

REGULATION OF MEDIA OWNERSHIP AND PLURALISM IN EUROPE: CAN THE EUROPEAN UNION TAKE US FORWARD?

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I. INTERNATIONAL POLICY TRENDS

Since the early 1990s, domestic media ownership restraints within most individual European Union ("EU") member states have come under intense de-regulatory pressure. This pressure reflects a competitive impetus on the part of dominant domestic suppliers to participate in an ever-increasing international trend towards concentrations of monomedia and cross-media ownership.¹

As evidenced by the historic development of large European media conglomerates such as *News International*, *Bertelsmann*, *Hachette*, and *Fininvest*, the tendency for media firms to expand and diversify is nothing new. However, in the last few years, many of the traditional boundaries which separated the various sub-sectors of the media and which protected them from external competition have, because of factors such as new technology and the European single market, begun to blur.² From an industrial perspective, these developments are thought to have improved the economic benefits of enlargement and expansion into complementary business activities. And many European countries appear to have become less willing to write off the perceived economic opportunity

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¹ See generally, Peter Humphreys, *Power and Control in the New Media*, Address at the ECPR New Media and Political Communication Workshop (1997); VICKY MACLEOD, *MEDIA OWNERSHIP AND CONTROL IN THE AGE OF CONVERGENCE* (1996); Philip Schlesinger & Gillian Doyle, *Contradictions of Economy and Culture: The European Union and the Information Society*, 2 J. EUR. CULTURAL POL'Y 25 (1995).

² PAUL STYLES ET AL., *PUBLIC POLICY ISSUES ARISING FROM TELECOMMUNICATIONS AND AUDIOVISUAL CONVERGENCE* 8 (1996). TIM CONGDON ET AL., *THE CROSS-MEDIA REVOLUTION: OWNERSHIP AND CONTROL* 4 (1995).

costs associated with restricting domestic media and cross-media ownership.

In Germany, a new Broadcasting Treaty signed by the Laender in Autumn 1996 has relaxed previous restrictions on ownership of broadcasting companies.³ Likewise, France has introduced relaxations on concentrations of ownership in the television and the radio sectors in 1994.⁴ Beyond Europe, the Telecommunications Act of 1996, in the United States⁵ exemplifies a clear tendency towards liberalization of anti-concentration provisions affecting the media. Within Europe, the trend towards relaxation has been led by the United Kingdom, with the 1996 Broadcasting Act,⁶ which radically de-regulates previous restrictions on broadcasting and on cross-media ownership.

II. THE RE-DESIGN OF UNITED KINGDOM MEDIA OWNERSHIP POLICY

At the end of 1993, the United Kingdom government announced the imminence of a thorough review of existing restrictions on media and cross-media ownership.⁷ The debate surrounding that announcement instantly gave voice to industrial concerns, particularly from the national newspaper sector, about the strategic position of the United Kingdom's existing organizations in a more competitive and international media marketplace.

A Committee led by the Department of National Heritage ("DNH")⁸ was given responsibility for conducting the *Review on Cross-Ownership*. An analysis of the public submissions made to that Committee in early 1994 indicates that considerable pressure was mounted for amendments allowing United Kingdom media firms to expand their domestic positions as they saw fit. In line with the message being sent from industry to governments in many other European countries, United Kingdom policy-makers were assailed by large and influential media owners, who asserted that existing restrictions on media ownership had been overtaken by events in the media world of the 1990s. By contrast, the public interest case in favor of maintaining or strengthening existing ownership restric-

³ MM-CM, REPORT ON MEDIA CONCENTRATIONS AND PLURALISM IN EUROPE, at 43 (1997).

⁴ *Id.* at 40-41.

⁵ Telecommunications Act of 1996, Pub. Law No.105-153.

⁶ Broadcasting Act, 1996, ch. 55 (Eng.).

⁷ Existing restrictions were contained primarily in the 1990 Broadcasting Act and also in newspaper merger provisions set out in the 1973 Fair Trading Act. See Broadcasting Act, 1990, ch. 42, (Eng.); Fair Trading Act, 1973, ch. 41 (Eng.).

⁸ The DNH was renamed the Department of Culture, Media, and Sport in May 1997.

tions to protect pluralism was reiterated in submissions from smaller regional media operators, consumer lobby groups, and trade unions.

The conclusions arrived at by the Review Committee on Cross-Ownership in 1995 explicitly acknowledged both of these sets of concerns, i.e., the need to preserve pluralism and the desirability of accommodating new industrial strategies for the latter half of the 1990s. A *Green Paper on Media Ownership* set out the following objectives to be addressed in new legislation:

Government has a responsibility both to promote diversity and choice for consumers and to set the right framework for industry to flourish. . . . The main objective [is] to secure a plurality of sources of information and opinion, and a plurality of editorial control over them. Another important objective is to provide the environment to enable United Kingdom broadcasters, equipment manufacturers and programme makers to take full advantage of major market opportunities⁹

[T]he existing structure of media ownership regulation, relying as it does on prohibitions which reinforce the traditional segmentation of the media market, is insufficiently flexible to allow media companies to exploit to the full the opportunities offered by new technologies¹⁰

The Government has decided that there is a continuing case for specific regulations governing media ownership, beyond those which are applied by the general competition law; but that there is a need to liberalise the existing ownership regulations both within and across different media sectors.¹¹

Although some amendments were introduced between the proposals set out in this *Green Paper* and the legislation finally enacted in 1996, the government remained steadfast throughout the period in its espoused commitment to the two key priorities expressed above: pluralism and industrial development.

Of course, the simultaneous pursuit of both of these broad objectives created an obvious conflict: pluralism would require more effective restraints on ownership whereas industrial ambitions called for deregulation. Policy-makers at the DNH were charged with reconciling these conflicting objectives within a single regulatory framework. According to those involved in the process, concerns about the government's relationship with the press

⁹ DEPARTMENT OF NATIONAL HERITAGE, *MEDIA OWNERSHIP: THE GOVERNMENT'S PROPOSALS*, 1995, Cm. 2872, at 16.

¹⁰ *Id.* at 20.

¹¹ *Id.* at 1.

during the policy formulation period were most important in deciding how these aims would be balanced against each other.

A. *Promoting Pluralism*

"The main objective . . . [of media ownership policy is] . . . to secure a plurality of sources of information and opinion, and a plurality of editorial control over them."¹²

Although safeguarding pluralism was presented as the main priority, the new media ownership provisions drafted by the DNH for the ensuing 1996 Broadcasting Act actually *reduce* protection for pluralism. Not only were monomedia ownership ceilings raised, especially in the case of terrestrial television, but previous restrictions on cross-media ownership between national newspapers, proprietors, and terrestrial television were largely done away with (albeit that the two largest national newspaper owners, News International and Mirror Group Newspapers, are still prevented from expansion into terrestrial television). In effect, the new media ownership provisions allow for radio, television and newspapers in the United Kingdom to be supplied by fewer media owners than had previously been considered an acceptable minimum under the 1990 media ownership legislation. In practice, this has resulted in much greater concentration of ownership of terrestrial television and in some additional cross-ownership between newspaper and television providers.

The failure to try and turn what was presented as the main objective—pluralism—into more effective media ownership legislation, may be accounted for partly by prevailing perceptions at the DNH that the general impetus for reviewing media ownership rules was a de-regulatory one. The industrial case in favor of liberalizing media ownership regulations was highly influential and, for the DNH, there appeared to be few persuasive proponents of the opposite case in favor of imposing more effective restrictions. However, the fact that pro-liberalization arguments proved more "influential" with MPs and policy-makers cannot be disassociated from the fact that this side of the issue was propagated by large media owners. By contrast, the opposite side was primarily argued by individual trade unions, and a handful of consumer groups and academics.

The role of the media in placing media ownership on the policy agenda and in stimulating (or failing to stimulate) a well-informed and balanced public discussion deserves consideration.

¹² *Id.* at 16.

Policy-makers at the DNH acknowledge that those responsible for conducting the public debate about media ownership rule changes had a particular vested interest in its outcome; they were conscious that self-interested media owners had the capacity to create completely artificial currents of opinion. They chose to deal with the power of media owners by adopting a "tactical" approach.

Rather than first looking at ways to contain the political influence of media owners, policy-makers took more or less the opposite approach. They decided that approval from "most of the media and, in particular, the newspaper sector" had to be within reach *before* finalizing which safeguards for pluralism would remain and could successfully be defended. This tacit negotiation between the government and the press paved the way not only for most media owners to gain exactly the de-regulatory concessions they were seeking, but also, ironically, for the government to present itself thereafter as a stout defender of the public interest in pluralism.

The danger that political factors may outweigh public interest considerations (of any kind) might be regarded as a general occupational hazard for regulation of the media. In this specific case of the re-formulation of United Kingdom media ownership policy, it appears to have been a systemic failing of the process. It was not merely the government of the day—i.e., Conservative MPs—who were muted in their support for more effective restraints on excessive media power, but opposition MPs as well. In fact, a Labour-supported amendment which would have enacted an even more substantial liberalization of cross-media ownership was only narrowly resisted by the government during the Commons Committee stage of the Broadcasting Bill.

So, the absence of an influential supporting constituency for pluralism meant that the "main objective" for the new media ownership rules became consigned to Ministerial rhetoric rather than any meaningful priority for those drafting legislative changes. Pitched against the desires of a much more powerful sectional interest—i.e., media owners—the arguments of those defending the public interest in pluralism left virtually no impression on policy making. A notable aspect of this situation is the failure, at every level, to take proper account of existing media power as a potential and actual obstruction to the development of any supporting constituency for pluralism. Notwithstanding the acknowledged role of a self-interested media in creating the prevailing climate of opinion, no special steps were taken to promote public awareness and discussion of the issues outside of the media.

Furthermore, to the extent that there existed any political will to even reflect upon pluralism and on the possible socio-political or cultural consequences of reducing media ownership restraints, it seems that little in the way of independent analysis was available for guidance. The absence of relevant information upon which to base policy decisions signals a notable lapse from what might be expected under rational policy making conditions.¹³ DNH policy-makers apparently relied instead on their 'intuitions' about what levels of media and cross-media concentration of ownership would seem acceptable.

Most striking, however, remains the issue that securing the approval of most media owners for the setting of the new media and cross-media ownership levels or 'getting the British Media Industry Group ("BMIG")¹⁴ on-side'—was clearly regarded as the key imperative. This explains how pluralism slipped from the high status accorded it in the policy agenda presented by the government to the public. Of greater significance is what it reveals about how policies involving the media take shape in this country.

Far from just independently investigating, weighing up, and seeking to uphold public interest principles of any sort, the main aim for United Kingdom media ownership policy-makers seems to have been securing approval for their willingness to introduce whatever policy changes the majority of media owners were calling for. Ironically, it is precisely this scenario which exemplifies the relationship between media ownership and political influence and thus the importance of curbing ownership levels. In practical terms, it also reveals an inherent flaw within the mechanism, at least at the national United Kingdom level, by which the public should be protected from such abuses of media and political influence.

As acknowledged in the 1995 *Green Paper*, part of protecting the public interest in diverse media ownership is placing equal restraints on all media owners and preventing any single individual or organization from gaining too much influence over public opinion.

"If one voice becomes too strong . . . democracy is damaged."¹⁵

¹³ See BRIAN HOGWOOD & LEWIS GUNN, *POLICY ANALYSIS FOR THE REAL WORLD* 45 (1984).

¹⁴ The BMIG was a lobby group consisting of four United Kingdom national newspaper owners: Associated Newspapers Ltd., Pearson plc., Guardian Media Group, and Telegraph plc.

¹⁵ DEPARTMENT OF NATIONAL HERITAGE, *MEDIA OWNERSHIP: THE GOVERNMENT'S PROPOSALS*, *supra* note 9, at 3.

But another questionable aspect of the 1996 legislation is its failure to attempt to place equitable constraints over the upper share of media power allowed to any individual or organization. The 1996 Act established upper ceilings on cross-media ownership, and on monomedia ownership in both the television and the radio sectors.¹⁶ However, it does not introduce any restraints over monomedia ownership of newspapers. Thus, 38% of national daily newspaper circulations in the United Kingdom are controlled by just one owner—News International.

The DNH was, it would seem, placed in the position of enacting the wishes of politicians and Government ministers who were “in awe of” media proprietors. The most influential of these proprietors appears to have been a lobby group formed by most national newspapers—the BMIG—but which excluded the two largest newspaper owning groups, News International and Mirror Group. The extent to which the 1995 *Green Paper* and the 1996 Act reflect ideas favored by the BMIG seems indicative of policy-making as a “selective response” to institutional interests.¹⁷ Cross-ownership between national newspapers and terrestrial television was liberalized, but only for those newspaper proprietors with a share of national circulations of less than 20%—i.e., excluding the two largest United Kingdom newspaper owning groups, News International and Mirror Group.

The imposition of cross-media newspaper ownership limits which prevent the two largest United Kingdom newspaper groups from expanding into terrestrial TV can certainly be seen as defending the public interest in pluralism. But it is not the same thing as insisting that all newspaper proprietors be brought back within sensible or reasonable common upper levels of newspaper ownership. According to DNH policy-makers, existing excesses of media power provide the context in which, politically, no such changes could be contemplated, irrespective of the public interest.

Another anomaly is that monomedia ownership restrictions—acceptable upper audience limits—for television and for radio were set at different levels in the 1996 Act, with commercial television operators effectively allowed to have a market share twice as large as commercial radio operators.¹⁸ Most people would regard

¹⁶ See Broadcasting Act, 1996, ch. 55, pts. I & II (Eng.).

¹⁷ See British Media Industry Group, *A NEW APPROACH TO CROSS-MEDIA OWNERSHIP*, (1995); BRITISH MEDIA INDUSTRY GROUP, *THE FUTURE OF THE BRITISH MEDIA INDUSTRY* (1994). See also PETER LEVIN, *MAKING SOCIAL POLICY: THE MECHANISMS OF GOVERNMENT AND POLITICS, AND HOW TO INVESTIGATE THEM* 38-41 (1997).

¹⁸ Whereas television ownership is restricted to a 15% share of total United Kingdom audiences including BBC audiences, radio ownership remains restricted to a 15% share of

television as a more powerful medium than radio, so it is difficult to see any logical justification for imposing a tighter check on commercial radio than on commercial television ownership.

Therefore, whatever intentions were expressed to produce a system of media ownership controls in the United Kingdom which would prevent any single voice from becoming too strong, it is difficult to escape the conclusion that this problem already existed. As a direct consequence, the media ownership provisions set out in the 1996 Broadcasting Act are awash with inconsistencies which can now only serve to reinforce the problem.

B. *Promotion of Economic or Industrial Policy Aims*

"Government has a responsibility . . . to set the right framework for the industry to flourish."¹⁹

If the issue of safeguarding pluralism and democracy was more a matter of Ministerial rhetoric than a genuine policy priority, the aim of promoting the economic health of United Kingdom media firms appears to have left a much stronger impression on the re-design of policy. Many large media industry participants called for a general liberalization of previous media ownership rules, based on the argument that this would enable greater efficiency and thus an improved economic performance by the sector. And, in view of the de-regulatory provisions set out in the 1996 Broadcasting Act, it appears that the Government found these arguments much more persuasive than the counter arguments in favor of tighter restrictions to protect pluralism.

However, appearances can be deceptive. Certainly, a number of de-regulatory amendments were conceded in the 1996 Act and each such concession may be linked with loosely worded claims that expansion and diversification would enhance the economic performance of the United Kingdom media industry. But little or no independent research was available to verify such claims and, indeed, DNH policy-makers have subsequently indicated that many of these industrial arguments were regarded with deep skepticism.

total United Kingdom audiences *excluding* BBC audiences. Given that the British Broadcasting Corporation ("BBC") enjoys a share of almost one half of total United Kingdom audiences both in television and in radio, the decision about whether to include or exclude those audiences when computing any other individual organization's market share is of immense significance. The effect of including BBC audiences within the total television market is to almost double the size of that market and thus to double the audience share a commercial television broadcaster may serve, as compared with what is allowed for commercial radio broadcasters.

¹⁹ DEPARTMENT OF NATIONAL HERITAGE, MEDIA OWNERSHIP: THE GOVERNMENT'S PROPOSALS, *supra* note 9, at 16.

In reality, political considerations, and not economic arguments determined the design of the new provisions on media ownership in the 1996 Act, although, as one policy-maker explains: "where it was convenient to try and have a veneer of an economic case, that case was deployed."

To assess the likely economic impact of the 1996 media ownership legislation changes, it is helpful to consider the relationship between *allowable* and *economically desirable* configurations for media firms. In order to fully exploit economies of scale and scope in the media, certain configurations are more desirable than others. Media ownership legislation in the United Kingdom, before and after the 1996 Broadcasting Act, placed no particular constraints on many potential configurations for a media enterprise; it has only affected levels of monomedia and cross-media ownership involving radio, television, and newspapers.

The main impact of the rule changes in the 1996 Act is the allowance of significant levels of cross-ownership between television, radio, and newspapers as well as much higher levels of (terrestrial) television ownership than before. This will permit new configurations to flourish. Not all such configurations, however, are desirable on the grounds of improved economic efficiency.

Of these two key changes, only one is unambiguously supported by the potential for additional economic efficiency gains—namely, the relaxation of monomedia restrictions affecting broadcasting and the press. This is because, on the whole, the economic performance of television, radio and newspaper firms does actually point to some clearly identifiable benefits arising from expansion *within* each of these individual sectors of activity. On the other hand, diagonal cross-expansion *across*, say, newspapers and television appears *not* to be well-supported by any specific economies of scope or inherent cross-synergies.

This brings to light an important discrepancy. According to the arguments in favor of de-regulation set out in the 1995 *Green Paper*, the availability of cross-synergies between newspapers and broadcasters represented a definite and major impetus for relaxing previous restraints over cross-media ownership:

The Government believes that it is essential that the media ownership regime should allow the media sector to develop. The similarity of functions which newspapers and broadcasters undertake in terms of collecting, editing and disseminating information, news and entertainment, means that there [are] obvious and natural synergies between companies within each

sector, and that it is [in] the interests of both the industry and the consumer to allow larger media companies to develop.²⁰

Yet, several senior managers in the United Kingdom newspaper and broadcasting industries interviewed in Spring 1997 expressed strong doubts about whether television broadcasting and newspaper publishing offer any substantive synergies. Most agree that the skills and techniques involved in newspaper production and distribution are quite *different* from those required in the television industry, and vice versa. The "bi-medial" approach introduced at the BBC in the 1990s (i.e. the sharing of production resources, where possible, between radio and television) may be feasible to some extent within broadcasting, but it does not extend to the combination of newspaper publishing with broadcasting activities. As one senior executive explains:

[t]here are actually a lot of successful groups who have operated both, always operating each distinctly - with the exception of, occasionally, slavishly cross-promoting [e.g. using an established newspaper title to promote a new TV service] . . . I do not think that television and newspapers are a 'natural' diversification from each other. I think people like to explain things strategically but the reason why, say, [newspaper company X] . . . got into television was because they thought it was a good business proposition, *not* because [of] synergies.²¹

According to many United Kingdom media managers, the economic rationale for combining newspaper with television operations is actually rather limited. Some opportunities may arise to combine back-office activities or, perhaps, to introduce improvements in managerial efficiency but, apparently, no more so than would arise in any merger situation involving other (loosely related) sectors of activity. The only special advantage of cross-owning television and newspapers is that it provides the opportunity to cross-promote products. Whether this feature is beneficial or damaging for the economy depends on how it is used.²²

If "natural" economies of scope and synergies are not strong features of cross-ownership between television broadcasting and

²⁰ *Id.* at 20.

²¹ Interview with Senior United Kingdom Civil Servant in London (Apr. 1997).

²² Whether or not this advantage is turned to the benefit of the economy depends on how it is used. If cross-promotion is used to facilitate *de novo* expansion (i.e., the introduction of new products which increase choice) then welfare and competition should be enhanced. See MARIA MOSCHANDREAS, BUSINESS ECONOMICS 349 (1994). On the other hand, cross-promotion used to build cross-sectoral dominance for existing products would have a negative impact on competition and on pluralism.

newspaper publishing, it follows that few economic benefits can be directly or solely attributable to the combining of these activities under common ownership. Thus, from a general or societal viewpoint, the economic case in favor of encouraging such patterns of cross-ownership appears relatively weak.

Nonetheless, from the viewpoint of individual companies, the rationale for cross-ownership may be quite persuasive. It is widely acknowledged that the main point of lobbying for a relaxation in United Kingdom cross-media ownership restrictions was to clear the way for newspaper proprietors to expand beyond their own sector (where demand is in gradual long-term decline) into the more profitable growth areas in the media (i.e. terrestrial television). But this argument in favor of cross-ownership has no basis whatsoever in terms of improved operational or economic efficiency. Instead, it is based on securing a low-risk route to long-term earnings growth for incumbent newspaper proprietors and shareholders.²³ The differentiation between these two motives—efficiency versus risk-spreading—is important and underlies the question of what is, and what is *not*, a legitimate concern for public policy.

Other explanations may account for television companies choosing to expand in the direction of a low-growth area such as newspaper publishing. One possible motivation is that more synergies and “economies of multifirmity” may develop over the long term.²⁴ For example, the growth in electronic communications might, as some newly combined television-newspaper owners suggest, create additional demand for products based on both audiovisual images and text.

Alternatively, factors other than profit-maximization may serve to encourage cross-media expansion. Managerial theorists have frequently cited the desire by managers to “build empires” as an important motivation for diagonal growth. Indeed, many United Kingdom media managers express belief that television companies’ expansion into newspaper publishing is “a defensive move” against hostile takeovers, i.e., making the enlarged company less attractive to potential predators.²⁵ Considerable regional sensitivities prevail about the possibility of losing control of media companies to “out-

²³ See *id.* at 346; KENNETH GEORGE ET AL., *INDUSTRIAL ORGANIZATION* 64 (4th ed. 1991).

²⁴ Alan Albarran & John Dimmick, *Concentration and Economies of Multifirmity in the Communications Industries*, 9 J. MEDIA & ECON. 41 (1996).

²⁵ See STEPHEN MARTIN, *INDUSTRIAL ECONOMICS: ECONOMIC ANALYSIS AND PUBLIC POLICY* 280 (2d ed. 1993); GEORGE ET AL., *supra* note 23, at 82.

siders," and this may encourage conglomerate expansion, irrespective of negative efficiency implications.

The key point is that policy measures which advance the commercial ambitions of particular media firms or owners cannot be equated with measures which enhance the general economic efficiency or competitiveness of the media sector. However, the reformulation of United Kingdom media ownership rules appears to have involved little or no effort to distinguish between private and public concerns. There are grounds for questioning the public interest case in favor of de-regulating cross-ownership between the terrestrial television and newspaper sectors. However, no research was available, nor was any commissioned by the DNH, which would provide an independent assessment of the economic implications of altering the rules on cross-ownership.

The lack of proper information gathering or analysis which characterized the re-design of United Kingdom policy from beginning to end has previously attracted criticism.²⁶ DNH policy-makers attribute this failing to the "time-scale involved," to the fact that Ministers were 'not interested' in independent research, and to the "political minefield" in which they were operating during the passage of the Broadcasting Bill. But the prospect that inconvenient contradictions might emerge from research to challenge the recommendations on political grounds cannot have escaped policy-makers' notice.

III. THE NEED FOR A NEW APPROACH

The conduct of recent media ownership rule changes in the United Kingdom illustrates a flaw in the mechanism by which concentrations of media power are supposed to be regulated. In theory, curbs on concentrated media ownership would safeguard democracy by protecting against unhealthy alignments between corporate media power and political power. But, in practice, the pre-existence of these alignments can serve to impede the implementation of such curbs. Because politicians want to, or increasingly feel that they need to accommodate the needs of particular or influential media groups, there is little will to champion or even investigate competing public interest goals for media ownership policy.

This problem is by no means confined to the United Kingdom. De-regulation of traditional constraints on media and cross-

²⁶ See Lesley Hitchens, *Get Ready, Fire, Take Aim: The Regulation of Cross-Media Ownership - An Exercise in Policy-Making*, 1995 PUB. L. 620.

media ownership has become a general trend, and one which is clearly being driven along by powerful industrial concerns, with pluralism taking a back seat.²⁷ As previous writers have suggested, the de-regulation of media ownership in Germany and Italy, as well as the United Kingdom, "can be taken as classic illustrations of the degree of political power exercised by powerful media corporations in capitalist democracies."²⁸

Thus, if we want media ownership regulation throughout Europe that is genuinely based on public interest goals such as pluralism or economic efficiency, we need to find new ways of determining policy which avoid giving undue weight to specific corporate media interests.

One possible solution is to shift responsibility for formulation of policy to the transnational level. If European media ownership policies were decided collectively—say, through the policy-making institutions of the European Union—then, arguably, the scope for specific national corporate media interests which shape policy outcomes might be reduced. However, the pursuit of a collective European approach to media ownership and pluralism regulation is, itself, beset by a formidable array of legal, political and practical difficulties.

IV. MEDIA OWNERSHIP REGULATION IN EUROPE

At the moment, there exists no special pan-European policy framework governing media ownership. Instead, European regulation consists of a "patchwork" of different national rules and regulations concerning ownership and cross-ownership of the media. Regulation of media ownership and pluralism has, however, found its way onto European policy agendas.

The Council of Europe, because of its interest in the protection of human rights and democracy, has recently taken an increasing interest in the impact of media concentrations on political and cultural pluralism. In 1992, a Committee of Experts on media concentrations and pluralism ("MM-CM") was set up to monitor the development of media concentrations throughout Europe and to analyze their impact on pluralism and to formulate proposals for action when necessary. This Committee's work led to the adoption, in 1994, of a Recommendation on measures to promote me-

²⁷ See *supra* note 1.

²⁸ Peter Humphreys, *Power and Control in the New Media*, Address at the ECPR New Media and Political Communication Workshop (1997).

dia transparency.²⁹ MM-CM remains active in considering new areas in which a Council of Europe policy initiative could serve to promote media pluralism.

The European Commission has also been working on bringing forward an initiative in this area since the publication of its *Green Paper on Pluralism and Media Concentrations in the Internal Market* in 1992.³⁰ This Paper reviewed existing levels of media concentration in Europe and suggested three possible policy options: (1) no action at the pan-European level; (2) action to improve levels of transparency; and (3) positive intervention—via a Regulation or a Directive—to harmonize media ownership rules throughout the member states. However, no final agreement has yet been reached as to which of these options would best serve the needs of the European Union.

The failure to move forward decisively on one or another of these options may be attributed, in large measure, to the range of conflicting opinions within Europe about the aims and the substance of a collective policy on media ownership. Such conflicts partly reflect the fundamental question of whether the European Commission has any right to pursue policies aimed at safeguarding pluralism.³¹ The European Parliament appears to believe so, and has pressed for action to address the many worrying examples of concentrations which can readily be observed in national and transnational European media markets today. The Council of Europe also evidently believes that pluralism is integral to the principle of freedom of speech and, as such, should be protected under the European legal order.³² However, the 1992 *Green Paper* concluded that EU intervention in media ownership legislation may be justified *only* on the basis of securing the proper functioning of the Internal Market and *not* on the basis of protection of pluralism, *per se*.³³

²⁹ COUNCIL OF EUROPE, RECOMMENDATION ON MEASURES TO PROMOTE MEDIA TRANSPARENCY, No. R (94) 13.

³⁰ COMMISSION OF THE EUROPEAN COMMUNITIES, PLURALISM AND MEDIA CONCENTRATION IN THE INTERNAL MARKET: AN ASSESSMENT OF THE NEED FOR COMMUNITY ACTION, COM(92)480 final [hereinafter PLURALISM AND MEDIA CONCENTRATION IN THE INTERNAL MARKET].

³¹ See Francesca Beltrame, Lawmaking in the European Union, Address at the W G Hart Legal Workshop, Institute of Advanced Legal Studies (1996); Lesley Hitchens, *Media Ownership and Control: A European Approach*, 57 MOD. L. REV. 585 (1994).

³² Andre Lange & Ad Van Loon, *Pluralism, Concentration and Competition in the Media Sector*, IDATE/IVIR (1991).

³³ See PLURALISM AND MEDIA CONCENTRATION IN THE INTERNAL MARKET, *supra* note 30, at 99.

Because concerns about competition or single market promotion are different from concerns about pluralism, the implied aims for harmonization under these two very different approaches will naturally diverge.³⁴ Safeguarding pluralism implies a need for European-wide restrictions which would eliminate undesirable concentrations of media power, whereas promoting competition implies equalization of ownership restrictions purely by reference to the economic needs of industry. Some mergers which do not threaten competition might pose a threat to plurality. Since media pluralism is a special concern in its own right, "reliance on a competitive environment to foster pluralism may be to adopt a too simplistic approach."³⁵

From the outset, the approach to harmonization of European media ownership policy has been characterized by uncertainty about the reconciliation of these two conflicting aims. Since DG XV took charge of advancing the pan-European approach in 1993, the Commission has been attempting "to inscribe Parliament's quest for pluralism in the logic of the Internal Market."³⁶

Contention about the appropriate legal basis for intervention has not been the only obstacle thrown into the Commission's path. The 1992 *Green Paper* set in motion a prolonged period of public consultation concerning which of the options set out at its conclusion would represent the best course of action. Responses to the consultation process have served only to reinforce the contention surrounding aims and means for a harmonized European media ownership policy.³⁷

Whereas the European Parliament, the ESC, and journalists' federations and trade unions emphasize the protection of pluralism as a primary objective for Community action on media ownership rules, industrial support for a harmonizing initiative tends to be based on a range of economic considerations. The Commission summarizes the industry's views as such: "the current national rules on media ownership must change, in particular so as to cope with globalization and the impact of new technologies. . . . [T]he question of the level—national or European—at which change must occur is the subject of vague or divided positions."³⁸ Some media

³⁴ See Petros Iosifides, *Merger Control and Media Pluralism in the European Union*, 1 COMM. L. 247 (1996).

³⁵ Hitchens, *supra* note 26, at 591.

³⁶ Beltrame, *supra* note 31, at 4.

³⁷ See Sophia Kaitatzi-Whitlock, *Pluralism and Media Concentration in Europe: Media Policy as Industrial Policy*, 11 EUR. J. COMM. 453 (1996).

³⁸ Commission of the European Communities, Communication to Parliament and Council: Follow-up to the Consultation Process Relating to the *Green Paper on Pluralism and*

firms regard the current patchwork of media ownership rules across Europe as an impediment to investment—a position which the Commission endorses—and they call for action to smooth the wide inconsistencies and disparities between current national media ownership rules. But all such industrial calls for change seem to favor a general liberalization of media ownership rules. At the same time, the Commission seems to be in sympathy with Parliament's view and asserts that "the single market cannot be put into practice at the expense of pluralism."³⁹

Contradictory policy agendas have been apparent, not only in the public responses gathered by DG XV, but also in the contrast between objectives simultaneously being pursued in other Directorates of the Commission. While the drive towards a European "Information Society" has been characterized by the theme of "liberalization," this does not sit altogether comfortably with the wish to protect indigenous cultures and to accommodate safeguards for pluralism supported by DG XV.⁴⁰

So, rather than proceeding directly from its first round of consultation to formal proposals for a draft Directive, DG XV instead embarked on a further round of consultation and it circulated two studies—one looking at the criterion of actual audience as a way to measure media concentrations⁴¹ and the other at the definition of a "media controller."⁴² Not surprisingly, responses to this second round of consultation have also affirmed a lack of consensus between opposing ideological camps as to the aims for a harmonized European media ownership policy.⁴³

In addition, the Commission has had to confront several practical problems associated with the enormous discrepancies in national market sizes across Europe. An absolute ceiling on media ownership capable of preventing undesirable concentrations in smaller countries would clearly place a very tight leash on media companies operating in large markets. On the other hand, if thresholds are set by reference to a certain proportion or percentage of national audiences (say, at 10% of the national media mar-

Media Concentration in the Internal Market - An Assessment of the Need for Community Action, COM (94)353 final at 7.

³⁹ *Id.* at 7.

⁴⁰ See Martin Bangemann, *Europe and the Global Information Society: Recommendations to the European Council* (Council of Eur. 1994); COMMISSION OF THE EUROPEAN COMMUNITIES, ACTION PLAN FOR THE INFORMATION SOCIETY (1994).

⁴¹ See GAH, FEASIBILITY OF USING AUDIENCE MEASURES TO ASSESS PLURALISM (1994).

⁴² See PHILLIPPE MOUNIER & SERGE ROBILLARD, *LA TRANSPARENCE DANS LE CONTROLE DES MÉDIAS* (EIM 1994).

⁴³ See MM-CM, REPORT ON MEDIA CONCENTRATIONS AND PLURALISM IN EUROPE (CE 1997).

ket), then operators in large member states will be allowed to grow considerably larger than rivals in smaller countries. The existence of a relationship between the size or wealth of a market and the diversity of media provisions it can naturally support creates further dilemmas. If the same level of diversity of media ownership is required within all European markets, then where would the resources be drawn from to support an equal number of suppliers in smaller and less wealthy countries or regions?

Such difficulties have deterred most European member states from firmly supporting the need for a harmonized media ownership regime. Others have spoken out in favor of the principle of subsidiarity. The United Kingdom's submission to DG XV points out that, even on the grounds of promoting the Internal Market, there is little to be gained from harmonizing media ownership rules, since the *main* obstructions to cross-border expansion by European media companies are cultural and linguistic barriers, *not* disparities in national regulations.⁴⁴ This point is echoed by many industry players who are opposed to any involvement by the Commission in the determination of media ownership rules for Europe.⁴⁵

As discussed earlier, a compelling argument in favor of action on media ownership at the European rather than the national level is that dominant media operators in Europe wield such significant political power in their own domestic markets as to impede national regulators from implementing any effective curbs over their growth. EU policy-making is not immune to industrial lobbying but, because of the diversity of national interests represented at the European level, there may be less opportunity for individual media suppliers to dictate their own policy requirements. Indeed, the strength of opposition from large industrial players to any European "interference" in domestic media ownership rules may well be seen as determined resistance to a process which could dilute their political influence. Desirable though this may be for the health of democracy within Europe, the Commission's rationale in favor of European action must, it would seem, preclude this argument since it is based on safeguarding pluralism.

⁴⁴ See DEPARTMENT OF NATIONAL HERITAGE, UNITED KINGDOM SUBMISSION TO DG XV ON A POSSIBLE EC DIRECTIVE ON MEDIA PLURALISM (1996).

⁴⁵ See Emma Tucker, *EU Media Initiative Bogged Down*, FIN. TIMES, Mar. 13, 1997, at 3.

V. TOWARDS A COLLECTIVE EU POLICY INITIATIVE

A. *Draft proposals for a "Media Pluralism" Directive (1996)*

In spite of the obstacles and objections to the advancement of a pan-European media ownership policy, DG XV managed to take a small step forward in July 1996 with the first draft of a possible EC Directive on Media Pluralism.

The Commission's proposals involved a 30% upper limit on monomedia ownership for radio and television broadcasters in their own transmission areas. In addition, the draft Directive suggested an upper limit for total media ownership—i.e., ownership of television, radio and/or newspapers—of 10% of the market in which a supplier is operating. All market shares would be based on audience measures—i.e., calculated as a proportion of total television viewing, radio listenership, or newspaper readership within the area in question—with consumption of each single type of media (television, radio or newspapers) divided by one-third for the purposes of assessing a supplier's overall share of the total market. The proposed derogations would allow member states to exclude public service broadcasters from these upper limits, if they so wish.

The definition of precise upper limits for media ownership has moved the policy debate onto a more practical footing. Inevitably, it has also been the site for major controversies about what level of diversity of ownership is appropriate for different market sizes. The approach taken in the proposals for a draft Directive has been to set the same fixed limits which would apply in any member state and either at the local, regional or national level, depending on which constitutes the appropriate market for the media supplier in question. Crucially, the Commission has taken the view that what counts is market share within the specific transmission area for a broadcasting service. This contrasts with the approach taken, say, in the United Kingdom, where what counts is a broadcaster's share of the national market, irrespective of the areas in which its service transmits. From a point of view of achieving equality of pluralism for all European media consumers, the Commission's approach seems highly effective. The problem is that it seems to disregard the fact that different market sizes—whether national or sub-national—can support different levels of diversity of ownership.

In principle, the imposition of a 30% upper limit on monomedia radio, television or newspaper ownership plus a 10% upper limit on total media ownership does not seem unreasonable. If pluralism is to exist, then a minimum of four suppliers each in

the radio, television, and newspaper sectors or ten different suppliers in the market as a whole may seem like an appropriate requirement. In practice, however, because of different rules and differing levels of resources available for media provision in each country, some of the member states of Europe would already fall afoul of these proposals, even in terms of diversity of ownership at the *national* level. For example, Finland has only two national broadcasters, each with a market share in excess of 30%.⁴⁶ The number of observable transgressions throughout Europe multiplies as the focus shifts down to smaller regional and local levels. At the same time, an upper monomedia ownership limit of 30% paves the way for even higher levels of concentration in some larger member states' markets than is currently permitted under national rules.

DG XV's proposals address the problem of diverging national regulations and they also seem well-suited to the task of establishing and protecting minimum levels of pluralism, in equal measure, for all citizens of the EU. But opponents of a pan-European policy initiative have been quick to seize on the distinction between promoting pluralism and completing the Internal Market, and to question which of these objectives DG XV's proposals really addressed. Whether member states want, and can afford to resource, equal levels of diversity of ownership at the sub-national as well as national level is an additional matter. It is not at all clear how member states or the Community at large would find the economic means to redress shortfalls in diversity of ownership in some sub-national or smaller national markets.

DG XV's response to objections raised (in particular, from the United Kingdom and Germany) has been to promise a more flexible approach to the upper ceilings suggested in the July 1996 draft, indicating that the 30% thresholds could be varied if national circumstances so demanded. But the Commission's negotiating position on upper ceilings is constrained by Parliament's consistent support for robust measures to counteract concentrations. Clearly, the greater the discretionary power left to member states in setting their own upper limits on media and cross-media ownership, the less effective any new Directive will be, whatever its objectives.

⁴⁶ See generally, Jonathan Barnard et al., *Top Fifty European Media Owners* (1996).

B. *Draft proposals for a "Media Ownership" Directive (1997)*

A revised set of proposals put forward by DG XV in Spring 1997 has introduced two small but significant modifications.⁴⁷ First, the title of the proposed Directive has been changed from "Concentrations and Pluralism" to "Media Ownership" in the Internal Market. This signals a move to deflect the focus away from pluralism (where the Commission's competence would be in question) towards the aim of removing obstacles to the Internal Market.

Secondly, a "flexibility clause" has been introduced. This adds flexibility to the proposed derogations so that individual member states can exclude any broadcaster they wish from the (unchanged) upper limits. This would be the case if the broadcaster in question is not simultaneously infringing these upper thresholds in more than one member state and as long as other appropriate measures are used to secure pluralism. Appropriate measures might include establishing, within any organization which breaches the limits, "windows for independent programme suppliers" or a "representative programming committee."⁴⁸

The effect of these modifications is the abandonment of the original goal of imposing a fixed minimum level of diversity of ownership for all European markets. Instead, member states can decide for themselves (at least for the time being)⁴⁹ whether or not the ownership thresholds set out in the Directive should apply to organizations operating within their own national territories. For the foreseeable future, there would be no absolute requirement for member states to enforce the upper thresholds set out in the Directive, but the new measures would prevent any member state from adopting *more* restrictive domestic media ownership rules (which, arguably, could obstruct cross-border investments or distort competition).

In effect then, as the switch of title suggests, the Directive is no longer about guaranteeing an equal right to pluralism (as represented by diversity of media ownership) for all EU citizens, irrespective of which European markets they live in. Although, in theory, the proposed Directive introduces a uniform set of media ownership restrictions throughout the EU, it is clear that, in practice, the "flexibility clause" would allow member states to maintain

⁴⁷ See Ian Gabara, *The EU Should Leave Media Rules to Member States*, WALL ST. J., Mar. 25, 1997, at 8.

⁴⁸ Council of European Communities, Explanatory Memorandum: Media Ownership in the Internal Market, (DG XV) (1997)

⁴⁹ It is suggested that this derogation would be temporary for 10 years from the adoption of the Directive, although smaller countries may be able to apply for an extension.

whatever upper restrictions on ownership are affordable—either economically or politically—in their own territories. What, then, is the point of introducing a harmonizing initiative?

Such back-tracking seems intended to boost support for a new Directive, but it makes it difficult to see how a harmonized approach could appease long-standing concerns (especially within the European Parliament) about national and transnational concentrations of media ownership in Europe. And, in spite of this “legalistic subterfuge,” opposition to the idea of any pan-European policy initiative has not been extinguished.⁵⁰ A problem still remains with *regional* media suppliers (e.g., United Kingdom broadcasters ITV), whose local market share exceeds 30% but whose share of the national market is relatively small. These suppliers are to be caught up in the rules in exactly the same way as genuine “media moguls;” i.e. *national* media suppliers whose market share exceeds 30% (e.g., Fininvest in Italy, or TF1 in France, or News International in the United Kingdom).

But if member states use the “flexibility clause” to exempt domestic operators from the proposed upper thresholds, then the new Directive will be meaningless. For some commentators, the legal uncertainty which the exemption clause would create would be worse than not having a common Directive at all. In the absence of an EU law, potential investors at least have the certainty that the national legislation applies.⁵¹

Debate about the revised EU initiative had to be postponed in March 1997 “in the face of ferocious lobbying against it.”⁵² The European Publishers Council has again publicly espoused its view that a pan-European media ownership initiative is unnecessary and would only hinder the development of European media companies.⁵³ ITV has also expressed strong concern that the United Kingdom’s regional television system could be potentially jeopardized under the new draft Directive, unless a “cast-iron guarantee” of exemption were given to regional broadcasters.⁵⁴

A uniform set of media ownership restrictions imposed rigidly throughout all European markets seems unfeasible, both economically and politically. But, if the approach to be taken is a flexible one, then it is open to question whether this should be determined

⁵⁰ See Gabara, *supra* note 47.

⁵¹ See *id.*

⁵² See Tucker, *supra* note 45.

⁵³ See *id.*; Jenny McEvoy, *EU Angers Publishers by Pushing on with Media Law* (Reuters Press Release, Mar. 11 1997).

⁵⁴ See *ITV concerned about proposed EU Media Ownership Directive* (Press Release, Mar. 17, 1997).

at the pan-European level, given that member states themselves are better placed than the Commission to take account of and directly legislate for the particular characteristics of their own markets.⁵⁵

One possible route forward would be to acknowledge that a uniform set of media ownership rules is unworkable because the resources available for media provision are unevenly spread across EU media markets. If a re-distribution of resources is unfeasible, then a non-uniform set of rules seems the only realistic option. Under these circumstances, the introduction of a "tiered" approach—i.e., stipulating required levels of diversity of ownership for markets of different sizes—would seem to offer several advantages over the proposed "flexible" approach. First, a "tiered" approach would remove much of the uncertainty (for cross-border investment) associated with widely divergent national systems of media ownership regulation. Second, it self-evidently takes account of the problem posed by divergences in the resources available for media provision in markets of different sizes. Third, it might help to transcend the problem of dominant national suppliers exerting undue influence over domestic political mechanisms designed to curb their growth.

DG XV continues to work on these draft proposals and the substance of any forthcoming Directive. Whether support for an initiative remains intact is a matter for speculation. Whether any "flexibility clause" would be approved by Parliament, which has repeatedly expressed its wish for strict rules to clamp down on excessive concentrations of media ownership, is an open question. Conversely, industrial concerns about the certainty and duration of the "flexibility clause" have meant that many large media players continue to lobby against the introduction of any EC Directive.

CONCLUSION

The conduct of recent media ownership rule changes in the United Kingdom raises concern about alignments between political and corporate media interests—a problem which is also evident in several other European countries. Since "political communication . . . conventionally takes the nation-state as its framework,"⁵⁶ a shift in responsibility for media ownership policy-making to the collective European level would seem to offer a

⁵⁵ DEPARTMENT OF NATIONAL HERITAGE, UNITED KINGDOM SUBMISSION TO DG XV ON A POSSIBLE EC DIRECTIVE ON MEDIA PLURALISM (1996).

⁵⁶ Philip Schlesinger, *Scotland's Parliament: Devolution, the Media and Political Culture*, 5 POL. Q. (forthcoming 1998).

means of by-passing this problem. What is perceived to be a "democratic deficit" within the EU also seems to imply, whether for better or for worse, less political potency for individual media interests at this level.⁵⁷

However, a solution is not as simple as this. It cannot be assumed that Europe's collective policy-making institutions would naturally form a consensus about which goals and whose interests media ownership policy ought to pursue. Contradictory aspirations which, from the outset, have marred progress on a collective EU approach towards media ownership are also reflected in the re-drafting of recent proposals for a possible new Directive. The promise of discretionary powers for individual member states may help to stave off resistance to a new initiative but, by trying to accommodate too many different concerns, the draft Directive is in danger of pleasing no one. A more decisive and visionary approach is called for if this collective initiative is to convey any useful benefits over and above regulation of media ownership and pluralism at the member state level.

⁵⁷ PHILIP SCHLESINGER, PROLEGOMENON TO A STUDY OF POLITICAL COMMUNICATION (ESRC Political Communication and Democracy Project Working Paper No. 14, 1997).