural activities, goods and services has already been adverted to, *supra*. They are taken to be “activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have”. By highlighting that activities, goods and services can have inherent cultural features, notwithstanding the co-existence of commercial features, this definitional provision provides support for the claim that a main purpose of the Convention is political delineation. Hélène Ruiz Fabri, for instance, has argued that the Convention constitutes a basis for mounting a challenge to an exclusively commercial approach to relevant issues.¹⁸⁹

Article 5 reiterates the sovereign rights of States in respect of cultural matters and Article 6 proceeds to explore a range of measures that States Parties may adopt with a view to protecting and promoting the diversity of cultural expressions. A list of illustrative examples of appropriate measures is preferred to a general definition of the same. The indicative list of measures includes: regulation; public financing; provision of opportunities for the “creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services”; ensuring effective access for “domestic independent cultural industries and activities in the informal sector” to “the means of production, dissemination and distribution of cultural activities, goods and services”; encouragement of [efforts of] non-profit organisations, public and private institutions, artists and other cultural professionals; establishment and support of public institutions, “as appropriate”. Last, but certainly not least, “measures aimed at enhancing diversity of the media, including through public service broadcasting”, are also contemplated.

The promotion and protection of cultural expressions are each given separate consideration in the context of States Parties’ relevant rights and obligations (Articles 7 and 8, respectively). No explanation is offered for the curious inversion of “promotion” and “protection”: protection is logically prior to promotion and such an ordering is reflected in the title of the Convention itself, as well as elsewhere in international human rights law (see, for example, the discussion of the duty of States to respect, protect and fulfil human rights, where the promotion of rights falls under the duty to fulfil – Chapter 5.2.3). Whereas earlier drafts of the Convention had proposed the imposition of substantive obligations on States Parties for the realisation of the aims of the Convention, they were progressively watered down and were not retained in the adopted text. This is perhaps explainable by a concern to make the Convention palatable to a larger number of States, including those with weak economies which would be apprehensive about the financial implications of (additional and specific) positive obligations.

Under Article 7 (‘Measures to promote cultural expressions’), States Parties “shall endeavour to create in their territory an environment which encourages individuals and social groups” to carry out a number of activities. Reliance on weak wording like “endeavour” and vague aims like the creation of an environment which encourages certain action, does not augur well for the effective attainment of the aims in question. The shortcomings of this kind of language have already been exposed in some detail in respect of the FCNM, where such formulations are recurrent. In the first place, individuals and social groups should be encouraged:

¹⁸⁹ Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 55.

to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;

This reference to creation, production, dissemination, distribution and access to cultural expressions, like other similarly itemised references elsewhere in the Convention, is important as it implicates a range of actors at different stages of the generation and transmission of cultural expressions.¹⁹⁰ The explicit call for attention for the situational specificities of persons belonging to minorities is also welcome. Both of these references are meaningful considerations when it comes to the actual realisation of the right to freedom of expression for persons belonging to minorities.

Secondly, individuals and groups should be encouraged “to have access to diverse cultural expressions from within their territory as well as from other countries of the world”. The importance of the transnational dimension has traditionally suffered from relative neglect in discussions about “cultural diversity” (to revert to more familiar parlance). However, the requirement that States endeavour to create an environment which encourages its subjects to have access to diverse cultural expressions is lofty and does not give rise to any justiciable or even quantifiable legal obligation. Alternative wording could have required States to endeavour to facilitate effective access to diverse cultural expressions of domestic and foreign origin. Such wording does not give rise to easily assessable legal obligations either, but it would signal a more serious sense of moral commitment than the present wording. Finally, the wording employed in Article 7(2)¹⁹¹ saps the provision of all vigour and helps to compound the criticism that the Convention’s objectives are poorly served by its “substantive” provisions.¹⁹² It requires States to “endeavour to recognize” the important contribution and roles of artists, communities and organisations involved in cultural creativity to the fostering of the diversity of cultural expressions.

Article 8 is entitled ‘Measures to protect cultural expressions’. More specifically, it concerns the ability of a State Party “to determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding”. Even in such situations of real peril for cultural expressions (overlooking the awkwardness of the reference to a risk of extinction of cultural expressions (which are by nature inanimate), instead of cultures (which are organic)), a State Party is not obliged to take action, but “may” do so. The failure to prescribe concrete action by States in such scenarios and only to allow it provides further evidence of the Convention’s overall weakness.¹⁹³ Article 17 provides for ‘International cooperation in situations of serious threat to cultural expressions’, i.e., situations determined in accordance with Article 8.

A number of procedural priorities are identified as being important for the pursuit of the Convention’s goals: information-sharing and transparency; education and public awareness; participation of civil society, and promotion of international cooperation (Articles 9-12,

¹⁹⁰ See also: H el ene Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversit e des expressions culturelles”, *op. cit.*, at 73.

¹⁹¹ Article 7(2) reads: “Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.”

¹⁹² For a different version of this criticism, see: Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, at 861.

¹⁹³ See also, H el ene Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversit e des expressions culturelles”, *op. cit.*, at 72.

respectively). Article 9(a) requires States Parties to “provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level”. Rachael Craufurd Smith has lambasted this provision for its inherent weaknesses: no obligation on States Parties to report on their countries’ state of cultural diversity in general terms; no obligation to report on measures or factors adversely affecting cultural diversity in their countries; no provision for sanctions for failure to file reports; no provision for effective monitoring and follow-up by an independent body.¹⁹⁴ As such, the promise of more robust proposals on the table during the drafting process failed to materialise.¹⁹⁵

Article 12(d) explicitly recognises the potential of new technologies to contribute to the attainment of these aims and accordingly calls for the promotion of their use. The Convention also underscores the importance of States Parties’ commitment to the integration of culture in their development policies at all levels with a view to maintaining and enhancing the diversity of cultural expressions (Article 13), as well as to “cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector” (Article 14).

Article 18 of the Convention provides for the establishment of an “International Fund for Cultural Diversity” which is to be financed by, *inter alia*, voluntary contributions by States Parties, “funds appropriated for this purpose by the General Conference of UNESCO”, contributions from miscellaneous sources and “any interest due on resources of the Fund”. A voluntary basis for financing the Fund can hardly be regarded as a secure basis, so until practice proves otherwise, the existence of the Fund can only be viewed as precarious.¹⁹⁶ The administration of the Fund is one of the tasks to be carried out by an Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, which is to be set up pursuant to Article 23 of the Convention.

Article 20 is entitled “Relationship to other treaties: mutual supportiveness, complementarity and non-subordination”; as such, it addresses a key preoccupation of States from the very beginning of the drafting process.¹⁹⁷ The compromise wording which prevailed strives to promote complementarity between the Convention and other international treaties; thereby avoiding controversial confrontations or hierarchisations.¹⁹⁸

The provisions for the settlement of disputes (Article 25 and the Annex entitled ‘Conciliation Procedure’) are also deficient for their failure to mandate parties involved in the proposed conciliation procedure to accept the findings of the purpose-created Conciliation Commission. The Commission is only empowered to make proposals for the resolution of disputes and the Parties involved are not obliged to accept the same proposals, merely to consider them in good faith. Again, in the absence of provision for possible sanctions for ignoring or rejecting

¹⁹⁴ Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, *op. cit.*, p. 38.

¹⁹⁵ *Ibid.*

¹⁹⁶ See further on this point, Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, *op. cit.*, p. 38 and p. 53.

¹⁹⁷ See further: Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, p. 11 and p. 14 of pre-publication text of chapter.

¹⁹⁸ See further, *ibid.*, at pp. 14-15.

the proposal of the Commission, the dispute-resolution apparatus is rendered potentially toothless.¹⁹⁹

In accordance with Article 29, having been ratified by the requisite 30 States, the Convention entered into force on 18 March 2007. The accession of the European Community to the Convention on 18 December 2006 proved a crucial catalyst for its entry into force. However, the importance of the Convention had already been recognised by other IGOs, in particular the Council of Europe. The Committee of Ministers of the Council of Europe adopted a Recommendation calling on Member States to ratify, accept, approve or accede to the UNESCO Convention at the earliest opportunity. The Recommendation was prompted by the recognition of “the commonality between the objectives and guiding principles” set out in the Convention and “a number of Council of Europe instruments concerning culture as well as the media”.²⁰⁰ The Recommendation also declared that “in the context of its work, the Council of Europe will have due regard to the provisions of the UNESCO Convention and will contribute to their implementation”.

It is, as of yet, too early to evaluate the real (initial) impact of the Convention. Much will depend, as Ruiz Fabri correctly points out, on the establishment and effectiveness of the Convention’s organs;²⁰¹ State practice relating to the Convention, and the engagement of civil society.²⁰² She is also right, however, to insist that political and symbolic importance of the adoption and entry-into-force of the Convention should not be understated. The Convention constitutes a significant statement of principle that State sovereignty should apply to cultural matters and thereby a counterweight to forcefully commercial approaches to cultural activities, goods and services.²⁰³ As detailed in the foregoing analysis, certain discrete emphases in the text of the Convention (eg. the link between diversity of cultural expressions and intercultural dialogue and understanding (Article 2); the need to pay due attention to the specific circumstances of persons belonging to minorities (Article 7(1)(a)); threats to cultural expressions (Article 8) and the potential of new technologies to enhance the diversity of cultural expressions) hold considerable promise. Repeated references to the different stages and processes involved in the production, transmission and reception of cultural expressions are also valuable insofar as they prompt a disaggregated approach to the realisation of the right to freedom of expression. This also facilitates the task of addressing bottle-necks in the different stages of cultural activity. However, in practical terms, the programmatic character of envisaged State obligations and the general absence of operationalising criteria that would facilitate their realisation are major hurdles to be cleared.²⁰⁴ The enduring impact of the Convention is likely to be best measured in terms of symbolism and awareness-raising; its consistent resort to non-committal language, although somewhat offset by intermittently more

¹⁹⁹ For further critique, see: Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, *op. cit.*, p. 39.

²⁰⁰ Recommendation Rec(2006)3 of the Committee of Ministers to member states on the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, adopted on 1 February 2006.

²⁰¹ Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 84.

²⁰² *Ibid*, at 85.

²⁰³ *Ibid*, at 55 and 83.

²⁰⁴ Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, at 860; Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 72. Note to self: [not readily justiciable; cross-fertilisation]

specific, programmatic provisions, means that it is unlikely to lead to meaningful legal achievements.²⁰⁵

7.4.3 European-level measures concerning cultural diversity

Attention will now turn to a selection of regulatory provisions at the European level which are implicitly, associatively or explicitly styled as promoting cultural diversity. It will take the provisions promoting European audiovisual works as its starting point.

As a result of the pronounced efforts undertaken by the European Union and the Council of Europe to synchronise their respective standard-setting measures pertaining to the audiovisual sector,²⁰⁶ much of the content of the two IGOs' flagship instruments dealing with transfrontier broadcasting is strikingly similar.²⁰⁷ Thus, the EU's Television without Frontiers Directive (TWF)²⁰⁸ and the Council of Europe's European Convention on Transfrontier Television (ECTT)²⁰⁹ both contain provisions for the promotion of European audiovisual works. Given the broad congruence between Articles 4 and 5, Television without Frontiers Directive, and Article 10, ECTT, only the former will be dealt with here.

7.4.3(i) "Television without Frontiers" Directive

Under Articles 4 and 5 of the Television without Frontiers Directive, television broadcasters in Europe are subject to a quota system for European, and independent European, works. The system is based on a rather convoluted definition of European works set out in Article 6, Television without Frontiers Directive. Relevant excerpts from Articles 4 and 5 are as follows:

Article 4

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

Article 5

²⁰⁵ C.f. Rachael Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?", *op. cit.*, p. 53.

²⁰⁶ Explanatory Report to the European Convention on Transfrontier Television, paras. 39, 40. See further: Daniel Krebber, *Europeanisation of Regulatory Television Policy: The Decision-making Process of the Television without Frontiers Directives from 1989 & 1997* (Nomos Verlagsgesellschaft, Baden-Baden, 2002), esp. Chaps. 4, 5 & 6.

²⁰⁷ See further: Tarlach McGonagle, "Workshop Report", in Susanne Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules* (Strasbourg, European Audiovisual Observatory, 2006), pp. 47-59, at 47-49; Pierre Goerens, "Interplay Between Relevant European Legal Instruments – ECTT and TVwF Directive: Competition or Complementarity?", in *ibid.*, pp. 1-11.

²⁰⁸ 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 298/23, 17 October 1989, and amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ L 202/60, 30 July 1997.

²⁰⁹ Council of Europe (1989), *European Convention on Transfrontier Television (1989)*, ETS No. 132, as amended by its *Amending Protocol* (1998), ETS No. 171, which entered into force on 1 March 2002.

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

The cited Articles tend to be regarded as the main provisions in the Television without Frontiers Directive which, by design or in effect, serve the goal of promoting cultural diversity in broadcasting.²¹⁰ As no other Article in the Directive deals with cultural diversity *per se*, it is perhaps predictable that the Articles promoting European, and independent European, works might, by default, be considered to be the most relevant. However, upon closer scrutiny, the perceived relevance of Articles 4 and 5 turns out to be somewhat specious as the (intended and actual) contribution of these Articles to the goal of promoting cultural diversity in broadcasting is actually quite limited.

Articles 4 and 5 have been roundly criticised by many commentators for being little more than EU cultural protectionism unconvincingly dressed up as promoting creativity and cultural diversity.²¹¹ In reality, they pursue dual economic and cultural objectives, but those objectives are not evenly weighted. The actual wording of relevant preambular Recitals and of the Articles themselves, as well as the *Realpolitik* of their drafting history, all suggest that Articles 4 and 5 were really conceived of as protective economic measures, designed to support the European audiovisual industry in the face of US dominance of global audiovisual markets. Conversely, the cultural credentials of Articles 4 and 5 appear questionable. They constitute particularly blunt instruments as regards their purported cultural objectives for a number of reasons: they lack any qualitative criteria; they lack any stipulations about time-scheduling and they lack any requirement to reinvest percentages of *profits* in new, independent European production. Such shortcomings increase the likelihood of mere *pro forma* compliance with Articles 4 and 5 by cost-conscious broadcasters who might prefer to meet their obligations by transmitting cheap, low-quality programming at off-peak hours. The reporting system concerning Articles 4 and 5 is primarily statistical, which makes it very difficult to gauge the qualitative impact of the provisions. Furthermore, in the absence of what have been termed “public, precise and transparent indicators”, it can be a problematic exercise to determine the exact extent to which States actually discharge their relevant obligations.²¹²

In light of the foregoing comments about the architectural design of Articles 4 and 5 being primarily quantitative, those Articles could appear to be predicated on a deterministic

²¹⁰ Note, for example, their thematic coupling during the latest formal process of revision of the Television without Frontiers Directive: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005.

²¹¹ See further: Tarlach McGonagle, “The Quota Quandary: An Assessment of Articles 4-6 of the Television without Frontiers Directive”, in David Ward, Ed., *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate Publishing Limited, forthcoming, 2008); Irimi Katsirea, “Why the European broadcasting quota should be abolished”, 28 *European Law Review* (No. 2, 2003), pp. 190-209; Jackie Harrison & Lorna Woods, “Television Quotas: Protecting European Culture?”, 12 *Entertainment Law Review* (No. 1, 2001), pp. 5-14.

²¹² *Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the “TV without Frontiers” Directive), as amended by Directive 97/36/EC, for the period 2001-2002 (2004/2236(INI))*, European Parliament Committee on Culture and Education, Rapporteur: H. Weber, Doc. No. A6-0202/2005, 21 June 2005, para. 7.

understanding of television broadcasting. A proper evaluation of the effectiveness of the provisions would necessitate due consideration of attitudinal complexities in viewing processes/reception analysis. It would also need to be informed by awareness of changing patterns of media usage (eg. the emergence of new participatory paradigms in broadcasting; increasing audience preferences for user-generated content, etc.).

The myth that Articles 4 and 5 constitute important vectors for cultural diversity can also be exposed by referring to the Articles' Eurocentric focus. If they were properly concerned about the promotion of cultural diversity, they would have to embrace the belief that cultural diversity is valuable in and of itself and thus a source of societal enrichment. Based on the assumption that audiovisual content is capable of expressing cultural identities, traditions and aspirations, the prescription of measures protecting/promoting *European* audiovisual content, as opposed to *extra-* or *non-European* audiovisual content, would be difficult to reconcile with such a profession of faith in the inherent value of cultures. On such a reading, the Articles could be perceived as implying a disconcerting hierarchisation of cultures and a *de facto* relegation of non-European cultures to a status of inferiority. However, given that the motivation for the protective/promotional measures for European audiovisual works is primarily economic – and not to promote cultural diversity as such, this criticism can hardly be sustained. To hold otherwise would be to fault Articles 4 and 5 for failing to fulfil goals imputed to them, but which they do not actually hold. The foregoing conceptual contradictions highlight the dangers involved in considering Articles 4 and 5 to be default measures for the promotion of cultural diversity.

7.4.3(ii) Audiovisual Media Services Directive

In December 2007, the protracted process of modernising the Television without Frontiers Directive drew to a close with the publication in the *Official Journal of the European Communities* of the so-called Audiovisual Media Services (AVMS) Directive.²¹³

The development of EU policy in audiovisual matters generally, and the negotiation, drafting and first formal revision of the Television without Frontiers Directive, in particular, have been described as struggles between different, or rather, opposing, philosophies of broadcasting. Interventionist (*dirigiste*) and liberal perspectives clashed repeatedly, and often acrimoniously, during the deliberative process. Articles 4 and 5 were a common site for those clashes. States espousing an interventionist approach to broadcasting, eg. France, insisted on the inclusion of the provisions and lobbied strongly for high prescriptions of European audiovisual content. Other States, such as Germany and the United Kingdom, which pursued more liberal philosophies as regards broadcasting, opposed the provisions and favoured limiting their scope. Against this background of contention and political positioning, it is surprising that the previous debates were not re-ignited to any significant extent during the latest formal revision of the Directive and that Articles 4 and 5 have remained essentially unchanged in the new text.

One of the most important novel features to be introduced into the AVMS Directive is the distinction between linear and non-linear audiovisual media services, described in the

²¹³ 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 332/27 of 18 December 2007.

Directive as “television broadcasting” and “on-demand audiovisual media service[s]”, respectively. The former are defined as services “provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule” (Article 1(e)). In other words, these are so-called “push” technologies (because content is “pushed” to viewers), such as traditional television broadcasting or other forms of scheduled broadcasting via the Internet or mobile phones. Non-linear audiovisual services, on the other hand, are defined as services “provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider” (Article 1(g)). These are also known as “pull” technologies (because viewers “pull” content from networks) or on-demand services. The AVMS Directive will introduce a form of tiered regulation, with different tiers of obligations and responsibilities applying to media service providers, depending on whether they provide linear or non-linear audiovisual media services. A basic, minimum level of content regulation will apply to non-linear audiovisual media services, whereas additional regulation will apply to linear audiovisual media services. The distinction between the two is likely to be of capital importance in respect of the future realisation of the objective of promoting the distribution and production of European audiovisual content (see further, *infra*).

The preamble to the AVMS Directive is sprinkled with references to the goal of promoting cultural diversity in the European audiovisual sector: most saliently, Recitals 1, 4, 5, 8 and 48. Of these, the first four are, by and large, differently-crafted re-affirmations of the importance of cultural (and linguistic) diversity. Recital 48, for its part, engages directly and extensively with the goal of promoting cultural diversity specifically in respect of on-demand audiovisual media services. It reads:

On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports set out under this Directive, Member States should also take into account notably the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services and in the actual consumption of European works offered by such services.

The observations and objectives outlined in Recital 48 are shored up in more concrete terms in the substantive part of the Directive. Article 3i is the operative provision and it reads:

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, *inter alia*, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.
2. Member States shall report to the Commission no later than 19 December 2011 and every four years thereafter on the implementation of paragraph 1.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

Article 3i's all-important first paragraph clearly steers a middle course between the two most opposing positions that could have been taken, i.e., to extend the application of Articles 4-5, Television without Frontiers Directive, fully to on-demand audiovisual media services, or not at all.²¹⁴ It is relevant to note in this connection that the Court of Justice of the European Communities (ECJ) had already held in the *Mediakabel* case that Articles 4 and 5 of the Television without Frontiers Directive *do* apply to near-video-on-demand services.²¹⁵ The new obligation in Article 3i can more accurately be described as promotional rather than prescriptive. Member States are obliged to “ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote [...] the production of and access to European works”, but only “where practicable and by appropriate means”. Such a qualification could easily render the obligation ineffective. It would be all too easy for States seeking to shirk this obligation to argue that the pursuit of the objective of promoting the production of and access to European works is not practicable in a complex and ever-changing technological environment.

Having said that, the qualification “where practicable and by appropriate means” does not sap the obligation of all its vitality. The fact that Article 3i(1) sets out illustrative examples of what any “appropriate measures” could conceivably entail is helpful insofar as it offers some guidance as to how the obligation could be discharged in practice. It is also relevant that Article 3i(2) creates new reporting obligations for Member States concerning the promotion, by on-demand services provided by audiovisual media service providers, of the production of and access to European works. These reporting obligations are additional to those already established pursuant to Articles 4 and 5 of the Television without Frontiers Directive. Another relevant consideration is that Article 3i(3) envisages a double-barrelled evaluation exercise on the part of the European Commission (i.e., on the basis of information provided by Member States, on the one hand, and an independent study on the other). It is to be expected that in the fullness of time, the reporting and evaluation processes will facilitate the development of indicators and bench-marking criteria, as well as the identification of best practices, all of which will contribute to the realisation of the potential of Article 3i.

Whatever the precise depth of potential that Article 3i does hold for contributing to the goal of promoting the production of and access to European works, its usefulness for the advancement of cultural diversity generally suffers from the same inherent conceptual constraints as Articles 4 and 5, Television without Frontiers Directive, as discussed, *supra*. It fails to articulate the goal of promoting cultural diversity in an inclusive way that would give due recognition to the importance of non-European audiovisual works (which, in practice, are often expressive of non-European cultures). It thereby fails to encourage, or even acknowledge the value of, audiovisual works emanating from non-European countries or their expression of the vitality and importance of cultural identities and imaginations which transcend, or are simply located beyond, Europe's political borders.

Other suspects and other prospects

²¹⁴ For a short overview of the different positions considered during the review of the Television without Frontiers Directive with a view to its modernisation, see: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005, pp. 2-3; European Commission Expert Group, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, May 2005, p. 5.

²¹⁵ Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, Judgment of the Court of Justice of the European Communities (Third Chamber) of 2 June 2005, ECR I-4891. The essence of the Court's reasoning can be found in para. 51 of the judgment.

In light of the shortcomings of Articles 4 and 5 of the Television without Frontiers Directive in terms of their exclusionary Eurocentricity and their ineptitude for dealing with novel technological complexities, it is necessary to explore the suitability of other mechanisms for advancing cultural diversity in the broadcasting sector. Particular attention will be paid to the relevant potential of public service broadcasting (PSB) and must-carry provisions.

7.4.3(iii) Public service broadcasting

By virtue of its philosophy and mandate, public service broadcasting (or public service media, as they are increasingly being called in deference to the diversification of technological forms across which they (may) operate) is simultaneously an ideal agent to, and an ideal forum in which to, promote cultural diversity. There is no single, fixed, legally-authoritative definition of public service broadcasting at the European level. The aims and defining characteristics of PSB are articulated in a variety of comparable formulations. For example, in one of its recent Recommendations to Member States, the Council of Europe's Committee of Ministers (CM) described the "specific role of public service broadcasting" as being:

to promote the values of democratic societies, in particular respect for human rights, cultures and political pluralism; and with regard to its goal of offering a wide choice of programmes and services to all sectors of the public; promoting social cohesion, cultural diversity and pluralist communication accessible to everyone.²¹⁶

Whereas the promotion of cultural diversity is often identified as a general objective of PSB, it can also feature in a more detailed fashion among the more specific objectives of PSB. For example, the CM's Recommendation on the remit of public service media in the information society also emphasises that:

In their programming and content, public service media should reflect the increasingly multi-ethnic and multicultural societies in which they operate, protecting the cultural heritage of different minorities and communities, providing possibilities for cultural expression and exchange, and promoting closer integration, without obliterating cultural diversity at the national level.²¹⁷

It should be noted that the Recommendation understands cultural diversity in an open, inclusive way – there is no question of the notion being restricted to European cultural diversity, as in the aforementioned regulatory measures prescribing the transmission of European audiovisual works. This is clear from para. 24 of the Recommendation, which states: "Public service media should promote respect for cultural diversity, while simultaneously introducing the audience to the cultures of other peoples around the world".

PSB is currently in a state of transition, but as Karol Jakubowicz has noted, "there was hardly a time in the eight decades of PSB's existence when it was not 'in transition'".²¹⁸ He describes the challenges constantly faced by PSB as being "at once conceptual and contextual": different understandings of the role of PSB and the fact that "changing contexts of PSB operation have always affected the shape, nature and objectives of that media institution and positioned it in society and on the media scene in a variety of ways".²¹⁹ The current state of

²¹⁶ Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007, Preamble.

²¹⁷ *Ibid.*, para. 23.

²¹⁸ Karol Jakubowicz, "Public Service Broadcasting: A Pawn on an Ideological Chessboard", in Els De Bens, Ed., *Media Between Culture and Commerce* (Bristol, UK & Chicago, USA, Intellect, 2007), pp. 115-141, at 116.

²¹⁹ *Ibid.*

transition has been triggered by technological, market-related and socio-cultural trends.²²⁰ How PSB engages with these new trends will largely determine its future. Broadcasting technologies are becoming inexorably digitised and converged. If PSB is to retain its previous (or even current) level of influence in this new technological environment, it is imperative that it develops into an effective player across diverse media types and formats. Relevant initiatives are being actively encouraged at the European level, notably in the standard-setting work of the CM that came to fruition in 2007.

Calls for increased general PSB exploitation of new technological opportunities are also increasingly being linked to the specific goal of promoting cultural diversity. For example, again in its Recommendation on the remit of public service media in the information society, adopted at the beginning of 2007, the CM stated:

Public service media should play a particular role in the promotion of cultural diversity and identity, including through new communication services and platforms. To this end, public service media should continue to invest in new, original content production, made in formats suitable for the new communication services. They should support the creation and production of domestic audiovisual works reflecting as well local and regional characteristics.²²¹

The CM's Recommendation on measures to promote the public service value of the Internet, adopted towards the end of 2007,²²² picks up on this theme. Its central objective is to prompt States authorities, where appropriate in cooperation with all interested parties, to take all necessary measures to promote the public service value of the Internet, *inter alia* by "upholding human rights, democracy and the rule of law [...] and promoting social cohesion, respect for cultural diversity and trust" in respect of the Internet and other ICTs. States authorities are expected to draw on the guidelines appended to the Recommendation in their efforts to realise its central objective. The guidelines have five main focuses: human rights and democracy; access; openness; diversity, and security. The guidelines' focus on diversity strives for equitable and universal involvement in the development of Internet and ICT content. As such, it encourages, *inter alia*:

- the development of a cultural dimension to digital content production, including by public service media;
- strategies and policies geared towards the preservation of digital heritage;
- participation in "the creation, modification and remixing of interactive content";
- measures for the production and distribution of user- and community-generated content;
- capacity-building for local and indigenous content on the Internet;
- multilingualism on the Internet.

The selection of measures listed above is indicative of an important level of awareness of the wide spectrum of novel issues that need to be addressed. Of course, a number of earlier Recommendations and Declarations adopted by the CM also continue to inform strategies for promoting cultural diversity in broadcasting. The most relevant of those standard-setting texts (including those mentioned above) are summarised here in tabular form:

²²⁰ See, *ibid.*, at 120.

²²¹ CM Recommendation Rec(2007)3 on the remit of public service media in the information society, *op. cit.*, para. 19.

²²² Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet, 7 November 2007.

Text	Topic
Rec (2007) 16	Promotion of public service value of the Internet
Rec (2007) 3	Remit of public service media in the information society
Rec (2007) 2	Media pluralism and diversity of media content
Declaration (2007)	Protecting role of media in democracy & in context of media concentration
Rec. No. R (2003) 9	Promotion of democratic and social contribution of digital broadcasting
Declaration (2000)	Cultural diversity
Rec. No. R (99) 1	Measures to promote media pluralism
Rec. No. R (97) 21	Media and promotion of a culture of tolerance
Rec. No. R (97) 20	“Hate Speech”
Rec. No. R (96) 10	Guarantee of independence of public service broadcasting
Declaration (1982)	Freedom of expression and information

7.4.3(iv) Must-carry regulation

Must-carry provisions will be considered at this juncture, instead of under access rights in Chapter 8 because “the must-carry principle is about the universal and equal accessibility of public interest programming” and “not about the individual consumer’s access to a certain platform”.²²³

So-called “must-carry” obligations,²²⁴ i.e., (regulatory) provisions mandating access to electronic communications networks for certain parties, subject to certain conditions, have considerable potential for ensuring access for minority groups to structural means of audiovisual transmission. However, the exploitation of that potential – to the extent that it is actually realised in practice – tends to occur at the national and sub-national levels.²²⁵ The most important supra-national regulatory provisions governing must-carry are based on notions of “general interest objectives”, which are left for determination by States authorities. The extent to which cultural diversity is inferred into such general interest objectives therefore depends on how well-disposed States authorities are towards the goal of promoting cultural diversity. More specifically, the extent to which minorities would feature in, or be catered for in, States’ policies on cultural diversity is similarly wedded to the goodwill of States authorities.

²²³ Natali Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting* (The Netherlands, Kluwer Law International, 2005), p. 112.

²²⁴ For an overview of current issues affecting “must-carry” obligations, see, generally, Susanne Nikoltchev, Ed., *IRIS Special: To Have or not to Have Must-carry Rules* (Strasbourg, European Audiovisual Observatory, 2005), and in particular, Sabina Gorini & Nico van Eijk, “Workshop on Must-Carry Obligations: Summary of the Discussion”, in *ibid.*, pp. 1-5. See also: Mike Feintuck & Mike Varney, *Media Regulation, Public Interest and the Law* (Second Edition) (Edinburgh, Edinburgh University Press, 2006), pp. 227-229; Natali Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting*, *op. cit.*, pp. 111-114, 202; Mike Varney, “Must-carry Obligations in the New European Regulatory Framework for Communications: A True Guardian of Pluralism and Diversity?”, 14 *Utilities Law Review* (2004/2005), p. 68.

²²⁵ For an overview of “must-carry” regulations in EU Member States, see: OVUM/Squire Sanders, *An inventory of EU ‘must-carry’ regulations: a report to the European Commission, Information Society Directorate* (February 2001).

Public service broadcasters are typical – but by no means the only – beneficiaries of must-carry regimes. Must-carry provisions can also apply to other types of broadcaster or content, including (as will be seen *infra*), commercial broadcasters which have public service obligations.

Must-carry obligations can prove of enormous importance to public service broadcasting, especially by helping to ensure its universal availability. The importance of must-carry provisions for ensuring the continued availability of PSB is heightening considerably in an increasingly digitised broadcasting environment. This realisation has prompted the Council of Europe’s Committee of Ministers to urge that must-carry regulations continue to be “applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes” via diverse digital platforms.²²⁶ The CM’s concern would appear to have escalated since then. In its Recommendation on media pluralism and diversity of media content, adopted at the beginning of 2007, it stated:

Member states should envisage, where necessary, adopting must carry rules for other distribution means and delivery platforms than cable networks. Moreover, in the light of the digitisation process – especially the increased capacity of networks and proliferation of different networks, member states should periodically review their must carry rules in order to ensure that they continue to meet well-defined general interest objectives. Member states should explore the relevance of a must offer obligation in parallel to the must carry rules so as to encourage public service media and principal commercial media companies to make their channels available to network operators that wish to carry them. [...]²²⁷

At the EU level, the main regulatory provisions governing must-carry obligations are to be found in the EU’s Universal Services Directive.²²⁸ The key provisions are set out in Article 31, which is devoted exclusively to the topic. Article 31(1)²²⁹ reads:

Member States may impose reasonable ‘must carry’ obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review.

The types of networks envisaged by this provision include cable, satellite and terrestrial broadcasting networks, but could also include other networks “to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts”.²³⁰ It has been pointed out that this qualification concerning usage of a

²²⁶ Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting, 28 May 2003, Appendix, para. 21.

²²⁷ Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007, para. 3.3.

²²⁸ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Services Directive). For commentary, see: Nico van Eijk, “New European Rules for the Communications Sector”, *IRIS plus – Supplement to IRIS – Legal Observations of the European Audiovisual Observatory*, 2003-2, at 5-6.

²²⁹ Article 31(2) recognises the ability of States to determine appropriate remuneration (if any) in respect of measures taken in accordance with Article 31, provided that all network providers are treated in a non-discriminatory manner and that procedures governing remuneration (where it is provided for) are proportionate and transparent.

²³⁰ *Ibid.*, Recital 44. Also of relevance in this connection is Recital 45, which states: “Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the

network by “a significant number of end-users” sits uneasily under the overarching theme of the Directive – *universal* access.²³¹ If the Directive is to remain true to its own internal logic, its concern should be to ensure access for all users to “a (minimum) must carry package because of the relevance of the programmes within the package”.²³² Without further elaboration or refinement, this qualification concerning “a significant number of end-users” fails to acknowledge geographical specificity. This is potentially problematic as whether the existence of a “significant number” of end-users is calculated at the national, regional or local level will have very different implications for locally-concentrated minority groups.

Significantly, Article 31 does not require Member States to impose must-carry obligations on network providers – it merely allows them to do so. As the Directive recognises that the practice of imposing must-carry obligations already exists in various Member States,²³³ the importance of Article 31 resides in the fact that it sets out the parameters which should govern any measures undertaken by Member States in respect of must-carry regimes. Recital 43 further clarifies the regulatory thinking behind Article 31 and the parameters it establishes: “Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review.”

As it is left to States to formulate their own “public policy” and define their own “general interest objectives”, the Directive does not enumerate – even for illustrative purposes – what kinds of general interest objectives could be involved.²³⁴ In the absence of further specifications, one commentator has submitted that such general interest objectives would presumptively include pluralism and cultural diversity, but - following ECJ case-law - not objectives of an economic nature.²³⁵ Thus, as already mentioned, Article 31 creates ample scope for the development of must-carry obligations pertaining to minorities.

The potential of must-carry provisions for PSB and for the promotion of cultural diversity was adverted to, albeit somewhat indirectly, in the leading ECJ case to date dealing with must-carry obligations, *United Pan-Europe Communications Belgium SA v. Belgium*.²³⁶ Article 31 could not be considered in the case as the Universal Service Directive was not in force at the time of the adoption of the regulatory provisions under scrutiny in the case.²³⁷ At issue in the case were national measures obliging cable operators to broadcast programmes transmitted by certain private broadcasters. The Belgian Conseil d’Etat referred four main questions to the ECJ for a preliminary ruling under Article 234 EC. Put broadly, those questions were

common regulatory framework for electronic communications networks and services”. It further holds that “Providers of such services should not be subject to universal service obligations in respect of these activities” and that the Directive “is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services”.

²³¹ Nico van Eijk & Natali Helberger, forthcoming, p. 73 of draft manuscript on file with author.

²³² *Ibid.*

²³³ *Ibid.*, Recital 43.

²³⁴ The only example specifically mentioned is “the transmission of services specifically designed to enable appropriate access by disabled users”: *ibid.*, Recital 43.

²³⁵ Thomas Roukens, “What Are We Carrying Across the EU these Days?: Comments on the Interpretation and Practical Implementation of Article 31 of the Universal Services Directive”, in Susanne Nikoltchev, Ed., *IRIS Special: To Have or not to Have Must-carry Rules*, *op. cit.*, pp. 7-19, at pp. 11-12.

²³⁶ Case C-250/06, Judgment of the Court of Justice of the European Communities (Third Chamber) of 13 December 2007.

²³⁷ *Ibid.*, paras. 25 and 26.

designed to elicit interpretive clarification of, *inter alia*, Article 49 EC – freedom to provide services, and whether the national legislation at issue would constitute a prohibited interference with that freedom.

Aside from its consideration of various aspects of European law, eg. the general legitimacy of policies geared towards the maintenance of pluralism due to its connection to the right to freedom of expression, the ECJ also made a number of pronouncements concerning the goal of upholding pluralism in the specific factual circumstances of the case. Those pronouncements are significant, first because of their contribution to existing doctrine dealing with pluralism in the audiovisual sector, and second, because of their obvious bearing on the ability of discrete groups in society to access pluralistic audiovisual content and by extension audiovisual content which corresponds to their cultural and linguistic needs and preferences. For instance, the Court accepted that the national legislation at issue in the case “pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region”.²³⁸ The Court proceeds to state that such legislation “guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture”.²³⁹ Although not explicitly referred to as “the promotion of cultural diversity in the broadcasting sector”, that is actually what was at issue in the case at hand. The Court’s key conclusions in its judgment read as follows:

[...] Article 49 EC is to be interpreted as meaning that it does not preclude legislation, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by private broadcasters falling under the public powers of that State and designated by the latter, where such legislation:

- pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and
- is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance.

It is for the national court to determine whether those conditions are satisfied.²⁴⁰

The Court was also instructive on the point that a transparent procedure, based on objective non-discriminatory criteria known in advance, is a necessary safeguard against the arbitrary exercise by Member States of the discretion vested in them.²⁴¹ It specifies, for example, that:

[...] each broadcaster must be able to determine in advance the nature and scope of the precise conditions to be satisfied and, where relevant, the public service obligations it is required to observe if it is to apply for that status. In that regard, the mere setting out, in the statement of reasons for the national legislation, of declarations of principle and general policy objectives cannot be considered sufficient.²⁴²

²³⁸ *Ibid.*, para. 42.

²³⁹ *Ibid.*, para. 43.

²⁴⁰ *Ibid.*, para. 51. See also, para. 52.

²⁴¹ *Ibid.*, para. 46.

²⁴² *Ibid.*

The standards of scrutiny envisaged here are very rigorous and specific and do much to foreclose the possibility of arbitrariness. The same rigour and specificity is evident again when the Court scrupulously tailors the basis of the must-carry status to the objective of securing pluralism by allowing certain access-oriented public service obligations. It states that:

[...] such status should not automatically be awarded to all television channels transmitted by a private broadcaster, but must be strictly limited to those channels having an overall content which is appropriate for the purpose of attaining such an objective. In addition, the number of channels reserved to private broadcasters having that status must not manifestly exceed what is necessary in order to attain that objective.²⁴³

Finally, it should also be signalled that owing to the focus of “must-carry” obligations on access to networks and technical facilities, some commentators have advocated, perhaps controversially, the development of (complementary) “must-offer” regimes, which would aim to enhance access to specific content.²⁴⁴ Such proposals style “must-carry” and “must-offer” obligations as constitutive elements of a concept of “universal service obligations with regard to content”.²⁴⁵ Additional measures supporting access to specific content – again, presumably determined on the basis of defined general interest objectives – could also have considerable potential for minorities. Much would depend on the extent to which minority perspectives, needs and interests would inform the determination of general interest objectives.

7.4.4 World Summit on the Information Society (WSIS)

In its ordering of the topics it addresses, the Declaration of Principles adopted at the Geneva Phase of WSIS brackets cultural diversity and identity with linguistic diversity and local content.²⁴⁶ Its approach to the promotion of cultural diversity is content-oriented and technologically-informed. Like the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, WSIS explicitly links the wider goal of promoting cultural diversity to the discrete goals of promoting the production of, and accessibility to, different types of content in diverse languages and formats.²⁴⁷ These goals are, in turn, linked to the goal of promoting wide and inclusive participation in the Information Society.²⁴⁸ It also emphasises the instrumental role that technology can play in preserving cultural heritage, which it recognises as “a crucial component of identity and self-understanding of individuals that links a community to its past”.²⁴⁹ At the Tunis Phase of WSIS, signatory States

²⁴³ *Ibid.*, para. 47.

²⁴⁴ Peggy Valcke (in cooperation with David Stevens and Eva Lievens), “The Future of Must-Carry: From Must-Carry to a Concept of Universal Service in the Info-Communications Sector”, in *ibid.*, pp. 31-40, esp. at pp. 32, 34, 35 & 39.

²⁴⁵ *Ibid.*, at p. 39.

²⁴⁶ WSIS (Geneva Declaration of Principles) “Building the Information Society: a global challenge in the new Millennium”, *op. cit.*, Section 8, paras. 52-54.

²⁴⁷ *Ibid.*, para. 53, which reads: “The creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society, paying particular attention to the diversity of supply of creative work and due recognition of the rights of authors and artists. It is essential to promote the production of and accessibility to all content – educational, scientific, cultural or recreational – in diverse languages and formats. The development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas.”

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*, para. 54.

committed themselves to “promote the inclusion of all peoples in the Information Society through the development and use of local and/or indigenous languages in ICTs” and to generally continue to “protect and promote cultural diversity, as well as cultural identities, within the Information Society”.²⁵⁰ Although the specific interests of persons belonging to minorities are not mentioned in connection with the general goal of promoting cultural diversity, “particular attention” will be paid to the “special needs of marginalized and vulnerable groups of society, including [...] minorities [...]” in building the Information Society.²⁵¹

Conclusions

The bridging of Chapter 6 with Chapters 7 and 8 is crucial for the structure and substance of this thesis. By recognising that the promotion of pluralistic tolerance is logically complementary to the prohibition of abusive speech, a link is established between what are routinely termed “negative” and “positive” State obligations. Although the distinction between negative and positive State obligations is retained here for organisational purposes, the analysis in Chapter 5 suggests higher levels of differentiation are possible under references to a continuum of State obligations to respect, protect and fulfil the right to freedom of expression of persons belonging to minorities. In any case, two general and related obligations on States which are of considerable importance for the realisation of the right to freedom of expression of persons belonging to minorities are the obligations to uphold media- and information-related pluralism and access to the media and other expressive fora. Both of these obligations branch out into more specific obligations, again which can be situated at various points along the continuum of States obligations to respect, protect and fulfil human rights.

The importance of media- and information-related pluralism can be explained in two main ways: its ability to facilitate or strengthen pluralistic tolerance in democratic society (by ensuring that diverse information about different groups in society is transmitted through different outlets); its ability to strengthen a broad range of democratic values and goals (by ensuring that diverse information of all kinds is transmitted through different outlets). The reference to “media- and information-related pluralism” captures the importance of both structures (i.e., conduits and discursive fora) and content (ideas, opinions and information).

This Chapter endorses the description of the State obligation to guarantee pluralism in the media sector as an imperfect communicative obligation as the obligation is not due to specific individuals and it is not correlative to a particular right in the Hohfeldian sense. Nevertheless, it is a vital aspect of the right to freedom of expression and of democratic communication. Thus styled, media- and information-related pluralism is difficult to define, quantify or operationalise.

This Chapter therefore disaggregates the concept and explains its importance at various levels, in particular source/ownership, outlet and content. These levels span structures, processes and output; each of which offers opportunities for participation and discrimination/exclusion. The distinction between different levels allows for the meaningful application of considerations of media functionality in respect of the communicative needs and interests of persons belonging

²⁵⁰ WSIS Tunis Commitment, *op. cit.*, para. 32.

²⁵¹ WSIS (Geneva Declaration of Principles) “Building the Information Society: a global challenge in the new Millennium”, *op. cit.*, para. 13, and reiterated in the Tunis Commitment, *op. cit.*, para. 20.

to minorities. International human rights treaties and other legally-binding texts regulating broadcasting at the global and European levels inadequately reflect this conceptual disaggregation and its practical advantages. A number of standard-setting initiatives that are not legally-binding on States do, however, recognise the theoretical and strategic benefits of such a differentiated approach to the safeguarding and promotion of media- and information-related pluralism (eg. CoE CM Recommendations and WSIS). If relevant treaty monitoring processes were to be increasingly characterised by disaggregated approaches along the lines outlined above, it would greatly enhance progress towards the realisation of an objective that all-too-often remains out of reach due to the perceived vagueness of its essential features and its status as an imperfect obligation.

The obligation on States to uphold cultural diversity could also be described as an imperfect obligation that is closely connected with the right to freedom of expression, including for persons belonging to minorities. Cultural diversity entails the existence and expression of multiple cultural identities. Cultural diversity is enabled by a societal climate of pluralistic tolerance and by the transmission of cultural expressions via diverse media and in diverse fora. The international treaty that embraces the foregoing considerations most extensively is the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The adoption of the Convention was a symbolic milestone, but it is eviscerated by ineffectual language that gives rise to very weak legal obligations. Its usefulness lies rather in its disaggregation of strategies and issues alike. It helps to embed intercultural dialogue or understanding and it recognises the important contribution of minority cultures to the attainment of the more general goal of cultural diversity.

At the European level, the main regulatory instruments governing broadcasting do not make any earnest attempt to promote cultural diversity. Provisions for the protection and promotion of European and independent European works are often regarded as default measures to promote cultural diversity but several design-faults (too Eurocentric, exclusionary, commercial and quantitative) prevent them from being properly considered as addressing cultural diversity, let alone promoting it. Nevertheless, the goal of promoting cultural diversity via the media is advanced through various other (mainly non-binding) instruments (esp. Recommendations by the CoE's CM) and regulatory measures at the national level (esp. concerning PSB, which is particularly suitable for the promotion of cultural diversity by virtue of its ethos and mandate, and must-carry provisions). The advancement of cultural diversity by media is also assured in no small measure by media- and information-related pluralism.