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## 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



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## PROCEDURAL PAGE

At the sitting of 1 September 2003 the President of Parliament announced that he had referred the motion for a resolution by Sylviane H. Ainardi and 37 other members, on the risk of a serious breach of the fundamental rights of freedom of expression and of information in Italy (B5-0363/2003) pursuant to Rule 48 of the Rules of Procedure, to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible.

On 6 November 2003 the President of Parliament acting in the name of the Conference of Presidents invited the Committee to resubmit its request for authorisation to prepare a report with a new title: "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)".

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs decided at its meeting of 25 November 2003 to draw up a report on this subject pursuant to Rules 48 and 163.

At the sitting of 4 December 2003 the President of Parliament announced that the committee had been authorised to draw up a report and that the Committee on Legal Affairs and the Internal Market, the Committee on Culture, Youth, Education, the Media and Sport and the Committee on Constitutional Affairs had been asked for their opinions.

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Johanna L.A. Boogerd-Quaak rapporteur at its meeting of 25 November 2003.

It considered the draft report at its meetings of 22 January 2004, 19 February 2004, 17 March 2004 and 30 March 2004.

At the last meeting it adopted the draft resolution by 28 votes to 19, with 0 abstentions.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans. (vice-chairman), Giacomo Santini (vice-chairman), Johanna L.A. Boogerd-Quaak (rapporteur and vice-chairman), Generoso Andria (for Bernd Posselt pursuant to Rule 153(2)), Mary Elizabeth Banotti, Maria Berger (for Sérgio Sousa Pinto), Sergio Berlato (for Niall Andrews pursuant to Rule 153(2)), Mario Borghezio, Alima Boumediene-Thiery, Giuseppe Brienza, Giorgio Calò (for Baroness Ludford pursuant to Rule 153(2)), Marco Cappato (for Maurizio Turco), Carmen Cerdeira Morterero, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Rosa M. Díez González (for Joke Swiebel), Koenraad Dillen, Francesco Fiori (for Marcello Dell'Utri pursuant to Rule 153(2)), Monica Frassoni (for Pierre Jonckheer), Georges Garot (for Martine Roure pursuant to Rule 153(2)), Ruth Hieronymi (for Hartmut Nassauer pursuant to Rule 153(2)), Renzo Imbeni (for Michael Cashman pursuant to Rule 153(2)), Margot Keßler, Heinz Kindermann (for Adeline Hazan pursuant to Rule 153(2)), Timothy Kirkhope, Eva Klamt, Ole Krarup, Lucio Manisco (for Fodé Sylla), Manuel Medina Ortega (for Gerhard Schmid), Cristiana Muscardini (for Roberta Angelilli pursuant to Rule 153(2)), Pasqualina Napoletano (for Martin Schulz pursuant to Rule 153(2)), Bill Newton Dunn, Marcelino Oreja Arburúa, Elena Ornella Paciotti, Paolo Pastorelli (for Thierry Cornillet), Hubert Pirker, Guido Podestà (for Charlotte Cederschiöld pursuant to Rule 153(2)), José Ribeiro e Castro, Giorgio Ruffolo (for Ozan Ceyhun pursuant to Rule 153(2)), Heide Rühle, Francesco Rutelli, Ilka Schröder, Patsy Sørensen, Anna Terrón i Cusí, Ian Twinn, Gianni Vattimo (for Walter Veltroni), Christian Ulrik von Boetticher and Stefano Zappalà (for Carlos

Coelho pursuant to Rule 153(2)).

The opinions of the Committee on Legal Affairs and the Internal Market, the Committee on Culture, Youth, Education, the Media and Sport and the Committee on Constitutional Affairs are attached.

The report was tabled on 5 April 2004.

## 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) (2003/2237(INI))**

*The European Parliament,*

- having regard to the motion for a resolution by:  
  
Sylviane H. Ainaridi and 37 others on the risk of a serious breach of the fundamental rights of freedom of expression and of information in Italy (B5-0363/2003),
- having regard to Article 10 of the European Convention on Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union,
- having regard to Articles 6 and 7 of the Treaty on European Union and Articles 22, 43, 49, 83, 87, 95 and 151 of the EC Treaty,
- having regard to its resolutions on media concentration<sup>1</sup>, services of general interest<sup>2</sup>, television without frontiers<sup>3</sup>, and the situation on fundamental rights<sup>4</sup>,
- having regard to the decisions of the Court of Justice of the European Communities<sup>5</sup> and the European Court of Human Rights<sup>6</sup>,
- having regard to the recommendations and resolutions of the Council of Europe in this field<sup>7</sup>,
- having regard to the Commission Communication on the future of European regulatory audiovisual policy<sup>8</sup>, the Green Paper on services of general interest,<sup>9</sup> the Report on the implementation of the EU electronic communications regulatory package<sup>10</sup> and Fourth Report on the implementation of the directive on 'television without frontiers'<sup>11</sup> (89/552/CEE)<sup>11</sup>,

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<sup>1</sup> OJ C 25, 29.1.2004, p.28.

<sup>2</sup> OJ C 140(E), 13.6.2002, p. 27.

<sup>3</sup> OJ 200, 30.6.1997, p. 4.

<sup>4</sup> P5\_TA(2003)0376.

<sup>5</sup> Familiapress, ECJ, 26 June 1997, Judgement Commission/Netherlands of 25 July 1991, Case C-535/89

<sup>6</sup> Informationsverein Lentia v. Austria (1993) and Demuth v. Switzerland (2002).

<sup>7</sup> Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting, Resolution (74) 26 on the right of reply - position of the individual in relation to the press, Recommendation No. R (94) 13 on measures to promote media transparency, Recommendation No. R (99) 1 on measures to promote media pluralism, Recommendation 1589 (2003) on freedom of expression in the media in Europe and Recommendation 1641 (2004) on public service broadcasting.

<sup>8</sup> Not yet published in OJ.

<sup>9</sup> Not yet published in OJ.

<sup>10</sup> Not yet published in OJ.

<sup>11</sup> OJ C 87(E), 11.4.2002, p. 156.

- having regard to the Protocol on the system of public broadcasting in the Member States and the Communication of the Commission clarifying the application of the state aid rules to public service broadcasting<sup>1</sup> ,
- having regard to the report of the European Union Network of Independent Experts on Fundamental Rights (2003), the Reporters Without Borders' annual reports and specific report on 'Conflict of interests in the media: the Italian anomaly' (2003), the reports of the European Federation of Journalists on 'European media ownership' (2003) and 'Crisis in Italian media: how poor politics and flawed legislation put journalism under pressure' (2003) and the figures on concentration in the Italian television and advertising market published inter alia by the Communications Regulatory Authority;
- having regard to the preliminary expertise of the European Institute for the Media on *"the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed"*,
- having regard to the public seminar of 19 February 2004 on 'Threats to Pluralism - The need for measures at the European level ',
- having regard to the following petitions:
  - Petition 356/2003 by Federico Orlando and three co-signatories (Italian), on behalf of the 'Articolo 21 liberi di' association, on the implementation of Article 7 of the Treaty on European Union regarding the protection of freedom of information in Italy;
  - Petition 1256/2003 by Ornella Erminio and Petition 35/2004 by Marco Canepari and 3286 others on the breach committed by Italy of the freedom and pluralism of the media guaranteed by Article 6;
- having regard to Rules 48 and 163 of its Rules of Procedure,
- having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinions of the Committee on Legal Affairs and the Internal Market, the Committee on Culture, Youth, Education, the Media and Sport and the Committee on Constitutional Affairs (A5-0230/2004),

### **Right to freedom of expression and information - the right to a free and pluralist media**

- A. whereas a free and pluralist media is an essential requirement for the full respect of the right of freedom of expression and information, and the case-law of the European Court of Human Rights affirms the obligation of states to protect and, where necessary, to take measures to ensure pluralism in the media,
- B. whereas “.. *‘Political’ pluralism is about the need, in the interests of democracy, for a range of political opinions and viewpoints to be expressed in the media. Democracy would be threatened if any single voice, with the power to propagate a single viewpoint, were to become too dominant*”, and that “*‘Cultural’ pluralism is about the need for a variety of cultures, reflecting the diversity within society, to find expression in the*

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<sup>1</sup> OJ C 320, 15.11.2001, p.5.

*media. Cultural diversity and social cohesion may be threatened unless the cultures and values of all groupings within society (for example those sharing a particular language, race, or creed) are reflected in the media.*"<sup>1</sup>

- C. whereas political and cultural pluralism within the media presupposes that it is also possible to express a wide range of political opinions, theories and positions in cultural, arts, university and school circles,
  - D. whereas a free and pluralist media reinforces the principle of democracy on which the Union is founded (Article 6 of the EU Treaty) and is essential in the European Union where citizens have the right to stand and vote in municipal and European elections in a Member State of which they are not a national,
  - E. whereas, pursuant to Article 151(4) of the EC Treaty, the European Community must take into account in its action respect for and promotion of the diversity of its cultures;
  - F. whereas the protection of human rights has become a priority objective of the European Union by Articles 6 and 7 of the EU Treaty, with the adoption of the Charter of Fundamental Rights, the approval of the Copenhagen criteria for the accession countries, the strengthening of the provisions on European citizenship, the development of an area of freedom, security and justice, the promotion of transparency and privacy, and the prevention of discrimination, and Article II-11(2) of the draft Constitution drawn up by the European Convention provides for the incorporation of the Charter of Fundamental Rights in the Constitution of the European Union;
  - G. whereas the European Convention states in Article I-2 of its draft Constitution that pluralism is a fundamental value of the European Union and that the preservation of cultural diversity is enshrined in Article I-3(3) thereof as an objective of the European Union;
1. Considers that where the Member States fail, either because they are not able or they are not willing, to take adequate measures the EU has a political, moral and legal obligation to ensure within its fields of competence that the rights of EU citizens to a free and pluralist media are respected, in particular, due to the lack of recourse of the Community courts by individuals in the case of an absence of pluralism in the media;
  2. Regrets the current fragmentation of EU regulatory situation as regards the media and stresses that the European Union should use its competencies (in relation to audiovisual policy, competition policy, telecommunications policy, state aid, public service obligations, citizens rights) to specify the minimum conditions to be respected by the Member States to ensure an adequate level of pluralism;

### **Audiovisual (and media) policy**

3. Notes that the audiovisual and media sectors are central areas for economic growth and for the realisation of the Lisbon agenda, but that concentration of ownership - often of a cross-border nature - and restrictions on market access limit the potential of European industry and that therefore the protection of media pluralism is essential for the

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<sup>1</sup> Gillian Doyle (2003): Media Ownership: the economics and politics of concentration in the UK and European media. London: Sage. pp 12.

harmonious development of the audiovisual and media sectors, although smaller and specific markets may not have the economic basis for supporting more than one player;

4. Reaffirms the validity of the principles underlying the 'television without frontiers' directive (Directive 85/552/EC) including free movement of European television broadcasts, free access to important events, promotion of independent European and recently produced works, protection of minors and public order, protection of consumers through clearly recognisable and transparent advertising and the right of reply, which are the basic pillars ensuring freedom of expression and information;
5. Underlines that radio and television broadcasting are complex and constantly evolving, and that the organisation of these services is different in all Member States according to cultural traditions and geographical conditions;
6. Stresses that the concept of the media is undergoing a redefinition through convergence, interoperability, and globalisation; technological convergence and the increase in supply through internet, digital, satellite, cable and other means should not however result in 'convergence' of content; consumer choice and pluralism of content is the key issue, more so than pluralism of ownership or supply;
7. Notes that digital media will not automatically guarantee greater choice, because the same media companies that already dominate the national and global media markets also control the dominant content portals on the Internet, and since the promotion of digital and technical literacy are strategic issues for the development of durable media pluralism, and expresses concern about the switching off of the analogue frequencies in some parts of the Union;
8. Points out once again that European legislation in the audiovisual sector does not take due account of the transmission of the same or similar content by different means of transmission and that therefore, information society services, with the exception of television and radio, are subject, regardless of their content, to the eCommerce Directive (Directive 2001/31/EC);
9. Calls, therefore, once again for a fundamental overhaul of the current legal framework in order to produce a framework package for audiovisual content with different levels of regulation depending on the relevance of the contents in terms of opinion forming, while maintaining the 'minimum requirements' nature of the Directive;
10. Notes the role of the local and regional media in promoting pluralism of sources of information and protecting the diversity of language and culture and the specific task for public broadcasting in this area where commercial media cannot answer this role for economic reasons (too small markets);
11. Deplores the fact that the protection of pluralism is no longer included among the priorities of the Commission's strategic communications on the audiovisual sector, nor does it even appear as one of the subjects to be dealt with under the revision of the television without frontiers directive;
12. Recognises that the variety of models for regulating the media markets developed by the Member States reflect the different political, cultural and social needs, but is nonetheless concerned that strongly divergent approaches could create obstacles for the

free provision of audiovisual and media services in the EU;

13. Regrets that the Contact Committee established under the television without frontiers is mostly composed of representatives of the national government ministries and not by members of independent media regulatory authorities;
14. Welcomes the establishment in some Member States of a media ownership authority with the duty to monitor the ownership of the media and the power to undertake own-initiative investigations; stresses that such authorities should also monitor compliance with the law, equal access to the media for the various social, cultural and political players and the objectivity and accuracy of the information supplied;
15. Notes that diversity of media ownership and competition between operators is not sufficient to ensure pluralism of media content and that the increased use of press agencies results in the same headlines and content;
16. Considers that pluralism in the EU is threatened by the control of the media by political bodies or persons and by certain commercial organisations, such as advertising agencies, and that, as a general principle, the national, regional or local government should not abuse its position by influencing the media and that furthermore, even stricter safeguards should be foreseen where a member of the government has specific interests in the media;
17. Recalls that the Green Paper examined possible provisions to prevent such conflicts of interests, including rules to disqualify persons who may not become media operators, and rules for the transfer of interests or changes in the 'controller' of the media operator;
18. Considers that, as far as the public is concerned, the principle of pluralism can and must be observed by each and every broadcaster, with due respect for the independence and professionalism of operators and opinion-formers. With this in mind, reaffirms the importance of editorial statutes designed to prevent interference in information content by owners or shareholders or outside agencies such as governments;
19. Welcomes the forthcoming Commission study into the impact of control measures on the television advertising markets but remains concerned about the relationship between advertising and pluralism in the media as large media companies have an advantage in obtaining more advertising;
20. Stresses expressly that cultural and audiovisual services are not services in the conventional sense and should therefore not be the subject of liberalisation negotiations under international trade agreements, e.g. in the context of GATS;
21. Welcomes the proposal put forward by the European Convention in Article III-217 of its draft Constitution concerning decision-making in connection with the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services;

### **Public-service broadcasting**

22. Notes the fundamental changes over the last twenty years in the environment in which public-service broadcasters operate owing to competition by the international and

commercial media and to technological change;

23. Notes that to promote cultural diversity in the digital age, it is important that public service broadcasting content reaches audiences through as many distribution networks and systems as possible. It is therefore crucial for public-service broadcasters to develop new media services. Also notes that the Amsterdam Protocol reserves for Member States the power of defining the mission of public service broadcasters and that the Communication from the Commission on the application of State aid rules to public service broadcasting of 15 November 2001 states that 'the public service remit might include certain services that are not "programmes" in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question';
24. Stresses therefore that the concept of public-service broadcasting is evolving in the converging information society. In addition to traditional television and radio broadcasting the development of new media services is becoming increasingly important in order to fulfil their remit to provide pluralistic content;
25. Emphasises the importance of media pluralism for promoting cultural, social and political diversity, and notes, in particular, the duty of the public-sector broadcaster to provide the public with a high-quality service which ensures access to diverse accurate, objective, neutral and reliable information, culture and content in order to guarantee credibility, pluralism, identity, participation and cultural innovation, as recognised furthermore, by the Protocol on public broadcasting annexed to the Amsterdam Treaty;
26. Stresses the need to ensure that in all the EU Member States the public broadcaster is fully independent and free from interference so that public funding is not used to maintain in power, or to limit criticism of, the government-in-office and that, in the event of interference from the national government, there is recourse to the courts or an independent adjudicator;
27. Notes that although both the Commission communication and the Altmark judgement provide criteria for the compatibility of public funding to public broadcasting, they do not require Member States to ensure adequate funding for the public service broadcasters; considers in this connection that the obligation on members of the public to pay a licence fee to support public service broadcasters can be meaningful only if those broadcasters play the specific role of providing the public with diverse, accurate, objective, comprehensive and high-quality information on social, political and institutional issues; notes with concern that the current trend is, on the contrary, towards a deterioration in quality and in content and that the payment of the licence fee for public-service broadcasters is in danger of serving merely to distort the market, owing to the competitive advantage which public-service broadcasters have over the commercial media, which deliver substantially the same content and quality of information;
28. Notes the European Commission's investigation into the Dutch State's financing of Dutch public-service broadcasters into whether the Dutch State has provided the public-service broadcasters with more funding than necessary to finance the public service and whether the beneficiaries of the public funds used these excess public funds to cross-

subsidise their non-public service commercial activities, and notes the previous investigations into the funding of the public service broadcasters in Italy, Spain and Denmark;

29. Welcomes the use in some Member States of obligations requiring cable operators to carry public service channels and the reservation of some digital transmission capacity for public service operators;

### **Commercial media**

30. Welcomes the contribution of commercial media to innovation, economic growth and pluralism, but notes that the increase in the concentration of the media, including multimedia multinationals and cross-border ownership, threatens media pluralism;
31. Notes that, although the Commission investigates the most significant mergers under the EU Merger Regulation, it does not specifically examine the effect of the merger on pluralism and that approved mergers may still be examined and blocked on the grounds of pluralism by the Member States;
32. Considers that even medium-sized media mergers can have significant effects on pluralism and that media mergers should systematically be subject to an examination of the effect on pluralism either by a competition authority or a separate authority as suggested by the OECD, without compromising editorial and publishers' freedom through governmental or regulatory intervention;
33. Notes the diversity of methods for determining the degree of horizontal concentration in the media (audience-share; licence holder-share; revenue share/frequency limitation and the capital share/broadcasting), and the degree of vertical integration and 'diagonal or cross' concentration in the media;
34. Expresses its concern at the fact that, in some Member States, operators already have exclusive control over access to their output and the viewers through proprietary systems (creation of 'bottlenecks') and other operators or users are excluded ('gate-keeper position');
35. Stresses that open, interoperable application programme interfaces (APIs) are of key significance in ensuring a free flow of information and freedom of choice for users and points to the provision contained in Article 18 of the Framework Directive on Telecommunications (Directive 2002/21/EC) calling for extensive interoperability in digital television;
36. Regrets the fact that the Commission has not taken up Parliament's calls and proposals for the timely definition of and support for interoperability;
37. Calls on the Commission, in order to avoid laying down a mandatory standard for digital television, to inform Member States of which measures are legally allowed to assist the migration to an open interoperable standard and to define the criteria it will use to determine whether interoperability and freedom of choice for users have been established before it submits its report by 25 July 2004, pursuant to Article 18(3) of the

Framework Directive (Directive 2002/21/EC), on the achievement of interoperability and freedom of choice for users in the Member States;

38. Points with concern to the increasing influence of electronic programme guides (EPGs), the bundling of programmes and Internet search engines on opinion forming and the trend towards vertical and horizontal cross-border concentrations in this field;
39. Stresses that the question of media pluralism involves, in addition to matters relating to ownership, matters relating to content and the public's right to receive objective and comprehensive information, which requires in particular that the various social, cultural and political players have equal and non-discriminatory access to the media;

### **Investigation by the European Parliament**

40. Recalls that the European Parliament was requested to examine the possible use of the procedure in Article 7 of the EU Treaty against the Italian Government for violation of the citizens' right to a free and pluralist press;
41. Stresses the importance of the reasons behind the European Parliament's initiative concerning the risks of violation in the European Union, and especially in Italy, of freedom of expression and information, which reflect widespread concern across European public opinion about the phenomena of media concentration and conflicts of interest;
42. Welcomes the preliminary expertise carried out by the European Institute for the Media within the context of a larger study: *'the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed'* which examines a core number of countries including larger Member States, smaller Member States and examples from Scandinavia, southern Europe and eastern Europe to give an overview of different systems reflecting different traditions of media use, and that the final study, due in June, will contain final comparative conclusions based on the situation on all 25 current and new EU Member States and complete recommendations;
43. Notes that in each of the eight countries examined (France, Germany, Ireland, Italy, Netherlands, Poland, Sweden, and United Kingdom) there are issues which require further investigation, and looks forward to the full study so that comparison can be made between all the Member States;
44. Notes furthermore, on the basis of detailed investigations already carried out by independent agencies, including within the European Union, which have prompted a large number of statements by international organisations, national authorities and the European Parliament itself that have been ignored by the Italian Government, that there could be a risk of serious and persistent breaches of the right to freedom of expression and information in Italy;
45. Notes, on the basis of its preliminary investigation into whether pluralism is adequately protected, that there are sufficient concerns to warrant a detailed examination of the situation by the European Commission followed by the submission of appropriate legislative proposals;

46. Considers that the report of the European Institute for the Media provides a basis for an annual report on pluralism examining the level of concentration on the supply side, (horizontal, vertical and cross-ownership), including the distribution of advertising resources, editorial independence, diversity of content (internal and external) and demand, i.e. public preferences;

#### **Situation in the Member States**

47. Notes that during 2002 in **France**:

- there were several violations of press freedom (e.g. the destruction of the print-run of a new free daily by the Unions, and of journalists being under pressure from the police);
- the French courts often rule against journalists in cases of libel as a result of the country's outdated defamation legislation and the protection of confidential sources; and
- the ECHR ruled that a Paris Appeals Court violated Article 10 of the European Convention on Human Rights;<sup>1</sup>

48. Notes that in **Ireland**:

- in the context of updating the defamation law the National Newspapers of Ireland submitted a proposal for an establishment of an independent Press Council and Press Ombudsman but that the Legal Advisory Group is seeking a statutory model consisting of Government appointees who would draw up their own Code of Standards and have complete power of the courts to enforce those codes,
- the absence of a level playing field in Ireland due to the payment of VAT on Irish newspapers but no VAT on the UK newspapers, which have approximately 25% of the Irish market,
- the seemingly dominant position of Independent Newspapers in the Irish market (reported variously as 50 - 80%) and the conclusions of the Competition Authority that there is sufficient editorial diversity and, thus, media pluralism is not threatened;

49. Notes that in **Germany**:

- the Federal Constitutional Court found that surveillance of telecommunications (i.e. the tracing of journalists' phone calls) did not constitute a breach of constitutional liberties as provided for in Articles 10 and 19 of the Basic Law, which guarantee confidentiality of information,
- a legislative proposal introduced by the Bundesrat in September 2003 and intended to afford individuals better protection against unauthorised photographing would punish infringements with prison sentences of up to two years or equivalent fines,
- there is no law ensuring access to documents of public authorities at the national (i.e. federal) level and that only four of the federal states have enacted such legislation;

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<sup>1</sup> Colombani and others, judgement of 25 June 2002.

50. Notes that in **Poland**:

- the publishing company Agora, which owns the top-selling daily newspaper and 20 local radio stations and 11 magazines, allegedly ‘was asked to pay a bribe for "lobbying" to achieve a more favourable media law allowing the publisher to acquire a private television station’,
- it is estimated that foreign investment in the print media covers 40% of the sector, and that this poses problems for journalistic freedoms with foreign publishers creating less-favourable working conditions than for their own companies, which discourages professionalism,<sup>1</sup>
- there is a restriction of internal freedom of the press within Article 10 of the Press law, which stipulates that a journalist must obey and follow the general principles of his/her publisher,
- there are currently no provisions (and no apparent plans to introduce provisions) in Polish media law regarding media concentration and the protection of pluralism;

51. Notes that in **the Netherlands**:

- there is a high level of concentration in both the television and press sectors where the three main suppliers control at least 85 % of the market and that, although the Netherlands has the highest penetration of cable TV services in Europe, this market is also dominated by three major cable operators,

52. Notes that in **Sweden**:

- the media are characterised by a fairly high degree of cross-media ownership, interlocking ownership structures between major players in the audiovisual field and cooperation agreements between the press and broadcasting industry where companies in both sectors are controlled by the same group; and that
- an investigation into the special conditions prevailing in the press markets has been criticised, as a study of the newspaper industry in isolation from other media would be inadequate under current market conditions;

53. Notes that in the **United Kingdom**:

- there is intense debate following the Hutton Report into the circumstances surrounding the death of scientist and Government advisor, David Kelly, the criticism by the public-service broadcaster of the reasons put forward by the government for the war in Iraq, the resignation of the Director-General and the Chairman of the Board of Governors and the potential ramifications for the practice of investigative journalism and, separately, there is much debate concerning the review of the BBC’s Charter and Agreement, which is considered a model for other systems;

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<sup>1</sup> It should however be noted that several foreign companies operating in Poland, namely the Norwegian Orkla-group and the Springer-Verlag Group ‘have voluntarily introduced internal rules to protect their writing staff from outside pressure and to separate managerial and editorial responsibilities’(OSCE).

54. Notes, as regards **Spain**, that:

- the employees of the Spanish public television channel TVE published a report denouncing the unprofessional practices used to foster unbalanced, biased or manipulated provision of information between 28 February and 5 March on the military intervention in Iraq and taking the view that the channel focuses on the position of those in favour of military intervention and ignores that of those advocating the continuation of the inspections and opposing the use of military force<sup>1</sup>;
- there is as yet no independent media regulatory authority;
- in its 2003 annual report (containing 2002 data) the Reporters Without Borders NGO expressed concern at ETA terrorist threats and attacks against journalists in the Basque Country (three explosive devices targeted at journalists were deactivated during the year) and those against a Madrid newspaper, perpetrated by an Italian anarchist group; the organisation also denounced the obstacles encountered by journalists seeking to report on the banning of the Batasuna party and the *Prestige* environmental disaster,
- that government pressure on the public-service broadcaster TVE resulted in blatant distortion and ignoring of the facts regarding responsibility for the appalling terrorist attacks of 11 March 2004;

55. Recognises that the accession countries have made substantial progress in adopting the *acquis*, but is concerned that some accession countries, having little or no tradition of an independent media, face particular challenges in relation to ensuring pluralism in the media, and doubts that these countries will recognise media pluralism as a priority and take adequate action to promote it;

### **Situation in Italy**

56. Notes that the level of concentration of the audiovisual market in Italy is currently the highest within Europe and that while Italian television offers twelve national channels and ten to fifteen regional and local channels, the market is characterised by the duopoly between RAI and MEDIASET where both operators together account for almost 90% of the total audience share and collect 96.8% of advertising resources, as against 88% for Germany, 82% for the United Kingdom, 77% for France and 58% for Spain;

57. Notes that the Mediaset group owned by Silvio Berlusconi is the largest private television and communications group in Italy and the world, which controls (inter alia) television networks (RTI S.p.A.) and advertising franchise holders (Publitalia '80), both of which have been formally found to hold a dominant position in breach of national law (Law 247/97) by the Communications Regulatory Authority (decision 226/03)<sup>2</sup>;

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<sup>1</sup> Reported by ABC on 11 March 2003.

<sup>2</sup> The Mediaset group controls:

- television networks (Canale 5, Italia 1 and Rete 4 in Italy and the Telecinco group in Spain
- a cable television network (Telepiù),
- satellite television (coming under Mediadigit) and terrestrial digital television networks,

58. Notes that one of the sectors in which the conflict of interests is most obvious is advertising, given that in 2001 the Mediaset group was in receipt of two-thirds of television advertising resources, amounting to a total of € 2 500 million, and that the main Italian companies have transferred much of their investment in advertising from printed matter to the Mediaset networks and from Rai to Mediaset<sup>1</sup>;
59. Notes that Silvio Berlusconi, since his appointment to the post of President of the Italian Council of Ministers in 2001, has not resolved his conflict of interests as he had explicitly pledged, but on the contrary has increased his controlling shareholding in the company Mediaset (from 48.639% to 51.023%), thereby drastically reducing his own net debt through a marked increase in advertising revenue to the detriment of competitors' revenues (and ratings) and, above all, of advertising funding for the written press;
60. Regrets the repeated and documented instances of governmental interference, pressure and censorship in respect of the corporate structure and schedules (even as regards satirical programmes) of the RAI public television service, starting with the dismissal of three well-known professionals (Enzo Biagi, Michele Santoro and Daniele Luttazzi) at the sensational public request of the President of the Italian Council of Ministers in April 2002 - in a context in which an absolute majority of the members of the RAI board of governors and the respective parliamentary control body are members of the governing parties, with this pressure then being extended to other media not in his ownership, leading inter alia to the resignation of Ferruccio de Bortoli, editor of *Corriere della Sera*, in May 2003;
61. Notes, therefore, that the Italian system presents an anomaly owing to a unique combination of economic, political and media power in the hands of one man - the current President of the Italian Council of Ministers, Silvio Berlusconi - and to the fact that the Italian Government is, directly or indirectly, in control of all national television channels;
62. Notes that in Italy the broadcasting system has been operating in extralegal circumstances for decades, as repeatedly recognised by the Constitutional Court, and in

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- advertising concerns (Pubitalia '80 in Italy and Publiespaña in Spain),
  - companies with a link to television broadcasting (Videotime, RTI Music, Elettronica Industriale, Mediavideo),
  - companies producing and distributing television products (Mediatrade, Finsimac, Olympia),
  - a fixed telephony company (Albacom),
  - an Internet portal (Jumpy S.p.A.),
  - a cinema distribution company (Medusa, which controls the retailer Blockbusters),
  - investment and financial services groups (Mediaset Investment in Luxembourg and Trefinance),
  - an insurance company (Mediolanum),
  - a construction company (Edilnord 2000),
  - a football team (AC Milan),
  - the Arnoldo Mondadori Editore publishing house, which includes Italy's largest publisher of books and a wide range of magazines,
  - the 'Il Giornale' newspaper (owned by his brother, Paolo Berlusconi) and the 'Il Foglio' newspaper (owned by his wife, Veronica Lario),

<sup>1</sup> For example, in 2003 Barilla invested 86.8% less in newspaper advertising and spent 20.6% more on adverts on the Mediaset networks and Procter&Gamble 95% less in newspaper advertising and 37% more on the Mediaset networks; even a public company like the Wind telephone operator cut its advertising expenditure in newspapers by 55.3% and increased it on Berlusconi's networks by 10%; furthermore, in 2003 Rai lost 8% of its advertising resources to Mediaset, making for an € 80 million loss in earnings. (Source: *Corriere della Sera*, 24 June 2003).

the face of which the efforts of the ordinary legislator and the competent institutions have proved ineffective in re-establishing a legal regime; RAI and Mediaset each continue to control three terrestrial analogue television broadcasters, despite the fact that the Constitutional Court in its judgement No 420 of 1994 has ruled it impermissible for one and the same entity to broadcast over 20% of the television programmes transmitted domestically on terrestrial frequencies (i.e. more than two programmes) and has found the regulatory regime under Law No 223/90 to be contrary to the Italian Constitution, despite being a 'transitional regime'; nor did Law No 249/97 (establishing the Communications Guarantee Authority and rules on telecommunication and radio and television systems) abide by the prescriptions of the Constitutional Court which, in its judgement 466/02, declared the constitutional illegitimacy of Article 3(7) thereof, 'insofar as it does not provide for the establishing of a hard-and-fast deadline, in any event not exceeding 31 December 2003, by which the programmes transmitted by broadcasters exceeding the limits referred to in paragraph 6 of Article 3 must be broadcast exclusively via satellite or via cable';

63. Notes that the Italian Constitutional Court declared in November 2002 (Case 466/2002) that '*...the present Italian private television system operating at national level and in analogue mode has grown out of situations of simple de facto occupation of frequencies (operation of installations without concessions and authorisations), and not in relation to any desire for greater pluralism in the distribution of frequencies and proper planning of broadcasting... This de facto situation does not therefore guarantee respect for external pluralism of information, which is an essential requirement laid down by the relevant constitutional case law... In this context, given the continued existence (and aggravation) of the situation which was ruled illegal by Judgment No 420 in 1994 and of networks considered 'surplus' by the 1997 legislature, a final deadline must be set that is absolutely certain, definitive and hence absolutely binding in order to ensure compatibility with constitutional rules'*'; notes that, nonetheless, the deadline for the reform of the audiovisual sector has not been respected and that the law for the reform of the audiovisual sector has been sent back by the President of the Republic for a new examination by the Parliament due to the non-respect of the principles declared by the Constitutional Court<sup>1</sup>;
64. Notes also that the guidelines laid down for the sole concessionary of public service broadcasting by the Parliamentary committee for the general guidance and supervision of broadcasting services, along with the numerous decisions adopted by the Communications Guarantee Authority (responsible for enforcing laws in the broadcasting sector) certifying breaches of law by broadcasters, are not respected by broadcasters themselves who continue to grant access to the national television medium in an essentially arbitrary manner, even during electoral campaigns;
65. Hopes that the legislative definition contained in the draft act for reform of the audiovisual sector (Article 2, letter G of the Gasparri law) of the 'integrated system of communications' as the only relevant market does not conflict with Community competition rules within the meaning of Article 82 of the EC Treaty or with numerous

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<sup>1</sup> See the judgements of the Constitutional Court of 10 July 1974 (Nos 225 and 206) and 28 July 1976 (No 202) on Law No 103 of 14 April 1975 (GURI, 17 April 1975, No 102), the negative opinion from the Constitutional Court, in its judgement of 21 July (No 148), which criticised the lack of anti-trust legislation and the resultant de facto and de jure creation of monopolies and oligopolies. The Constitutional Court, Judgement No 826/88, Judgement of 1994 (No 420, GURI No 51, 14 December 1994) and Judgement 466/2002.

judgments of the Court of Justice<sup>1</sup>, and does not render impossible a clear and firm definition of the reference market;

66. Hopes also that the 'system for assigning frequencies' provided for in the draft Gasparri law does not constitute mere legitimisation of the de facto situation and does not conflict, in particular, with Framework directive 2002/21/EC, Article 7 of the Authorisation directive 2002/20/EC or Directive 2002/77/EC, which specify, inter alia, that the assigning of radio frequencies for electronic communication services must be based on objective, transparent, non-discriminatory and proportionate criteria;
67. Highlights its deep concern in relation to the non-application of the law and the non-implementation of the judgements of the Constitutional Court, in violation of the principle of legality and of the rule of law, and at the incapacity to reform its audiovisual sector, as a result of which the right of its citizens to pluralist information has been considerably weakened for decades; a right which is also recognised in the EU Charter of Fundamental Rights;
68. Is concerned that the situation in Italy could arise in other Member States and the accession countries if a media magnate, such as Rupert Murdoch, chose to enter into politics;
69. Regrets that the Italian Parliament has yet to adopt a regulation resolving the conflict of interests of the President of the Italian Council of Ministers, which is what Silvio Berlusconi had promised to do within the first hundred days of his government;
70. Considers that the adoption of a general reform of the audiovisual sector could be facilitated if it contains specific and adequate safeguards to prevent actual or future conflicts of interest in the activities of local, regional or national executive members who have substantial interests in the private audiovisual sector;
71. Hopes, moreover, that the draft Frattini law on conflict of interests will not stop at de facto recognition of the premier's conflict of interests, but will provide for adequate mechanisms to prevent this situation from continuing;
72. Regrets that, if the obligations of the Member States to ensure pluralism in the media had been defined after the 1992 Green Paper on pluralism, the current situation in Italy could possibly have been avoided;

## **Recommendations**

73. Notes that the European Community already has competence in a number of policy areas and avails itself of policy tools with direct relevance for media pluralism, such as the rules on free access for societies to important events in the Television without Frontiers Directive, rules on fair, reasonable and non-discriminatory access to application program interfaces (APIs) and electronic programme guides (EPGs) in the Access Directive, on Must-Carry in the Universal Service Directive, on the use of an open API for digital interactive television services and platforms and on the

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<sup>1</sup> For the characteristics of substitutability of the reference market see the judgments *Continental Can*, case 6/72, *Hoffman La-Roche*, case 85/76 and *Ambulanz Glöckner*, case C-475/99; for the lack of a sufficient degree of substitutability of the reference market see judgments *United Brands*, case 27/76 and *Ahmed Saeed*, case 66/86.

harmonisation of standards in order to achieve full interoperability of digital television on the level of the consumers in the Framework Directive;

74. Stresses that these tools need to be understood as core elements of the Community's policy to safeguard media pluralism and thus need to be applied, interpreted and further developed by the Commission with a view to strengthening these measures in order to combat horizontal and vertical media concentration in traditional as well as in new media markets;
75. Calls, therefore, on the Member States and the Commission to safeguard pluralism in the media and to ensure, in accordance with their powers, that the media in all Member States are free, independent and pluralist;
76. Calls on the Commission to submit a communication on the state of media pluralism in the EU as soon as possible including:
  - (a) a review of existing measures and practices, both in the Member States and at European level, designed to encourage political and cultural pluralism within or between editorial offices, including with regard to content, and promote an analysis of any shortcomings, acknowledging the economic challenges to guaranteeing pluralism on smaller and specific markets like local or small country regions,
  - (b) a thorough examination of the possibility of action based on its existing competencies and its obligations to ensure a high level of protection of human rights,
  - (c) an examination of the measures which should be taken by the Member States and those which should be taken by the European institutions,
  - (d) an examination of the use of appropriate instruments, including the use of non-binding instruments during a first stage which could then lead to binding instruments if insufficient action is taken by the Member States, and
  - (e) a consultation procedure on a possible action plan of measures to be taken at the EU level or by the Member States to ensure an adequate level of pluralism across the European Union;
77. Calls on the Commission to submit a proposal for a directive to safeguard media pluralism in Europe in order to complete the regulatory framework, as requested in its resolution of 20 November 2002;
78. Considers that the protection of media diversity should become the priority of EU competition law, and that the dominant position of a media company on the market of a Member State should be considered as an obstacle to media pluralism in the European Union;
79. Emphasises that legislation should be adopted at European level to prohibit political figures or candidates from having major economic interests in the media; considers that legal instruments should be introduced to prevent any conflict of interest; calls on the Commission to submit proposals to ensure that members of government are not able to use their media interests for political purposes;

80. Calls, therefore, on the Commission also to examine the following issues for inclusion in an action plan on measures to promote pluralism in all EU sectors of activity:
- (a) the revision of the television-without-frontiers directive to clarify the obligation of the Member States to promote political and cultural pluralism within or between editorial offices, taking into account the need for a consistent approach across all communications services and media forms;
  - (b) the establishment of EU-wide minimum conditions to ensure that the public service broadcaster is independent and free from interference by the government, as recommended by the Council of Europe;
  - (c) the promotion of political and cultural pluralism in journalism courses so that the views held within society are adequately reflected within or between editorial offices;
  - (d) an obligation on the Member States to make an independent regulator (such as the telecommunications or competition regulator) responsible for monitoring media ownership and equal access and with the power to undertake own-initiative investigations;
  - (e) for the establishment of a European 'Working Party' composed of independent national media regulators (see, for example, the Article 29 data-protection group);
  - (f) rules requiring the transparency of the ownership of the media, in particular, in relation to cross-border ownership and for the publication of information on significant interests in the media;
  - (g) a requirement that information on media ownership collected in the national markets be sent for comparison to a European-wide body, such as the European Audiovisual Observatory;
  - (h) an examination into whether divergent national regulatory models create obstacles in the internal market and whether there is a need for the harmonisation of the national rules restricting the horizontal, vertical and cross ownership of the media to ensure a level playing field and, in particular to ensure an adequate supervision of cross-border ownership;
  - (i) an examination of the need to introduce in the EU Merger Regulation a 'pluralism' test and lower thresholds in relation to media mergers, or whether such provisions should be included in the national rules;
  - (j) guidelines on the way the Commission will take public-interest concerns such as pluralism into account when applying competition law to media mergers,
  - (k) an examination into whether the advertising market distorts the conditions of competition in the media sector and whether specific controls on the advertising market are needed to ensure equitable conditions of access;
  - (l) a review of the 'must carry' obligations in the Member States on

telecommunications operators to carry the public service broadcasters, the market trends and whether further measures are needed to promote the distribution of the public service broadcasters;

- (m) the establishment of a general right of EU citizens applicable to all media to reply to inaccurate information, as recommended by the Council of Europe;
  - (n) an examination into the need to reserve sufficient digital transmission capacity for public service broadcasters;
  - (o) a scientific study on the impact of the new communication technologies and services on media concentration and pluralism;
  - (p) a comparative study on national rules relating to political information - in particular in the context of elections and referendums - and equal and non-discriminatory access for different groupings, movements and parties to the media, as well as the identification of best practices in this field to guarantee the right of citizens to information, to be recommended to Member States;
  - (q) possible specific measures which should be adopted to assist the development of pluralism in the accession countries;
  - (r) the establishment of an independent body in the Member States, such as a Press Council, consisting of external experts, to oversee disputes over reporting by the media and journalists,
  - (s) measures to encourage media organisations to strengthen editorial and journalistic independence and high standards of quality and ethics through editorial statutes or self-regulatory means;
  - (t) the promotion of works councils in media organisations, and in particular, in companies established in the accession countries;
81. Recalls that the Commission's action should, however, be based on the principle of proportionality laid down in the last paragraph of Article 5 of the Treaty establishing the European Community, which stipulates that any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty;
82. Calls for the preparation of an annual report on pluralism which assesses the diversity of the content (internal and external) in relation to the political and cultural preferences of the public, assesses editorial independence, and analyses the impact of concentration of ownership on diversity; and for pluralism in the media to be specifically included in the annual report of the EU network of independent experts on human rights;
83. Calls on the Commission to provide clarification of the Altmark ruling to the broadcasting sector and to prepare a draft directive under the codecision procedure on the conditions for validation of funding;
84. Asserts that any legal or administrative measures instituted by a Member State and affecting the pluralism of the media or the freedom of expression and information, as well as the absence of action by a Member State to protect these fundamental rights

could fall within the scope of Article 7(1) or Article 7(2) of the Treaty on European Union;

85. Considers that, where Parliament has political misgivings regarding media diversity and pluralism in one of the Member States, it should have the possibility of independently initiating procedures to investigate the matter before using, as a last resort, its right of initiative under Article 7(1);
86. Calls for the inclusion of a specific provision in the Constitution for Europe on the need to ensure pluralism in the media;
87. Urges Member States to incorporate in their national constitutions an active duty to promote respect for freedom and diversity of the media, implementing in more detailed form what was laid down in this respect in the Charter of Fundamental Rights of the European Union in December 2000 in Nice; considers that, in order to guarantee that this duty is carried out, an independent court should be empowered to examine legislation and regulations in this field for conformity with the said provisions of the constitution;
88. Invites the Italian Parliament to:
  - accelerate its work on the reform of the audiovisual sector in accordance 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;
  - to find a genuine and appropriate solution to 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,
  - to take measures to ensure the independence of the public service broadcaster;
89. Instructs its President to forward this resolution to the Council, the Commission, the Council of Europe and the governments and parliaments of the Member States and the accession countries.

## EXPLANATORY STATEMENT

The rapporteur welcomes this opportunity for the Parliament to reexamine the issue of pluralism in the media. It should be recalled that the protection of pluralism in the media has been a recurrent concern of the EP, especially during the adoption of the directive on 'television without frontiers'.<sup>1</sup>

This time, the EP, having been called upon to examine the issue of pluralism in Italy<sup>2</sup>, decided to look more broadly at pluralism in the EU. The rapporteur agrees that it is not possible to make valid conclusions concerning the situation in one Member State without first examining the situation in all the Member States.

For many years, the Parliament has been suggesting to the Commission that there is a need for EU intervention to ensure an adequate level of pluralism. The Commission, after an overview of the state of affairs in the Community (see its Green Paper on pluralism)<sup>3</sup>, prepared a draft directive on the protection of pluralism. Unfortunately, and despite some real gestures of encouragement by the Commissioner concerned<sup>4</sup>, as well as favourable opinions from the EP<sup>5</sup>, the Economic and Social Committee<sup>6</sup> and even the Council<sup>7</sup>, the Commission decided in 1997 to suspend the proposal on the grounds that it was dubious whether a sufficient legal basis existed (strong German resistance no doubt also played its part).

Almost ten years on, the Commission continues to be reluctant to act: the protection of pluralism is no longer included among the priorities of its strategic communications on the audiovisual sector, nor does it even appear as one of the subjects to be dealt with under the revision of the directive on 'television without frontiers'<sup>8</sup>.

The EP, and the rapporteur, by contrast, considers the issue to be of ever-increasing importance, and, on 4 September 2003, Parliament raised the issue of pluralism once again,

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<sup>1</sup> Council Directive of 3 October 1989, 89/552/EEC - OJ L 298, p. 23; amended by EP and Council Directive of 30 June 1997, 97/36/CE (OJ L 202, p. 60)

<sup>2</sup> Due to a petition from the Italian Article 21 Group.

<sup>3</sup> Communication to the EP and the Council on audiovisual policy (COM(1990) 78); Commission Green Paper of 23 December 1992 (COM(1992) 480), followed by Commission communication of 5 October 1994: 'Follow-up to the consultation process relating to the Green Paper on pluralism and media concentration in the internal market - an assessment of the need for Community action' (COM(1994) 353). It may be noted how technological development is permitting the ever-greater proliferation of interactive services (pay-TV), to the point where this will soon become a mass phenomenon. This may render obsolete the Commission's distinction between mass communication and individual communication (cf. its text on audiovisual policy and creating favourable conditions for the expansion of the European programme industry's companies - COM(1994) 523).

<sup>4</sup> On 26 September 1995 Mario Monti, then Commissioner for the internal market, told the EP's Committee on Culture: 'I have to repeat once again that there is no contradiction between the objective of pluralism and that of the internal market. Indeed, the internal market cannot operate smoothly unless an equivalent level of protection of pluralism obtains throughout the Community. In the absence of common rules, Member States will always be free to erect legal barriers and thus discharge themselves of their responsibility to protect pluralism at Community level'.

<sup>5</sup> A3-0435/93, OJ C 44, 20.1.1994

<sup>6</sup> Opinion 93/C304/07, OJ C 304, 10.11.1993; ESC Opinion 195/95 of 22 February 1995

<sup>7</sup> Informal Culture Council (1995)

<sup>8</sup> See the Commission's fourth report (COM(2002) 778) on the implementation of the directive on 'television without frontiers' (89/552/CEE) for the period 2001-2002, adopted on 6 January 2003: [http://www.europa.eu.int/comm/avpolicy/regul/twf/applica/comm2002\\_778final\\_en.pdf](http://www.europa.eu.int/comm/avpolicy/regul/twf/applica/comm2002_778final_en.pdf)

calling for the 1992 Green Paper to be updated by early 2004.<sup>1</sup>

## Definition of pluralism

Although many definitions of pluralism exist, the rapporteur considers that the following text provides a clear definition “.. ‘Political’ pluralism is about the need, in the interests of democracy, for a range of political opinions and viewpoints to be expressed in the media. Democracy would be threatened if any single voice, with the power to propagate a single viewpoint, were to become too dominant’, and that “‘Cultural’ pluralism is about the need for a variety of cultures, reflecting the diversity within society, to find expression in the media. Cultural diversity and social cohesion may be threatened unless the cultures and values of all groupings within society (for example those sharing a particular language, race, or creed) are reflected in the media.”<sup>2</sup>

It should be noted that, notwithstanding the importance of "cultural" pluralism, Although both equally important, this report focuses primarily on the respect of "political" pluralism and does not for example examine the extent to which cultural diversity is protected by the television without frontiers directive.

## Need for review

Various factors point to a need to update the legal framework to ensure the protection of pluralism in the Member States. Member States should themselves be expected to take the measures necessary to ensure pluralism, and they need to have adequate tools to do so. Nonetheless, not all matters of concern can be solved as, for example, commercial pressure, issues of supply and demand and the need for advertising revenue.

So far, the issue of pluralism in the media has only been dealt with indirectly, as the Community's legislators have taken the view that it was not for them to intervene on the matter without a specific provision in the Treaties.<sup>3</sup> However, with the Amsterdam and Nice Treaties the Union's constitutional framework has changed, the protection of fundamental rights is now one of the defining elements and priority objectives of both the Union and the Community (the Community being the Union's more structured core)<sup>4</sup>. There is consequently a need to review the existing competences and legislation of the Union in the light of the

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<sup>1</sup> See paragraphs 38-41 of the Perry resolution of 4 September 2003 (P5\_TA-PROV(2003)0381- A5-0251/2003 - EP resolution on 'television without frontiers' (2003/2033(INI)):

'38. Expresses its concern that growing concentration of ownership or control of broadcasting and other media, whether 'horizontal' or 'vertical', may subvert pluralism and democracy; 39. Believes that a commitment to diversity of ownership and/or control of broadcasting, and of broadcasting and other media, should be incorporated in any future Directive, without prejudice to the other initiatives to be undertaken by the Commission as requested by the European Parliament in its aforementioned resolution of 20 November 2002; hopes that the amendment of Directive 89/552/EEC or the new Directives on audiovisual content will include rules on ownership of televisual media that will ensure pluralism in the field of information and culture; 40. Believes that clear limits must be placed on the ownership and control of management of audiovisual communications media; 41. Calls on the Commission to monitor levels of media concentration in Europe and to draw up an updated Green Paper on this issue by the beginning of 2004.'

<sup>2</sup> Gillian Doyle (2003): Media Ownership: the economics and politics of concentration in the UK and European media. London: Sage. pp 12.

<sup>3</sup> The Draft Constitution prepared by the European Convention states that pluralism is a fundamental value of the European Union.

<sup>4</sup> It is not possible for a country to be a member of the Community without also being a member of the Union (Article 48 TEU).

obligation of the EU to ensure the respect of fundamental rights within its internal legal system.<sup>1</sup>

Secondly, there is a need to update the legal framework for the media market, especially that for 'television without frontiers'<sup>2</sup>, in order to respond to a number of economic, legal and institutional challenges:

- the exponential growth, in Europe<sup>3</sup> and generally, of services related to the information society<sup>4</sup>;
- the accelerating globalisation of the markets<sup>5</sup>;
- media convergence (as intensified by the progress of digital technology);
- the increasing concentration of media ownership<sup>6</sup>;
- restrictions on the freedom of journalists<sup>7</sup>; and
- the enlargement of the European Union to the central and eastern countries, countries which do not have a tradition of a free and pluralist media.

Thirdly, the question arises whether pluralism is adequately protected in the Member States and whether there is pluralism is adequately protected from possible abuse, such as, for example, a single significant provider which uses all its media sources to present a single viewpoint or a government which influences the media to present its viewpoint. A preliminary investigation by the European Institute for the Media has highlighted that in each of the Member States and accession countries it has examined there are issues which could be the subject of further investigation. In particular, of course, there is the situation in Italy<sup>8</sup> which

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<sup>1</sup> The European Court of Human rights considers that a state whose internal legal order does not prohibit violations may itself be violating the Convention of Human Rights.

<sup>2</sup> This applies both at Union and at Council of Europe level. The latter's Convention on Transfrontier Television of 5 May 1989 is a major reference point for the EU Member States.

<sup>3</sup> The Commission's most recent report on the audiovisual sector in Europe (COM(2001) 9) stated that at the beginning of 2000 there were in the EU, including land-based, satellite and cable channels, over 580 channels of national coverage (there are now probably about 1000, if one considers the numbers for 2000 as compared 1998 - + 58% - and 1996 - + 170%). At the same time, the turnover of the radio and TV broadcasting sector in the EU was estimated to be EUR 62 bn, while TV advertising revenue accounted for a market in the region of EUR 22 bn. The Commission noted the paradox that the exponential growth of networks and media has not been accompanied by an increase or diversification in content or by significant changes in user habits: there has been no increase in time dedicated to the new media rather than the television; users continue to favour a limited number of programmes; and the respective market shares of private and public networks have not changed.

<sup>4</sup> The development of interactive services is rendering obsolete the restriction of the directive to 'mass communications' and its exclusion of on-demand services (e.g. pay-per-view television). Cf. the comments of the EBU (European Broadcasting Union) when consulted on the revision of the directive on 'television without frontiers'.

<sup>5</sup> In the audiovisual sector, not only films but also television programmes are now distributed via more than one type of broadcasting technique (analog, digital, satellite and cable) and on several national markets.

<sup>6</sup> Of the ten leading groups at world level, 4 are European. The process of concentration is intensified by the circumstance that, unlike their public-sector counterparts, private broadcasters derive their revenue essentially from advertising, thus draining resources that were previously available for other economic sectors.

Concentration among economic operators also feeds on the need for ever higher levels of investment on the part of newcomers if they are to obtain a significant audience share. The chances are thus reduced of newcomers being able to obtain sufficient advertising revenues to compensate for the capital invested, even in the long term.

<sup>7</sup> See the judgements of the Constitutional Court of 10 July 1974 (Nos 225 and 206) and 28 July 1976 (No 202) on Law No 103 of 14 April 1975 (GURI, 17 April 1975, No 102), the negative opinion from the Constitutional Court, in its judgement of 21 July (No 148), which criticised the lack of anti-trust legislation and the resultant *de facto* and *de jure* creation of monopolies and oligopolies. The Constitutional Court, Judgement No 826/88, Judgement of 1994 (No 420, GURI No 51, 14 December 1994) and Judgement 466/2002.

<sup>8</sup> See for example, "The impact of media concentration on professional journalism" OSCE Representative on freedom of the media.

presents an anomaly due to a unique combination of economic, political and media power in the hands of Silvio Berlusconi and as a result the Italian Government seems to be, directly or indirectly, in control of all national television channels. Although the situation is unique, it could nonetheless arise in other Member States and therefore the EU should act now to ensure that adequate safeguards are in place in the Member States.

### **Right of freedom of expression and information**

Article 11 of the Charter<sup>1</sup> (Freedom of Expression and Information) 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.'*

This is the most recent formulation of a fundamental right which was proclaimed for the first time in Article 11 of the Declaration of the Rights of Man and the Citizen of 26 August 1789<sup>2</sup>, and subsequently in Article 19 of the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948<sup>3</sup>, and, as far as Europe is concerned, in the Final Act of the Helsinki Conference of 1 January 1975 and, above all, in Article 10 of the European Convention on the Protection of Human Rights<sup>4</sup>.

### **Content of the right**

On the level of content, Article 11 sets out not only the 'active' freedom to express oneself but also the 'passive' freedom to be informed - a concept which is only implicit in the recognition

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<sup>1</sup> European Charter of Fundamental Rights, proclaimed by the Union institutions at Nice in December 2000 (<http://ue.eu.int/df/default.asp?lang=en>).

<sup>2</sup> 'The free communication of ideas and opinions is one of the most precious of the rights of man; every citizen can then freely speak, write, and print, subject to responsibility for the abuse of this freedom in the cases is determined by law.'

<sup>3</sup> This article reproduces Article 19(2) of the International Pact on Civil and Political Rights of 16 December 1966.

<sup>4</sup> The remarks attached to Article 11 of the Charter are as follows: '1. Article 11 corresponds to Article 10 of the European Convention on Human Rights, which reads as follows: '*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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'*

Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention, without prejudice to any restrictions which Community competition law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR.

2. Paragraph 2 of this Article spells out the consequences of paragraph 1 regarding freedom of the media. It is based in particular on Court of Justice case-law regarding television, particularly in case C-288/89 (judgement of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and others* [1991] ECR I-4007), and on the Protocol on the System of Public Broadcasting in the Member States annexed to the EC Treaty, and on Council Directive 89/552/EC (particularly its 17th recital).'

of the individual's right to information that appears in Article 10 of the European Convention on Human Rights<sup>1</sup>.

Like all other rights, the right to freedom of expression and information (and therefore, indirectly, the right to pluralism deriving therefrom) is limited by restrictions that are defined by the Charter itself, the Treaties, the ECHR or the case-law of the European Courts. The latter have evolved a wealth of case-law which has made it possible to specify more clearly the relationships of this fundamental right with other criteria such as the protection of public morality<sup>2</sup>, the independence of the judiciary<sup>3</sup>, the reputation and rights of others<sup>4</sup>, the right to political criticism<sup>5</sup>, the right of reply<sup>6</sup>, and the fight against racism<sup>7</sup>.

The Courts have also, on various occasions, ruled on the relationship between economic factors and issues of pluralism, as well as on the question of the legitimate limits on the activities of broadcasting organs.

In the judgment in the case of *Demuth v. Switzerland*<sup>8</sup>, for example, the European Court of Human Rights referred to “*the legitimate need for the quality and balance of programs in general*” (...). 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*” (§ 43).

In the judgment in the case of *Informationsverein Lentia and others v. Austria*, the European Court of Human Rights stressed the fundamental role of freedom of expression in a democratic society, “*in particular, where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive .... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.*” (§ 38)<sup>9</sup>

The Court of Justice of the European Communities has given similar rulings. In two judgments of 25 July 1991 concerning the Dutch *Mediawet* the Court of Justice acknowledged that the maintenance of the pluralism “*is connected with freedom of expression, as protected by Article 10 of European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order*”<sup>10</sup>.

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<sup>1</sup> A corollary of this principle is the positive correlation between the amount of information available and the effective protection of the right to information. Conversely, a de facto or de jure limitation on access to the media (e.g. in the wake of excessive concentration) can entail the liability of a Member State, inter alia vis-à-vis the Strasbourg judges.

<sup>2</sup> Judgment of 7 December 1976, *Handyside*, and judgment of 29 October 1992, *Open Door and Dublin Well Woman*, Series A No 246

<sup>3</sup> Judgment of 22 February 1988, *Sunday Times and Barfod*

<sup>4</sup> Decision of the Commission on Human Rights of 5 March 1990 on Appeal 1463/89 (*Times Newspapers Ltd*)

<sup>5</sup> Judgment of 8 July 1986, *Lingens*, Series A No 103 and judgment of 23 May 1991, *Oberschlick*, Series A No 204

<sup>6</sup> Decision of the Commission on Human Rights of 12 May 1988 on Appeal 12194/86 (*Kuhner*)

<sup>7</sup> Judgment of 23 September 1994, *Jersild*, Series A No 298

<sup>8</sup> Judgment of 5 November 2002

<sup>9</sup> ECHR Judgment of 24/11/1993 on the Austrian radio monopoly, EuGRZ 1994, 549 - *Lentia Informationsverein*

<sup>10</sup> ECJ, 25 July 1991, *Commission v. Netherlands*, 353/89, ECR, p. 4089 (pt. 30); ECJ, 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, 288/89, ECR, p. 4007 (pt. 23); also ECJ, 3 February 1993, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, 148/91, ECR, p. 513 (Recitals 9 and 10), see also ECJ, 26 June 1997, *Familiapress*, C-368/95, ECR, p. I-3689 (Recitals 18 and 24); *Judgment Sacchi* of 30 April 1974, Case 155/73, ECR 1974 p... , in which the European Court of

## Protection of the right in the EU

On the formal level, the Charter is, above all, a politico-institutional document whose role is to increase the visibility of the fundamental rights referred to in Article 6 of the TEU. The rights set out in the Charter are not binding on jurisdictions in the Community, but they nonetheless form an obvious point of reference for the institutions, among them the European Parliament, that proclaimed the Charter in Nice in December 2000. In the Commission Communication<sup>1</sup> issued immediately after the proclamation of the Charter of Fundamental Rights, the institutions of the EU undertook a commitment to respect the rights and principles in the Charter and said that all the legislation of the EU will be brought in line with these rights.

It should be noted that once the Community/Union has intervened in a particular field, then it is clear that it has competence. The question is then whether, in exercising these powers, the Community/Union fully respects the Charter of Fundamental Rights. It is not sufficient that the rights and principles of the Charter are not violated. It should also be ensured that, in a field in which the Community/Union has intervened, it does not tolerate such violations by the Member States which act as a decentralized European administration. According to the European Court of Human Rights, a State whose internal legal order does not prohibit violations of the rights and freedoms protected by that instrument when they are committed by federated entities or private parties, in fact is violating the European Convention on Human Rights, because such violations have at least their indirect source in the failure of the legislator, a State organ, to take appropriate measures<sup>2</sup>. Although the Union is not itself a signatory to the ECHR, the Charter of Fundamental Rights of the European Union as an instrument for the protection of human rights, should give rise to similar obligations for the EU.

Consequently, once the European legislator has intervened in a particular field it should be verified whether it has adopted all the measures which could reasonably prevent the risk of a

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Justice ruled that televised messages, including commercials, should be considered as 'services' rather than as 'goods' under competition law; *Judgment Van Binsbergen* of 3 December 1974, Case 33/74, ECR 1974 p...., in which the ECJ ruled that Articles 59 and 60 of the EC Treaty *have direct effect and can be invoked before national courts, at least insofar as they require the removal of all forms of discrimination against service providers arising from their nationality or from their residence in a Member State other than that in which the services is provided*; *Judgment CBEM c. CLT*, Case C-311/84, ECR 1985, which defines the actions falling within the concept of abuse of a dominant position; *Judgment Cynèthèque* of 11 July 1985, Cases C-60 and 61/84, ECR 1985, concerning the obligation of the national courts to determine compliance with ECHR Article 10; *Judgment Bond van Adverteerders* of 26 April 1988, Case C-352/85, ECR 1988 ... , *Judgment Groppera* of 28 March 1990, Series A No 173 and *Judgment Ert* of 18 June 1991 Case C-260/89, ECR 1991, which oblige national legislative bodies to take account of ECHR Article 10 when imposing restrictions on broadcasting and to avoid creating dominant positions for public broadcasters; *Judgment Grogan* of 4 October 1991, Case C-159/90, ECR 1991, on the dissemination of information on countries in which abortion is practised; *Judgment 5/10/94 TV10* of 5 October 1994, Case C-23/93, ECR 1994, which recognises the right of a Member State to restrict broadcasting by a company located outside its territory where the sole intention is to escape the jurisdiction of the Member State receiving the broadcasts (principle confirmed by *Judgment Leclerc* of 9 February 1995, Case C-412/93, ECR 1995).

<sup>1</sup> Commission Communication of February 2001.

<sup>2</sup> See, e.g., Eur. Ct HR, *Young, James et Webster v. United Kingdom* judgment of 13 August 1981, Series A n° 44, § 89 ; Eur. Ct. HR, *X and Y v. the Netherlands* judgment of 26 March 1985, Series A n°91, § 23 ; Eur. Ct. HR, *Lopez Ostra v. Spain* judgment of 9 December 1994, Series A n° 303-C, § 51 ; Eur. Ct. HR, *A v. the United Kingdom* judgment of 23 September 1998.

violation of fundamental right in the field in question, taking account of course of the principles of subsidiarity and proportionality.

Notwithstanding any measures which are adopted by the EU to prevent the risk of a violation of a fundamental right, in the event that the behaviour of a Member State seems to be acting contrary to the principles in the Charter of Fundamental rights Article 7 of the EU Treaty provides a mechanism for determining the existence of a clear risk of a breach or a serious and persistent breach of fundamental rights. As regards the existence of a clear risk of a breach of fundamental rights, this mechanism can be initiated by the European Parliament on, for example, the basis of information received in a petition, after of course having followed its internal procedures.

### **Role in a proper functioning democracy**

Freedom of expression and information is also vital for the exercise of other fundamental rights, including freedom of opinion and freedom of association, that are crucial to the proper functioning of a democracy<sup>1</sup>. There are three interlocking sets of rights: the right of voters to make an informed choice, the right of candidates to put their policies across and the right of the media to report and express their views on matters of public interest.<sup>2</sup> It follows that the fuller and more diverse are the available sources of information, the more the expression of the will of the people will be solidly grounded, above all at the moment of voting - be it at local, regional, national, or European level<sup>3</sup>.

On this basis, it is clear that the protection of pluralism is a vital criterion for the EU, in the context of reinforcing the idea of European citizenship and the democracy principle set out in Article 6(1) of the EU Treaty, all the more so due to the right of EU citizens to stand and vote and to stand as a candidate in municipal and European Parliament elections by citizens of the Union residing in a Member State of which they are not nationals<sup>4</sup>.

### **Protection of pluralism in the Member States and the accession countries**

In order to assist with the preparation of this report the EP commissioned the European Institute for the Media (EIM) to prepare a comparative study entitled: "*the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed*", covering all the Member States and the accession countries. A preliminary expertise was presented by the EIM on 5th March 2004 covering France, Germany, Ireland, Italy, Netherlands, Poland, Sweden, and United Kingdom.

This study sets out the legislative and regulatory framework in each country examined,

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<sup>1</sup> In this connection, see the case-law of the Italian and German Constitutional Courts (BVerfGE 57,295,319 e BVerfGE 83, 238,295; 87,181, 197).

<sup>2</sup> "Media and elections: case studies", the European Institute for the Media.

<sup>3</sup> Under the 'functional' approach, it is for the State to take appropriate measures to ensure that the choice of media available offers as much diversity and balance as is possible (German Federal Constitutional Court, N° 73, 118, 159 et seq.; BVerfGE N° 97, 228 258,266 et seq.; N° 95, 163, 172 et seq.).

<sup>4</sup> Enshrined in the Treaty and detailed arrangements are laid down in Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, Directive 93/109/EC - Voting rights of EU citizens living in a Member State of which they are not nationals in European Parliament elections.

including not only the rules on the ownership of the media, but also the existence of codes of conduct of journalists. The report then describes the "main players in the media landscape" in which the institute analyses the number of channels/titles and the ownership of the titles. Finally, the report sets out conclusions and issues of concern. This report aims to examine the issues in an objective manner and to provide data which can be used as parameters to measure the level of pluralism in the Member States.

This preliminary study analyses the situation in a selection of Member States including larger Member States, smaller Member States and examples from Scandinavia, Southern Europe and an accession country to give an overview of different systems reflecting different traditions of media use in an objective manner. The complete study due in June will contain final comparative conclusions based on the situation on all 25 current and new EU Member States and complete recommendations.

The rapporteur considers that there is a need for an annual report on pluralism examining, for example, the level of concentration on the supply side, (horizontal, vertical and cross-ownership), editorial independence, diversity of content (internal and external) and demand, i.e. public preferences and suggests that the report of the European Institute for the Media provides a good basis.

She notes that in each of the eight countries examined (France, Germany, Ireland, Italy, Netherlands, Poland, Sweden, and United Kingdom) there are issues which require further investigation, and strongly considers that there are sufficient concerns to warrant a detailed examination of the situation by the European Commission. Furthermore, having examined in particular the work of the Council of Europe in this field and many other reports into the situation in the media in the EU<sup>1</sup> she considers that there is an urgent need for further action to ensure the protection of pluralism.

### **Existing instruments at EU level**

The current EU regulatory framework concerning the media is currently very fragmented, being contained in the television without frontiers directive, in the competition rules and in the telecommunications package. In the case of the television without frontiers directive and the merger regulation, the EU rules permit the Member States to adopt stricter rules in order to ensure the protection of pluralism.

#### **a) Audiovisual policy**

The first category concerns the directive on 'television without frontiers'<sup>2</sup>, i.e. Directive 89/552/EC of 3 October 1989 (as amended by Directive 97/36/EC of 30 June 1997),<sup>3</sup>. This

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<sup>1</sup> "Television and the concentration of the media", European Audiovisual Observatory, 2001 (new report is expected mid February 2004); Media diversity in Europe, Council of Europe, Advisory panel on media concentrations, pluralism and diversity questions 2002; "The impact of media concentration on professional journalism", OSCE Representative on Freedom of the Media; Report of the network of independent experts on the situation of fundamental rights in the EU; the reports of the European Federation of Journalists.

<sup>2</sup> In, respectively, OJ L 298, 17.10.1989, and OJ L 302, 30.7.1997

<sup>3</sup> and the provisions for the promotion of the European programmes (MEDIA I and II)<sup>3</sup>, which sketch out an outline for an EU cultural policy (this objective comes from the Treaty of Maastricht, which entered into force in 1994 in parallel to Directive 89/552) In addition to introducing a new Article 151 on cultural policy, the Treaty of Maastricht gave official recognition to public aids for the promotion of culture (Article 92, third paragraph (d))

directive harmonises the provisions regarding advertising, sponsorship, the protection of minors and the right of reply which had been frequently invoked by the Member States in ways that blocked the free movement of broadcast content. It proposes the creation of a European audiovisual area and an obligation on broadcasters to include a quota of European programmes in their schedules.

This directive does not seek to ensure the protection of pluralism, but leaves it to the Member States “to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive”.<sup>1</sup> The Preamble of Directive 97/36/EC specifies that the Member States may exercise this right with a view to adopting rules concerning “*the need to safeguard pluralism* in the information industry and the media, and the protection of competition with a view to avoiding the abuse of dominant positions and/or the establishment or strengthening of dominant positions by mergers, agreements, acquisitions or similar initiatives; whereas such rules must be compatible with Community law” (44<sup>th</sup> recital).

It does not, however, regulate individualised on-demand services, nor does it set minimum standards for the protection of pluralism, for the role of universal service and the means of paying for it (licences/fees/advertising revenue), for the status of public-sector broadcasters and the terms for provision of services, or for relations with other media, notably the press.

#### b) Competition policy

A similar situation exists in relation to Community law in the field of concentrations. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings<sup>2</sup>, provides in Article 21 § 3 for an exception to the principle of the exclusive authority of the European Commission to adopt decisions relating to the compatibility of Community-wide concentrations with the Common Market rules. This provision states, “Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law”, and it provides that shall in any case be regarded as legitimate interests “public security, *plurality of the media* and prudential rules”.

Member States may therefore prohibit, in the name of media pluralism, any concentration between undertakings, even where this has been authorized in advance by the Commission.

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EC).

<sup>1</sup> Article 26

<sup>2</sup> OJ L 257 of 21/09/1990, p. 13 (amended version)

c) Telecommunications package

The 'telecommunications package' which entered into force on 24 July 2003<sup>1</sup> seeks to regulate the convergence of communications services, media and information technology<sup>2</sup>. The package contains common rules for fixed and mobile telephone networks and cable and satellite TV networks, on the basis of the technological neutrality of communications service provision. It introduces competition into areas which have traditionally been subject to monopolies or oligopolies. It also establishes a number of common rules, concerning: scope and principles; basic definitions; National Regulatory Authorities; the concept of 'dominant market position'; and the procedures for allocating, on the basis of criteria that are objective, transparent, non-discriminatory and proportionate, such resources as radio frequencies, numbers and transit rights.<sup>3</sup> It gives the Member States the possibility to impose obligations on the cable operators to carry the public service broadcaster.<sup>4</sup>

### Possible future measures

The European Union has used its powers to intervene in areas relating to the media, but in mergers and in the television without frontiers directive it has left it to the Member States to take measures to ensure the protection of pluralism.

This creates the impression that the Member States, when they take action in accordance with the exception provided, they will by definition be acting in conformity with the requirements of fundamental rights. Unfortunately this is not always the case.

Instead of leaving the current ambiguous situation, the rapporteur considers that these instruments need to be revised to define the obligations of the Member States to ensure the protection of pluralism. As mentioned above, once the European legislator has intervened in particular field it should be verified whether it has indeed adopted all the measures which could reasonably prevent the risk of a violation of fundamental in the field in question.

The rapporteur therefore urges the Commission to make a thorough review of the existing powers (the internal market (Article 95 EC), competition law (Articles 81-89), cultural policy

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<sup>1</sup> 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; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108/7, 24 April 2002; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) OJ L 108/21, 24 April 2002; 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 Service Directive), OJ L 108/51, 24 April 2002 and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37, 31 July 2002, all available at: [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/maindocs/index\\_en.htm#directives](http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/index_en.htm#directives).

<sup>2</sup> An initial report on the incorporation of the EU Electronic Communications Regulatory Package was recently forwarded to the EP and the Council (COM(2003) 715 - SEC(2003) 1342, 19 November 2003).

<sup>3</sup> It is presumed that an enterprise having significant market power enjoys a position of economic strength enabling it to act to a large extent independently of competitors, clients and consumers in general. With a view to ensuring the free flow of information, media pluralism and cultural diversity, the providers of interactive digital TV services are encouraged to make their platforms available to the Community public and to use open APIs.

<sup>4</sup> Article 31 of the Universal Service Directive.

(Article 151)<sup>1</sup>, the right of establishment (Articles 43-48), the freedom to provide services (Articles 49-55), the rights of citizens (Articles 19-22) and the monitoring of public broadcasting (protocol to the Treaty of Amsterdam)<sup>2</sup>) to assess the measures which could be adopted to ensure the protection of pluralism.

The rapporteur is of the opinion that for the Member States to be able to intervene better, their legal framework should be strengthened by the adoption at EU level of specific measures that guarantee pluralism. This is particularly important given the opportunities and the threats that the information society poses, especially regarding new offerings, such as digital services.

It should also be acknowledged that the private sector is strongly driven by economic factors, but just as, for example, in relation to the protection of the environment, good corporate behaviour should be expected from market operators. Furthermore, it is of the utmost importance that in the public sector there are high standards and the promotion of pluralism so that this sector can provide an example to the private sector.

In the draft resolution, she has made suggestions based on Council of Europe resolutions and recommendations, practices in the Member States, and suggestions received from experts and contributions at the seminar on pluralism in the media. Of course, the principle relevant instrument is the television without frontiers directive, and it is essential that the protection of pluralism be included in the next revision of this directive.

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<sup>1</sup> Cf. the new wording of Article 151(4) EC (post-Amsterdam), which makes the protection of culture a matter for the Community and the Member States.

<sup>2</sup> This is referred to in the resolution of the Council and the Member State government representatives adopted on 25 January 1999 - see OJ C 30, 5.2.1999.

9 July 2003

## MOTION FOR A RESOLUTION B5-0363/2003

pursuant to Rule 48 of the Rules of Procedure

by Sylviane Ainardi and others,

on the risk of a serious breach of the fundamental rights of freedom of expression and of information in Italy

*The European Parliament,*

- A. whereas the Union is based on respect for the fundamental rights guaranteed by the European Convention on Human Rights (ECHR),
- B. whereas Article 10 of the ECHR safeguards the fundamental right of freedom of expression, which is also to be interpreted as freedom to receive or communicate information or ideas without any interference from public authorities,
- C. whereas several sources, both public (European Parliament, Council of Europe, UN) and private (EU Network of Independent Experts on Human Rights, European Federation of Journalists, Reporters sans Frontières, Articolo 21 Liberi di, and the international press), have deprecated the critical situation which has developed in Italy, where Mr Berlusconi, as Prime Minister and businessman, controls the entire spectrum of public and private radio and TV broadcasting, newspapers, publishing houses and advertising,
- D. whereas this ongoing situation, which has been marked by several incidents that breach the rules governing freedom of expression, has been considered by the parliamentary committee concerned, and whereas there are adequate grounds for initiating the procedure referred to in Article 7(1) of the EU Treaty,
  - 1. Proposes to the Council that it take steps to assess whether there is a risk of a breach of the fundamental rights of freedom of expression and of information set out in Article 10 of the ECHR and in Article 11 of the Charter of Fundamental Rights of the European Union (on pluralism of information) adopted by the EU institutions in Nice in December 2000.

19 March 2004

## **OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the own-initiative report on the parameters for determining 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 of the European Union - 'the freedom and pluralism of the media shall be respected')  
(2003/2237(INI))

Draftsman: Klaus-Heiner Lehne

### **PROCEDURE**

The Committee on Legal Affairs and the Internal Market appointed Klaus-Heiner Lehne draftsman at its meeting of 27 January 2004.

It considered the draft opinion at its meetings of 8 March 2004 and 17 March 2004.

At the last meeting it adopted the following suggestions by 16 votes to 15.

The following were present for the vote: Giuseppe Gargani (chairman), Willi Rothley (vice-chairman), Ioannis Koukiadis (vice-chairman), Paolo Bartolozzi, Maria Berger, Bert Doorn, Raina A. Mercedes Echerer (for Uma Aaltonen), Giovanni Claudio Fava (for Carlos Candal pursuant to Rule 153(2)), Francesco Fiori (for Klaus-Heiner Lehne pursuant to Rule 153(2)), Marie-Françoise Garaud, Malcolm Harbour, Piia-Noora Kauppi (for Janelly Fourtou), Kurt Lechner, Giorgio Lisi (for Marianne L.P. Thyssen pursuant to Rule 153(2)), Sir Neil MacCormick, Toine Manders, Lucio Manisco (for Michel J.M. Dary pursuant to Rule 153(2)), Arlene McCarthy, Manuel Medina Ortega, Pasqualina Napoletano (for Bill Miller pursuant to Rule 153(2)), Marcelino Oreja Arburúa (for José María Gil-Robles Gil-Delgado), Barbara O'Toole (for Evelyne Gebhardt), Elena Ornella Paciotti (for Fiorella Ghilardotti), Anne-Marie Schaffner, Francesco Enrico Speroni (for Alexandre Varaut), Bruno Trentin (for François Zimeray pursuant to Rule 153(2)), Ian Twinn (for Lord Inglewood), Diana Wallis, Rainer Wieland, Joachim Wuermeling and Stefano Zappalà.

## SHORT JUSTIFICATION

### 1. Introduction

Pluralism and freedom of expression under a democratic free-market system of the kind existing in all EU Member States mean that the legal possibility of using or having access to communications media must be guaranteed for all citizens and all forms of cultural, social and regional expression.

However, access is subject to the limits on the availability of the space and resources needed to enjoy it, taking into account other constitutionally guaranteed rights. Freedom must also entail absence of preventive controls and censorship.

The free market, in the information sector as elsewhere, eludes political control. Moreover, in a democratic system, pluralism cannot be imposed by decree without restricting freedom of the press and freedom of expression.

The protection of freedom of expression and information in Europe should also be seen in the context of the wide-ranging and rapid technological changes taking place.

In the information sector, conventional outlets (TV, radio, press) have been supplemented in the space of a few years by new digital broadcasting services (terrestrial, satellite, cable) and network services (Internet, multimedia), which considerably extend the range of choices available to the European public. This growth in the communications media landscape has been accompanied by intersectoral convergence. At the same time, extensive market integration has occurred as a result of partnerships and mergers between companies owning communications media, telecommunications operators and leaders in the computer sector.

The technological convergence made possible by broadband and multi-platform access, and the possibility of accessing the Internet not only from computers but also from devices such as digital TV and third-generation mobile communication systems, mean that systems and services are becoming interoperable and interchangeable.

Digital technology means that the options and features offered by network services based on different technologies are increasingly alike. This opens up more and more possibilities for democracy and the spread of ideas.

The European Union attributes such importance to the switch from analogue to digital that it has made it one of the strategic elements of the Lisbon Programme for the knowledge-based economy.

The e-Europe Action Plan 2005 calls on the Member States to publish action plans by 2003 for the switch to digital, including any scheduled dates for abandoning the analogue system.

## 2. Competition rules and freedom of expression

One of the tools for safeguarding freedom of expression and information is the enforcement of the rules on free competition (prohibition of restricted practices and abuses of dominant position) on one or more national markets or within the same linguistic area.

However, efficient companies are run with the aim of winning markets and must be able to secure strong market positions. It is important to make it clear that holding a dominant position is not in itself illegal if it results from the efficient running of a company. A company is guilty of an anti-competitive practice representing an abuse of a dominant position only if it uses its power to eliminate or evade competition, for example by imposing exorbitant purchasing or selling prices or offering benefits (loyalty discounts, predatory prices) in a discriminatory manner to certain customers in order to influence their behaviour or in an attempt to exclude competitors from the market. In such cases the European or national anti-trust authorities will intervene to impose penalties for abusive behaviour.

This point of view is reinforced by the fact that, in its '*Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*'<sup>1</sup>, the Commission states that relevant markets will always be assessed on a forward-looking basis, as the NRA will include in its assessment an appreciation of the future development of the market. 'The starting point for carrying out a market analysis (...) is not the existence of an agreement or concerted practice (...) nor a concentration, nor an alleged abuse of dominance, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination.'

On the other hand, the Member States' laws generally provide for transparency of ownership of communications media in order to avoid the creation of monopolies or oligopolies.

In addition, the Commission, in cooperation with the Member States, can already exchange information of this kind so as to examine, in the context of international development, problems relating to financial participation and technical or commercial agreements between groups in the audiovisual sector or between access providers for various networks, including the Internet.

When it comes to convergence, a distinction will need to be drawn between digital broadcasting services, which are governed by conventional rules on the ownership of communications media, where such rules exist, and on-line services, which should be subject without restriction to the rules of a competitive market, so as to ensure that operators have equal right of access to networks and systems and that consumers enjoy the right to diversity of information.

## 3. Pluralism of information

The application of Community competition law to the information society sector, in addition to purely economic aspects, must take into account the need to safeguard pluralism of information, with due regard for the freedom of the press and the freedom of expression recognised in the Member States' constitutions.

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<sup>1</sup> OJ C 165, 11.7.2002.

With regard to the rules on the ownership of communications media, common parameters must be identified from among the national criteria currently in force, supplemented by other parameters such as audience criteria or resources control.

These parameters must also take account of the differences in legal traditions, particularly at constitutional level, as well as the differences in cultural traditions in all Member States.

The national rules in force on ownership of communications media (licensing systems, allocation of frequencies, audience thresholds, capital participation, etc.) should therefore be extended to the new digital broadcasting services (terrestrial, satellite and cable) in order to overcome any danger of abuse involving concentrations. The whole sector should be properly coordinated at European level.

The phenomenon of ‘portals’, where available information tends to be concentrated and standardised, should not become a means of cornering access to various information sources or to financial resources linked to advertising. The profusion of difficult to identify information sources on the Internet also generates confusion among the public. Hence the need to find rapid solutions that will enable the public to pick out the information available. An initial solution could be the introduction of a ‘European quality mark’ for information and professional ethics through self-regulation of the sector, governing sites which provide information and entertainment, in order to ensure pluralism and independence of information and combat illegal content. With regard to the editorial responsibility of communications media, it is worth recalling the Council of Europe’s recommendation of 19 January 1999. It points out that efforts to secure the editorial and journalistic independence of communications media through an ‘editorial statute’, designed to prevent possible interference in information content by owners or shareholders, or outside agencies such as governments, are tackled in different ways in the various Member States, in some cases through constitutional provisions, and in others through self-regulation agreements. To guarantee the quality of information, operators in the sector (media-owning companies, editors and journalists) should adopt ethical standards (such as a code of ethics or rules on professional standards).

In any case, as far as the public is concerned, the principle of pluralism can and must be pursued by each and every broadcaster, as regards both the independence and professionalism of those working in the sector and opinion formers.

The existence and development of local broadcasters are also crucial for securing cultural and regional pluralism.

The switch to digital will have an impact on the pluralism and diversity of information provided by local broadcasters because of the need for more extensive financial investment on the part of operators. Local broadcasters will therefore need support in order to ensure their survival.

#### 4. Situation in Italy

In Italy there are around 20 national broadcasters, of whom slightly more than half now have franchises or similar licences. This number is more than sufficient to ensure competition and pluralism. Industrial groups with significant financial strength (such as Fiat in the 1980s), particularly prestigious publishing groups such as Rizzoli, Rusconi and Mondadori, sought to launch national television services. The failure of their efforts is certainly not due to lack of resources, but lies rather in their inability to provide the public with a service that will meet viewers' traditional preference for public service and withstand the competition from that sector.

An examination of pluralism in broadcasting would be incomplete, and would give rise to patchy results, if it were restricted to national broadcasting. The capacity of licensed national output to influence public opinion, which gives rise to concern, becomes less, or is substantially attenuated, when there is a voice for the cultures represented, and views expressed, by local broadcasters, which are not an influencing factor, but act as a stimulant and a source of freedom of ideas.

Where the effects of external pluralism are concerned, it is not only the number of national broadcasters which counts, but also the many local broadcasters. As the Communications Regulatory Authority pointed out in the conclusion to an inquiry into the existence of dominant positions, external pluralism *'manifests itself in the actual possibility for all citizens to choose from among a multiplicity of sources of information; that choice would not be effective if they were not in a position to have available, in both the public sector and the private sector, a multiplicity of programmes guaranteeing the expression of different views'* (paragraph 4.3.2.3. of Resolution No 365 of 13 June 2000, which concluded that dominant, anti-competitive positions or positions damaging to pluralism do not exist in the sector).

It is undoubtedly a serious mistake to consider that, for the purposes of pluralism, only the choice of programmes put out by national broadcasters and channels is important, because in the absence of local broadcasters, the system for providing information would be reduced to a level standardised to reflect the interests and taste of the national media<sup>1</sup>.

In the main town of every province (representing the territory of each province) users can choose between at least **15 national broadcasters and 10 local broadcasters**, the latter varying from place to place. Far from running counter to pluralism, this situation actually enhances it, by ensuring that the audience receives information about a range of local matters and the views expressed locally. The range of choice for individual users is fixed, where national output is concerned, and varies from place to place where local output is concerned. This certainly minimises that ability to influence public opinion which justifies a prudent approach to regulating radio and television broadcasting.

The principle of pluralism of information, however, means that there must be a multiplicity of sources of information, which constitute the freedom to express a range of realities and views. Regional broadcasting can be incorporated into national broadcasting through radio relay

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<sup>1</sup> *'The development of a system of information capable of providing a outlet for specific local matters forms part of the unavoidable duty of giving a voice to those institutions which represent the country's connective tissue: as an ineluctable consequence, this requires an adequate provision of frequencies and advertising resources'*. (Constitutional Court, Judgment 826/88, paragraph 20).

links between installations and networks (syndication), without placing an additional burden on the radioelectric spectrum. It is also important to bear in mind that Law No 66/2001 permitted local broadcasters to acquire frequencies in order to experiment with digital broadcasting. Mediaset, RAI and all the existing main broadcasters have increased their own transmission capacity so as to ensure access to their own programmes for the whole country, even during the transitional period when the existing networks will be broadcasting simultaneously in analogue and digital format. Subsequently, after the analogue switch-off, the excess transmission capacity (40%) will be made available by the network operators to suppliers of third-party content, on the basis of fair contractual conditions. This ensures access for new content suppliers who will be able to use the network operators' infrastructure without facing the massive investment that this requires<sup>1</sup>.

Broadcasters less sensitive to the duties incumbent on them as franchise holders have no interest in increasing coverage beyond a certain limit, given the costs of setting up and maintaining facilities. It must therefore be recognised that the current national broadcasting system, involving franchised or legitimate operators, is marked by vigorous competition and is likely to develop in a pluralist direction.

There are no barriers to the effective consolidation of *external pluralism* (companies, information sources).

It should be added that Italy's Law No 28/0 on equal access to the media (*par condicio*) has ensured that conditions of pluralism prevail in political broadcasting by laying down rules on equal access for politicians to all programmes in which political trends and opinions are discussed.

It is generally acknowledged that the television channels belonging to the Mediaset Group (a public limited company listed on the Milan Stock Exchange since 1996, part of which is owned by the Berlusconi family's Fininvest holding company), which are controlled directly or indirectly by the Prime Minister and which, according to a recent judgment of the Constitutional Court, might display certain *leanings* in the field of information and culture, broadcast *general interest programmes*, observing the rules of impartiality and thoroughness and using the services of managers and journalists of all political tendencies. It is only at the Retequattro station that the director has displayed clear pro-government sympathies.

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<sup>1</sup> Article 2a (Digital broadcasting on terrestrial frequencies. Broadband terrestrial audiovisual systems)  
1. In order to permit the launch of markets in digital television programmes on terrestrial frequencies, operators who legitimately carry out the activity of broadcasting on terrestrial frequencies, by satellite and via cable shall be authorised, normally within their catchment area or part thereof, to experiment with television broadcasting and information society services using digital technology. To that end, broadcasters making such applications may set up consortia or establish agreements for the management of the relevant installations and for the transmission of multimedia programmes and services. Publishers of multimedia products and services may also participate in such consortia and agreements. Television broadcasting using digital technology shall be transmitted on channels which are legitimately operated and also on channels which may arise from the purchases referred to in paragraph 2. Each operator which holds more than one television franchise must reserve, within each block of digital programmes and services, equal opportunities and in any case at least 40% of the transmission capacity of that block of programmes and services, on fair, transparent and non-discriminatory conditions, for experiments by other operators, which are not controlling, controlled or affiliated companies within the meaning of Article 2(17) and (18) of Law No 249 of 31 July 1997, including those operators who are already operating by satellite or via cable and franchise broadcasters who have not yet attained minimum coverage within the meaning of Article 3(5) of Law No 249 of 31 July 1997. Authorisation shall be granted by the Ministry of Communications within 60 days of the submission of the application, which shall be accompanied by an implementation plan and a radioelectric plan.

It is also wrong to say that the prime minister is able to exert ‘considerable influence over Italian public television’.

Since the law reforming the public service act, the franchise holder is no longer under government control and now falls under the responsibility of parliament. Parliament's guidelines and monitoring committee is responsible for laying down guidelines and exercising controls. Members of the board of directors are appointed by Parliament (see Constitutional Court ruling of 24 March 1993, No. 112, paragraph 9).

Furthermore, there are no connections which would enable the government to exert any direct or indirect influence over public service programming and in any case the prime minister has never been given this kind of influence.

The instability of certain other stations can be linked to the use of analogue technology, as pointed out in the most recent ruling of the Constitutional Court on the matter. Nevertheless, the court made it clear that its ruling should not stand in the way of any future reorganisations of the system based on digital technology (ruling of 20 November 2002, No. 466). The draft law on ‘*Guiding principles for the reorganisation of the broadcasting system and of the company RAI-Radiotelevisione italiana S.p.a. and delegation of authority to the government for issuing the broadcasting code*’ now being discussed by the Italian parliament, will create an open and competitive market for electronic communications networks and services and related infrastructures, taking account of the public interest. Having recognised the existence of companies enjoying substantial market power, the draft law seeks to prevent such companies from using this power to restrict or distort competition.

The market in question is identified, taking due account of the opportunities offered by the digital system, and the draft law sets out the conditions for swiftly making this system widely available.

It is a definition which, with some possible adjustments, will meet the criteria laid down by the European Community in Directive 2002/21/EC and in the Commission’s guidelines for market analysis.

## SUGGESTIONS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to include in its motion for a resolution the following suggestions:

1. The principle of the free flow of information and pluralism of communications media is a fundamental right linked to the functioning of democracy in our societies. The right to free expression must therefore be guaranteed for all citizens as regards television and information society services in general;
2. Considers that the EU must undertake to protect cultural diversity in the media and safeguard freedom of expression, diversity of opinion, pluralism, creativity and the right to free access to information;
3. Underlines that radio and television broadcasting are complex and constantly evolving, and that the organisation of these services is different in all Member States according to cultural traditions and geographical conditions;
4. Reaffirms the validity of the principles underlying the 'television without frontiers' directive (Directive 85/552/EC) including free movement of European television broadcasts, free access to important events, promotion of independent European and recently produced works, protection of minors and public order, protection of consumers through clearly recognisable and transparent advertising and the right of reply. These are the basic pillars ensuring freedom of expression and information;
5. Reiterates the fundamental importance of the subsidiarity principle, in accordance with which it is primarily for the competent national, regional and local authorities of the Member State to be free to make their choice of missions, organisation and financing arrangements for radio and television broadcasting services;
6. Believes that a commitment to diversification of ownership and/or control of television broadcasting and other media should be included in any future directive, without prejudice to other initiatives the Commission may undertake; hopes that the amendment of Directive 89/552/EC or new directives on audiovisual content will include rules on the ownership of televisual media that will ensure pluralism of information and culture;
7. Considers that one of the tools for safeguarding freedom of expression and information is the enforcement of the rules on free competition (prohibition of restricted practices and abuse of dominant positions). However, efficient companies are run with the aim of winning markets and must be able to secure positions of genuine market strength. Holding a dominant position is not in itself illegal if its results from the efficient running of a company. Only if a company uses its power to prevent competition does this constitute an abuse of a dominant position where action should be taken by the competent anti-trust authorities;

8. Considers that, as far as the public is concerned, the principle of pluralism can and must be observed by each and every broadcaster, with due respect for the independence and professionalism of operators and opinion-formers. With this in view, reaffirms the importance of editorial statutes designed to prevent interference in information content by owners or shareholders or outside agencies such as governments;
9. Points out that the digital system and the technological convergence allowed by broadband and multi-platform access means that the options and features offered by network services based on different technologies are increasingly alike, opening up more and more possibilities for democracy and the spread of ideas. In the space of a few years, television, radio and print media have been supplemented by new digital broadcasting services (terrestrial, satellite, cable) and network services (internet, multimedia), considerably extending the range of choices open to the European public. Efforts must therefore be made to continue promoting interoperability so as to allow the widest possible access by users to digital television;
10. Stresses that digital technology can provide a much broader spectrum of frequencies and thus genuine pluralism of information, but that steps must be taken to ensure that digital broadcasting does not end up in the hands of a small number of groups capable of financing this instrument with its international scope. The allocation of frequencies should not favour those who are first to apply for them, nor should it strengthen the power of operators who control major holdings;
11. Points out that the phenomenon of ‘portals’, which tend to concentrate and standardise available information, should not become a means of cornering access to various information sources or financial resources linked to advertising. One possible solution would be to extend the powers of national regulatory authorities to cover these new services so as more effectively to guarantee pluralism and diversification of information;
12. Considers that in Italy effective legal and economic conditions exist to ensure competition, pluralism of information media and freedom of expression;
  - (a) there are 20 national broadcasters (and others could be established without any particular administrative difficulties), of which only three (Mediaset Group) are controlled directly or indirectly by the prime minister. The Mediaset Group guarantees the full independence of operators and opinion formers;
  - (b) no cases of abuse of a dominant position by the Mediaset Group have been identified;
  - (c) the public service franchise holder (RAI) is no longer under government control but falls under the responsibility of parliament. Parliament's guidelines and monitoring committee is empowered to lay down guidelines and exercise supervision and members of the board are appointed by parliament (see Constitutional Court ruling of 24 March 1993, No 112, paragraph 9). Furthermore, no links exist that would allow the government to exert any direct or indirect influence over public service programming;

- (d) Law No. 28/00 (*par condicio*) fully ensures pluralism in political broadcasting, by laying down rules on equal access for politicians to all programmes where policies or opinions are discussed, thereby penalising the most powerful politicians;
- (e) the conditions for pluralism and freedom of expression will be further strengthened by the adoption of a draft law on reorganisation of the broadcasting system currently under discussion in Parliament, which provides for widespread availability of the digital system (a decree is already in force providing for a reduction in the price of decoders).

29 March 2004

## **OPINION OF THE COMMITTEE ON CULTURE, YOUTH, EDUCATION, THE MEDIA AND SPORT**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

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))

Draftswoman: Ruth Hieronymi

### **PROCEDURE**

The Committee on Culture, Youth, Education, the Media and Sport appointed Ruth Hieronymi draftswoman at its meeting of 26 November 2003.

It considered the draft opinion at its meetings of 15 and 29 March 2004.

At the last meeting it adopted the following suggestions unanimously.

The following were present for the vote: Vasco Graça Moura (acting chair), Ruth Hieronymi (draftswoman), Pedro Aparicio Sánchez, Geneviève Fraisse, Lucio Manisco, Doris Pack, Sabine Zissener, Nuala Ahern (for Eurig Wyn), Giuseppe Di Lello Finuoli (for Alexandros Alavanos), Phillip Whitehead (for Lissy Gröner), Hélène Flautre (for Raina A. Mercedes Echerer pursuant to Rule 153(2)), Pasqualina Napoletano (for Barbara O'Toole pursuant to Rule 153(2)), Elena Ornella Paciotti (for Gianni Vattimo pursuant to Rule 153(2)) and Luigi Vinci (for Konstantinos Alyssandrakis pursuant to Rule 153(2)).

## SUGGESTIONS

The Committee on Culture, Youth, Education, the Media and Sport calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Stresses that pluralism in the media is an essential prerequisite for democracy, social pluralism and cultural diversity and that the basis of all media policy is to ensure the free flow of information, freedom of expression and media pluralism;
2. Points out that, hitherto, it has been primarily a matter for the Member States to ensure pluralism in the media in accordance with the subsidiarity principle unless the freedom to provide services pursuant to Article 49 et seq. of the EC Treaty is affected or the provisions of European competition and cartel law (Article 81 et seq. of the EC Treaty) are applicable;
3. Points out that Articles 6 and 7 of the TEU identify the protection of fundamental rights as a priority objective of the European Union, and that Article 10 of the European Convention on Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union safeguard freedom of information, which is understood to include media pluralism and non-interference by public authorities;
4. Stresses the importance of the reasons behind the European Parliament's initiative concerning the risks of violation in the European Union, and especially in Italy, of freedom of expression and information, which reflect widespread concern across European public opinion about the phenomena of media concentration and conflicts of interest;
5. Points out that, pursuant to Article 151(4) of the EC Treaty, the European Community must take into account in its action respect for and promotion of the diversity of its cultures;
6. Stresses that the European Convention states in Article I-2 of its draft Constitution that pluralism is a fundamental value of the European Union and that the preservation of cultural diversity is enshrined in Article I-3(3) thereof as an objective of the European Union;
7. Points out that the European Union has confirmed its support for media pluralism and freedom of information in the Charter of Fundamental Rights (Article 11, paragraph 2) and that provision has been made for its incorporation in the Constitution of the European Union in Article II-11(2) of the draft Constitution drawn up by the European Convention;
8. Calls, therefore, on the Member States and the Commission to safeguard pluralism in the media and to ensure, in accordance with their powers, that the media in all Member States are free, independent and pluralist;
9. Notes that the media markets are still largely national markets;
10. Notes that in Italy the degree of concentration of television output is 90%, under the direct or indirect control of the Prime Minister, who also has a dominant position in the

advertising market, as the Communications Regulatory Authority has pointed out, and that the electronic media have given rise to cross-border output which requires an urgent update of the European legislation, designed to establish the minimum conditions needed to prevent such horizontal or vertical, national or trans-national concentration, and to safeguard the functioning of public-service broadcasting and its independence of government interference;

11. Takes the view that public radio and television broadcasting organisations play an important role in ensuring pluralism in the media since their work should be carried out in accordance with the protocol on public broadcasting contained in the EC Treaty and the judgments of the European Court of Justice to enable them to fulfil their assigned remit, free from government interference, using a system of transparent and adequate funding, and to carry out the tasks arising from that remit in the transition from analogue to digital technology;
12. Welcomes the provisions of Article 31 of the Universal Service Directive (Directive 2002/22/EC) to impose 'must carry' obligations on undertakings providing electronic communications networks used for the public distribution of radio or television broadcasts;
13. Notes that, as a result of the increasing convergence of means of transmission and digitisation, new technologies have emerged which have significantly changed access to information and the media and, through vertical and horizontal trends towards concentration, may endanger pluralism, democracy and cultural diversity;
14. Expresses its concern at the fact that, in some Member States, operators already have exclusive control over access to their output and the viewers through proprietary systems (creation of 'bottlenecks') and other operators or users are excluded ('gate-keeper position');
15. Stresses that open, interoperable application programme interfaces (APIs) are of key significance in ensuring a free flow of information and freedom of choice for users and points to the provision contained in Article 18 of the Framework Directive on Telecommunications (Directive 2002/21/EC) calling for extensive interoperability in digital television;
16. Regrets the fact that the Commission has not taken up Parliament's calls and proposals for the timely definition of and support for interoperability;
17. Calls on the Commission, in order to avoid laying down a mandatory standard for digital television, to inform Member States of which measures are legally allowed to assist the migration to an open interoperable standard and to define the criteria it will use to determine whether interoperability and freedom of choice for users have been established before it submits its report by 25 July 2004, pursuant to Article 18(3) of the Framework Directive (Directive 2002/21/EC), on the achievement of interoperability and freedom of choice for users in the Member States;
18. Points out once again that European legislation in the audiovisual sector does not take due account of the transmission of the same or similar content by different means of transmission and that therefore, information society services, with the exception of

television and radio, are subject, regardless of their content, to the eCommerce Directive (Directive 2001/31/EC);

19. Calls, therefore, once again for a fundamental overhaul of the current legal framework to produce a framework package for audiovisual content with different levels of regulation depending on the relevance of the contents in terms of opinion forming, while maintaining the 'minimum requirements' nature of the Directive;
20. Points with concern to the increasing influence of electronic programme guides (EPGs), the bundling of programmes and Internet search engines on opinion forming and the trend towards vertical and horizontal cross-border concentrations in this field;
21. Calls again on the Commission to initiate a consultation process to assess the development of new technologies and new communication services, the impact of mergers, alliances and joint ventures on the internal market and pluralism in the media and on the right to freedom of expression and public access to information society services, and to look into the coherence of the relevant national and European legal provisions;
22. Calls again on the Commission to draw up the updated Green Paper already called for in Parliament's resolution on media concentration of 20 November 2002, setting out the issues raised here and current law in the present and future Member States together with likely future developments;
23. Calls on the Commission to examine promptly whether a legal basis exists for a Europe-wide regulatory framework or other regulatory options - and to explore the political, economic and legal implications thereof - to safeguard freedom of expression and pluralism in the media, and to protect and promote cultural diversity and fair competition on the advertising market;
24. Stresses expressly that cultural and audiovisual services are not services in the conventional sense and should therefore not be the subject of liberalisation negotiations under international trade agreements, e.g. in the context of GATS;
25. Welcomes the proposal put forward by the European Convention in Article III-217 of its draft Constitution concerning decision-making in connection with the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services;
26. Welcomes the decision by the UNESCO General Assembly of 16 October 2003 to draw up a normative instrument to protect cultural diversity;
27. Considers that there are actual risks of a serious and persistent breach of freedom of information in Italy, taking into account:
  - (a) that the concentration of means of communication in the hands of the Prime Minister to an extent which, as pointed out by the Communications Regulatory Authority, exceeds the market share laid down by Italian legislation for both television output and the advertising market, and that, as confirmed by several judgments by the Italian Constitutional Court, it does not ensure implementation of the principle of pluralism with regard to information,

- (b) the repeated instances of interference, pressure and censorship by the Prime Minister in the programming and establishment plan of the public-service broadcaster RAI,
- (c) the wealth of documentation concerning points (a) and (b) provided (partly at the European Union's instigation) by various international and independent agencies, which has already prompted unambiguous international reactions, including from the European Parliament, although these have not resulted in any change of direction by the Italian Government with regard to this contentious issue.

## SHORT JUSTIFICATION

Freedom of information, diversity of opinion and pluralism in the media are of fundamental importance for the democratic and cultural foundations of any society. Article 151 of the EC Treaty gives the European Communities the task of contributing to the flowering of the cultures of the Member States, while respecting their national and regional diversity. In addition, the European Union confirms the principle of pluralism in its Charter of Fundamental Rights and in the European Convention's draft Constitution.

The Member States have hitherto had primary responsibility for ensuring media pluralism. However, there is direct responsibility at European level if the freedom to provide services (Article 49 et seq. of the EC Treaty) or European competition and cartel law (Article 81 et seq. of the EC Treaty) is concerned. Since the media sector is mostly characterised by national markets, the freedom to provide services long remained unaffected where many media were concerned. However, the development of electronic media has increasingly led to cross-border situations. An appropriate European legal framework for cross-border television was created to take account of this development, in the form of the 'Television without frontiers' directive (Directive 89/552/EEC, amended by Directive 97/36/EC).

The development and liberalisation of the telecommunications sector are creating more new cross-border situations, to take account of which the European Union adopted what is known as the 'telecom package' in 2002, creating a legal framework for modes of transmission in the telecommunications sector. In order to safeguard freedom of information and pluralism, Article 18 of the framework directive (Directive 2002/21/EC) lays down the principle of interoperability in digital television, so as to prevent both horizontal and vertical concentration. Even now, the way in which proprietary systems are used in some Member States is giving cause for concern. The European Community has framework powers in this sphere, but has hitherto not exercised them sufficiently. Contrary to the calls made by the European Parliament (above all in its resolution of 26 September 2002 on the successful introduction of digital television), the Commission has not taken action to provide effective support for the Member States in ensuring interoperability. For instance, the Commission has still not made it known what measures to promote the migration to an open interoperable standard are permitted under subsidy legislation, nor what criteria it will use to verify the existence of interoperability. This is why an examination of the extent to which the European Union is doing justice to this important task of ensuring media pluralism is the main focus of this opinion.

The switch to digital also affects public-service broadcasters, who play an important part in ensuring freedom of information and media pluralism. This is explicitly acknowledged in the Protocol to the EC Treaty on the system of public broadcasting. In accordance with their special role, public-service broadcasters should therefore also be able to participate in digital developments, although the requirements of Community law regarding the transparency and appropriateness of the funding of the tasks entrusted to those broadcasters must be met.

Another area which is very important for safeguarding media pluralism is the promotion of cultural diversity in the Member States, which the European Community takes into account pursuant to Article 151(4) of the EC Treaty, and which is laid down as an objective of the European Union in the European Convention's draft Constitution (Article I-3(3) of the draft

Constitution). The negotiating position of the European Union and its Member States in the GATS negotiations is of crucial importance with regard to safeguarding freedom of information, diversity of opinion and pluralism. In the event of audiovisual services being liberalised, special measures to promote cultural diversity would gradually be ruled out in the longer term.

In addition to these areas for action at European level, in which the European Union can and must take measures, in particular, to secure interoperability in digital television and to promote cultural diversity, the Commission should monitor developments regarding media pluralism in the Member States more closely. Moves towards not only horizontal but also, and especially, vertical concentration should be examined. In its resolution of 20 November 2002 the European Parliament already called on the Commission to launch a comprehensive consultation process and to present an updated Green Paper on this important topic.

17 March 2004

## **OPINION OF THE COMMITTEE ON CONSTITUTIONAL AFFAIRS**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

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))

Draftsman: Johannes Voggenhuber

### **PROCEDURE**

The Committee on Constitutional Affairs appointed Johannes Voggenhuber draftsman at its meeting of 24 November 2003.

It considered the draft opinion at its meeting of 16 March 2004.

At the last meeting it adopted the following suggestions by 10 votes to 6.

The following were present for the vote: Giorgio Napolitano (chairman), Jo Leinen (vice-chairman), Johannes Voggenhuber (draftsman), Georges Berthu, Jens-Peter Bonde, Giorgio Calò, Richard Corbett, Jean-Maurice Dehousse, Giorgos Dimitrakopoulos, Andrew Nicholas Duff, José María Gil-Robles Gil-Delgado, Sylvia-Yvonne Kaufmann, Hans-Peter Martin, Iñigo Méndez de Vigo, Ana Miranda de Lage (for Enrique Barón Crespo) and Françoise Veyrinas (for Teresa Almeida Garrett).

## INTRODUCTION

Since the Maastricht Treaty and through the Amsterdam and Nice Treaties the protection of fundamental rights is now one of the defining elements and priority objectives of both the Union and the Community. After having been left for decades to the interpretation of the Luxembourg judges, as a competence reserved to the Member States, the protection of fundamental rights now appears at the heart of the Union's policies thus spearheaded by Articles 6 and 7 of the TEU and complemented by the approval of the Copenhagen criteria for the accession countries, by the strengthening of the provisions on European citizenship and, above all, by the new policies for the development of the Union as an area of freedom, security and justice.

### PRINCIPLE OF DEMOCRACY

The principle of democracy, as stated in Article 6(1) of the EU Treaty, relates to the realisation of the basic values of freedom and equality by attributing the key function of law-making to the people. Most important in this respect is the guaranty of fundamental rights promoting democracy - above all, the right to vote and freedom of expression<sup>1</sup>.

European Union membership is no longer conceived as an automatic warranty of domestic democracy. The European Union has come to the point where acceding countries with new and, probably, fragile democracy will join the Union, whose current Member States also demonstrate the risks of violation of freedom of expression and information<sup>2</sup>. Therefore, it is of utmost importance to state that the free and independent media are an essential indicator of the democratic maturity of a society. The right to freedom of expression and information is intrinsically linked to the citizens' right to know, which is a prerequisite for making well-informed decisions. The possibility to express freely ideas and opinions enhances public dialogue and therefore stimulates the development of the democratic process in society.

It follows that the fuller and more diverse are the available sources of information, the more the expression of the will of the people will be solidly grounded, above all at the moment of voting - be it at local, regional, national, or, today, European level. On this basis it is clear that the protection of pluralism is a vital criterion for the EU, in the context of reinforcing the idea of European citizenship and the democracy principle set out in Article 6(1) of the EU Treaty.

The Treaty on European Union in Article 7 allows for a determination of the existence of a serious and persistent breach by a member State "of principles", i.e. of the common principles enshrined in Article 6(1) of the EU Treaty. There is no specification as to the required number of violated principles. What can be immediately excluded from the wording of the provision is that *all* principles have to be breached in order to justify a determination by the Council. The clear purpose of Article 7 of the EU Treaty is to ensure a set of inalienable foundations of the Union. In fact, where democracy is endangered, this will, in general, impact also on fundamental rights, in particular the right to democratic participation, where fundamental rights are at stake, the same will be true for the principle of liberty including freedom of expression. Consequently, a breach of one of the four principles alone justifies a determination under Article 7(1) or 7(2) of the EU Treaty.

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<sup>1</sup> *Griller Stefan and others* (1998) "The Treaty of Amsterdam - Facts, Analysis, Prospects"

<sup>2</sup> *Verhoeven Amaryllis* (1998) 23 E.L.R., June

## Charter of Fundamental Rights

The Nice Intergovernmental Conference (IGC) decided not to make the Charter of Fundamental Rights legally binding yet, but all Member States plus the European Parliament, the Council and the Commission accepted the document at political level. The charter is therefore politically binding in terms of its scope.

The Convention on the Future of Europe incorporated the Charter of Fundamental Rights into the draft Constitution; there was very wide agreement to do so. Although the IGC has not yet been able to reach an overall agreement, incorporation has not been questioned so far. Any assessment of a possible risk of a serious breach of principles referred to in Article 6(1) must therefore also be made on the basis of the Charter of Fundamental Rights.

**Article II-11, Freedom of expression and information**, as proposed by the Convention states that:

- 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.*

Pursuant to Article II- 52(3) of the draft Constitutional Treaty, the meaning and scope of this right are the same as those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

It could be concluded from all above mentioned that freedom of expression and information constitutes one of democracy requirements, and it is protected by Article 6(1) of the TEU. Subsequently, Member States' legal actions or failure to act, which decline or could restrict media pluralism and freedom of expression and information, thereby could form a precondition for to apply Article 7(1) or 7(2) in order to determine whether 'there is [a clear risk of] a serious breach by a Member State of principles mentioned in Article 6(1)' of the EU Treaty.

## SUGGESTIONS

The Committee on Constitutional Affairs calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Any legal or administrative action by a Member State affecting media pluralism or freedom of expression and information as well as failure to act in order to protect those fundamental rights could fall under the scope of application of Article 7(1) or 7(2) of the EU Treaty.
2. Should there be a political concern by the European Parliament with regard to media diversity or pluralism in a Member State, the Parliament should have the possibility of autonomous procedures in order to investigate before eventually using its right of initiative according to Art. 7(1).
3. The preservation of media diversity shall become the special duty of the Union's competition laws. The market dominant position of a media enterprise in a Member State shall be deemed to be a disruption of media diversity in the Union.