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Cultural diversity in the digital age: EU competences, policies and regulations for diverse audiovisual and online content

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1. Introduction

Pursuant to the 2005 United Nations Educational, Scientific and Cultural Organization (UNESCO) *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the UNESCO Convention), ‘cultural diversity’ refers to the manifold ways in which the cultures of groups and societies find expression ... whatever the means and technologies used (UNESCO, 2005: article 4(2)). Parties to this convention may in particular ‘adopt measures aimed at enhancing diversity of the media...’ (ibid.: article 6(2)(h)). The European Union (EU) ratified the UNESCO Convention confined to its competences in the fields covered by this instrument and without prejudice to member states’ initiatives towards this aim (Council of the European Union, 2006).

The value of pluralism as well as the respect for cultural and linguistic diversity are founding principles of the EU, as confirmed by articles 2 and 3(3) of the Treaty on European Union (TEU)¹ and articles 11(2) and 22 of the EU Charter on Fundamental Rights (the Charter),² in conjunction with article 6(1) TEU. Cultural diversity is recognised as a cross-cutting horizontal policy issue that shall guide EU actions yet mindful of the cultural policy of each member state (cf. Treaty on the Functioning of the European Union (TFEU),³ article 167).

As it is recognised by the UNESCO Convention, the media is central, and the audiovisual media is an even more prominent amplifier of member states’ linguistic and socio-cultural traditions which complements Europe’s cultural diversity (Schmahl, 2008: 251). Especially the audiovisual sector ‘remains by and large domestic in its origin and consumption’ compounding to a somewhat diffuse European identity ‘bound perhaps at the very least by its common ground of difference, sense of transcendence and transition ...’ (Sarikakis, 2007: 18).⁴ Media policy therefore should be seen as an enabling mechanism to enhance the media’s capacity to play a positive role with respect to cultural diversity (Raboy, 2007).

This chapter offers a concise introduction to EU policies aimed at protecting and promoting cultural expressions in the audiovisual and online sectors. Corresponding with its competences, the EU emphasises economic integration and internal market objectives in full recognition that ‘[a]udiovisual media services are as much cultural services as they are economic services’.⁵ For obvious reasons, cultural diversity closely interacts with the freedom of expression and information as well as media pluralism – both protected under article 11 of the Charter (Cavaliere, 2012: 362; UNESCO, 2005: article 4(2)). Raboy (2007) maintains: ‘Media pluralism is a multifaceted notion that if interpreted in relation to cultural diversity means that media effectively carries a variety of cultural expressions’ (cf. Dommering, 2008: 23).

Following a value-chain approach, this chapter discusses the complementary role of various EU sectoral regulations towards the creation and circulation of cultural content. The

analysis focuses on the Audiovisual Media Services (AVMS) Directive (European Parliament and Council, 2010) and various aspects of the EU regulatory framework for electronic communications, relevant to the distribution of audiovisual and online content. Besides regulation, significant EU initiatives to promote cultural expressions in the audiovisual and online sectors are briefly introduced, in particular when substantial funds from the EU budget are allocated for this purpose.

The next section introduces the EU's commitment to cultural diversity in relation to its competences to shape public policy aimed at the protection and promotion of cultural expressions in the audiovisual and online sectors. The following section traces sectoral EU regulations and other support measures which directly or indirectly serve the promotion of cultural diversity in the audiovisual and online sectors. The concluding part discusses the complexity of promoting cultural diversity in light of both cultural content supply and demand considerations and provides an outlook to emerging policy issues.

2. The EU's commitment to cultural diversity in relation to its competences

In order to comprehend the EU's commitment to cultural diversity a short overview of EU primary law is necessary to illuminate the competences of the EU in the audiovisual and online sectors. This section covers the marginal EU competences for culture and those arising from the freedom to provide audiovisual services in the internal market. It then explores how EU policy can take account of issues of media pluralism.

2.1. Marginal cultural competences

Pursuant to Article 167(4) TFEU EU actions shall be guided by the respect and the promotion of cultural diversity. Article 167(2) TFEU carries a specific competence for the EU to encourage cooperation between member states and, if necessary, to act in support of artistic and literary creation, notably in the audiovisual sector. This competence is subsidiary to national cultural policy and does not extend to EU actions that would affect institutions in the audiovisual sector of the member states (cf. Schmahl, 2008: 253). Moreover, article 167(5) TFEU prohibits *verbatim* EU actions in the pursuit of primarily cultural objectives through the approximation of laws and regulations in the member states. Hence, in the field of culture the assigned EU competences are marginal and translate effectively into a demarcation of their limits.⁶

2.2. The freedom to provide audiovisual services

In spite of the fairly reduced EU cultural competence, the freedom to provide services affords the necessary inroads for EU action in the audiovisual sector. Already in its 1974 *Sacchi* decision, the Court of Justice of the European Union (CJEU) held that '[i]n the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services ... [and] comes, as such, within the rules of the Treaty.'⁷ This has marked the inception of the reading that audiovisual activities are of a dual nature representing a peculiar mix of economic and cultural service.⁸

Subsequently, the freedom to provide services has been instrumental in removing legacies of member states' rules that were discriminating in one way or the other against foreign television programmes, thus liberalising the provision of audiovisual services in the common market (Böttcher and Castendyk, 2008: 90; Harcourt, 2005: 22f.). On a number of occasions member states invoked cultural policy objectives, however, every so often a protectionist or disproportionate measure failed to justify national restrictions to the freedom

to provide services, not least because many restrictions were outlived by the technical possibilities.⁹ The EU has been in a position to resolve the issue of cross-border broadcasting via satellite television and cable re-transmission which can explain the relative success of the EU freedom to provide services compared with member states' national policies in the 1990s (Humphreys, 2008: 183).

Gradually the EU accumulated regulatory influence in the audiovisual field that peaked when in 1989 the so-called Television without Frontiers (TWF) Directive (Council of the European Communities: 1989) was issued on the basis of its competence to coordinate member states laws to bring about the freedom to provide services in the internal market (now article 53(1) TFEU in conjunction with article 62 TFEU). EU legislation in the audiovisual sector is thus motivated by economic integration and internal market objectives, yet emphasises positive synergies for cultural diversity and also media pluralism, as will be shown below.

In external relations, the EU is now exclusively competent for the common commercial policy, including trade in services (articles 3 and 207(3) TFEU). Article 207(4)(a) TFEU contains an important threshold when entering into international agreements in the field of trade in cultural and audiovisual services that requires the Council to act unanimously, 'where these agreements risk prejudicing the Union's cultural and linguistic diversity'. In negotiating international trade agreements, EU bodies and member states have jointly sought to exclude audiovisual services from liberalisation, e.g. under the General Agreement on Trade in Services (GATS). There is in fact an expectation in international law that the UNESCO Convention might help to legitimise EU and member states' politics of cultural protectionism (Craufurd Smith, 2007; Puppis, 2008: 417). Relevant issues are discussed in detail in the fourth part of this book.

2.3. Media pluralism as a EU fundamental value

Media pluralism is a fundamental EU value (see article 11(2) of the Charter, in conjunction with article 6(1) TEU) and an important engine for cultural diversity in the audiovisual media sector. From the comparatively weak wording of article 11(2) of the Charter ('The freedom and pluralism of the media shall be respected'), it was inferred that in substantial terms EU actions shall refrain from interfering with media pluralism (Casarosa, 2010: 499). Whether and to what effect the CJEU will harness the value of media pluralism in article 11(2) of the Charter is not clear but some authors predict it is bound to have an impact on its interpretation of EU law (Cavaliere, 2012: 377; Centre for Media Pluralism and Freedom, 2013: 66f.).

Despite several calls by the European Parliament for EU legislation on media concentration and ownership, initiatives in this direction never materialised due to member states' strong resistance and the EU's supposedly lacking competences (Harcourt, 2005: 63f.). EU merger control and antitrust law, of course, cannot substitute for media ownership legislation but the European Commission (Commission)'s application of these instruments in the audiovisual media sector has arguably benefitted media pluralism objectives (cf. Ariño, 2004: 107f.; Harcourt, 2005: 41f.). Competition cases have contributed to media pluralism to the extent they imposed remedies to keep digital media markets open, to prevent vertical foreclosure, and to ensure a diversity of infrastructure and content providers.

Since the launch of its three-step approach towards advancing the debate on pluralism within the EU in 2007 (European Commission, 2007), the Commission has been promoting a broader and more inclusive interpretation of media pluralism: Although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism. ... Ensuring media pluralism, in our understanding, implies all measures that

ensure citizens' access to a variety of information sources, opinion, voices etc. in order to form their opinion without the undue influence of one dominant opinion forming power (ibid., 2007).

This approach induced a chain of activities towards a reinforced monitoring of media pluralism supported by the EU (KU Leuven - ICRI *et al.*, 2009; cf. Valcke, 2010 and 2014). Although some observers considered this a move to elegantly evade the issue of EU competences (Komorek, 2009), the High Level Group on Media Freedom and Pluralism (2013) and the Council of the EU (2013) have supported the idea of an institutionalised monitoring system at the EU level. Nevertheless, the European Parliament (2013a), backed by notable bottom-up initiatives¹⁰ has kept exerting pressure on the Commission to adopt, in the framework of the future revision of the AVMS Directive, a number of binding standards at the EU level with regard to media ownership – such as transparency and conflict of interest rules.

2.4. Mind public service broadcasting

Public service broadcasting or - more inclusively - public service media¹¹ occupies a special role in relation to the promotion of cultural expressions (McGonagle, 2014: 63). Such role is explicitly recognised in article 6(h) of the UNESCO Convention and – at the EU level – in the 1997 Protocol (No. 29) on the system of public broadcasting in the member states.¹² Protocol No. 29 emphasises that ‘the system of public service broadcasting in the member states is directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism’ (ibid.).

Public service broadcasting institutions are well entrenched in Europe and protected from EU interference because Protocol No. 29 guarantees member states’ organisational autonomy in this area observant of the EU competition rules.¹³ EU primary law, however, does not foresee the introduction of public service media at the EU level.

From the previous analysis, it follows that, on the one hand, the EU presides the economic tenets of audiovisual and online services in the internal market and on the other hand, it has only marginal competences as regards the cultural and democratic functions of the media. This complex and interlocked distribution of competences must be borne in mind for a proper understanding of the role of the EU in promoting cultural diversity in the audiovisual and online sectors.

3. EU policies contributing to cultural diversity in the audiovisual and online sectors

To trace the role of EU instruments that contribute to cultural diversity, this section covers EU legislation and action in the field of audiovisual and media policy, in addition to regulatory instruments in the field of electronic communications. This combined treatment is a reflection of the reliance on electronic communications infrastructure and services for imparting and receiving audiovisual and online media even though there exists a division of labour between the regulation of transmission and the regulation of content.

3.1. The Audiovisual Media Services Directive

The AVMS Directive forms the center piece of EU regulation in the audiovisual sector today. It succeeds the 1989 TVWF Directive, which did already feature certain regulatory elements on cultural diversity. Thus, for quite some time now cultural diversity cannot be regarded as a mere by-product of the freedom to provide services in the internal market.

The AVMS Directive was conceived as a response to converging media and transformations in media production, formats and distribution, testifying to the fact that audiovisual and media policy is at a new crossroad. The very introduction of the notion of ‘audiovisual media services’ (article 1(a)) marks this adjustment because it brings together well-known television formats with on-demand offers in edited content libraries.

Like its predecessor, the TWF Directive, the AVMS Directive establishes an internal market for audiovisual media services through a combination of the country of origin principle and positive harmonisation. The country of origin principle, also known in EU law as ‘mutual recognition’, entails that a provider of audiovisual media services is only subject to regulation in the member state of its establishment and that a receiving member state may not impose additional restrictions except where provided for by the directive. This is accompanied with positive harmonisation, which ensures the transposition of a harmonised layer of regulation into member states’ national laws pertaining to audiovisual media services. Audiovisual services originating in an EU member state must adhere, as a minimum, to national laws aligned to the AVMS Directive (‘minimum harmonisation’) but member states may prescribe additional requirements, for example in the pursuit of cultural diversity.

The AVMS Directive applies indiscriminately to all audiovisual media services in the member states, including public service media, which is not in conflict with member states’ autonomy to organise their system of public service broadcasting. However, it makes a distinction between linear services (traditional one-to-many broadcasting services) and on-demand services in terms of applicable rules, with a lighter set of rules applying to the second category (‘graduated regulation’).

The following section discusses several provisions in the AVMS Directive that aim to foster cultural diversity. More generally, it can be noted that the free circulation of audiovisual media services in the internal market, as facilitated by the directive, has fostered transnational television in the EU. Obviously, it is hard to quantify the contribution of the directive to cultural diversity, not least because certain audiovisual formats are expressly produced for audiences in the receiving member state. Generally speaking, the free circulation of audiovisual media services has been instrumental to permeate what were previously national domains, in particular contributing to the diversity of private television and audiovisual formats.

3.1.1. Promotion of European productions

The first type of measures intended to promote cultural diversity are the ‘European works’ quotas, which are stated ‘to promote markets of sufficient size for television productions in the member states to recover necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions ... a majority proportion in television broadcasts of all member states’ (recital 65 of the AVMS Directive). Since their adoption in the TWF Directive, these measures have been criticised for installing protectionism in favour of domestic productions and not primarily of cultural content (Chavannes and Castendyk, 2008: 846). Nonetheless, such market-making mechanisms for local and regional content are still widely supported as contributing to European cultural expressions, and have been maintained – and even extended to on-demand services – in the AVMS Directive.

Under article 16 of the AVMS Directive, broadcasters in the EU are required to reserve a majority of their transmission time to European works.¹⁴ This majority proportion should be achieved progressively in relation to ‘the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public’ and is derived ‘excluding the

time allotted to news, sports events, games, advertising, teletext services and teleshopping' (ibid.).

In addition, article 17 of the directive requires that a subset of the thus 'reserved' European works are created by producers who are independent of broadcasters, '[in order to] stimulate new sources of television production, especially the creation of small and medium-sized enterprises [and] ... offer new opportunities and marketing outlets to creative talents, to cultural professions and to employees in the cultural field' (recital 68 of the AVMS Directive).

Member states can implement progressively a ten percent quota in favour of independent European productions either in relation to the transmission time or to the programming budget of a broadcaster.¹⁵ Special consideration should be given to promoting recent works up to five years following their production.

Although, similar to article 16 of the directive, article 17 of the directive does not primarily target cultural content, by requiring vertically integrated broadcasters to transmit or commission independent production, it eventually fosters the diversity of sources and opens a certain window for 'independent' creativity in the audiovisual sector. However, the potential of this quota is likely limited due to the broadcasters' prerogative to select the independent European productions they want to invest in; broadcasters are ultimately free to favour something of the same.

In complying with the quotas, member states may be inclined to promote domestic television formats. However, recital 70 of the directive urges them to encourage co-produced European works or European works of non-domestic origin. Still, following Castendyk (2008: 434), the *raison d'être* of the privileges for European works in the AVMS Directive is to provide a harmonised framework in which pre-existing national quotas can continue to exist if re-declared as European. In their implementation member states enjoy flexibility to give consideration to the appropriateness and practicality of the quota regime, which allows countries of a more *dirigiste* tradition and those with a more libertarian political culture to coexist (cf. Castendyk, 2008:435).

Similar issues regarding the economic and cultural viability of 'European' content may arise in the context of audiovisual content libraries available on-demand. According to the AVMS Directive, [o]n-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity (recital 69 of the AVMS Directive).

Compared with the regime for linear services, the rules introduced by the AVMS Directive to support European works in on-demand services are more flexible: as an alternative means, service providers can be required to contribute financially to the production and rights acquisition of European works or to the share and/or prominence of European works in their on-demand content library. The on-demand character of the services concerned would have rendered the introduction of a transmission quota for European works meaningless. The alternative to give prominence to European works is the first sign of recognition that the abundance of audiovisual content online may require new regulatory approaches that reconnect the supply with the demand-side. Another difference with the regime for linear services is the absence, for providers of on-demand audiovisual media services, of any requirement to promote European works by *independent* producers.

3.1.2. Events of major importance for society and of high interest to the public

The second type of measures that are deemed to have an effect on the dissemination of cultural expressions are the provisions ensuring the public's access to certain broadcasted

events where exclusive rights have been attributed. Article 14 of the AVMS Directive aims to ensure the free reception of selected events of major importance for society; or, in other words, to prohibit that such events are broadcasted on an exclusive basis ‘in such a way as to deprive a substantial proportion of the public ... of the possibility of following such events by live coverage or deferred coverage on free television’ (ibid.).

The AVMS Directive does not define what exactly constitutes events of major importance,¹⁶ but leaves it to the member states to draw up, in a transparent and predictable fashion, their national lists of events and also to determine if the public should have access to the selected events by fully or partially live or deferred coverage. This measure is bidirectional in that, in exceptional cases, it can override broadcasters’ exclusivity and ensure that the specific events at issue are freely accessible to the public. The cultural dimension is triggered by accepting that events of major importance for society constitute one of the foundations that form a national identity, as is the case with sports competitions or cultural events with an accepted national character.

In order ‘to promote pluralism through the diversity of news production and programming across the Union’ (recital 48 of the directive), Article 15 of the AVMS Directive opens up to the benefit of any broadcaster established in the EU the possibility to include short extracts from televised events of high interest to the public in own news reports. This is done by way of obliging the broadcaster holding an exclusive right to offer access to short extracts on a fair, reasonable and non-discriminatory basis to third broadcasters. The right to short news reports is limited to the reproduction in general news reports of third broadcasters and their corresponding on-demand audiovisual media services. In the context of audiovisual media this right is considered necessary to accompany news reports with original footage of the event and for this reason it also – in a sub-ordinate fashion – enables the dissemination of information and greater diversity of news reporting.

3.2. The regulatory framework on electronic communications

Since the 2002 reform of the regulatory framework on electronic communications, broadcasting networks and transmission services fall explicitly under the scope of application of the EU rules, as is also the case with all other infrastructures that convey electronic signals, e.g. the Internet. The core of EU policy in the area of electronic communications aims to ensure end-to-end connectivity, interoperability and competition. However, the EU rules are mindful of the contribution of infrastructure regulation to media pluralism and cultural diversity. According to Directive 2002/21 on a common regulatory framework for electronic communications networks and services, ‘[t]he separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection (European Parliament and the Council, 2002a: recital 5). National regulatory authorities charged with implementation at the national level can promote cultural and linguistic diversity, as well as media pluralism within their remit (European Parliament and the Council, 2002a: article 8).

As a reflection of member states’ practices, Directive 2002/22, known as the Universal Service Directive, provides for the introduction of reasonable must-carry obligations for the transmission of specified radio and television broadcast channels and services to the public (European Parliament and the Council, 2002b, article 31(1)). Must-carry obligations are a means to ensure that providers of electronic communications networks used for the distribution of radio or television impart certain privileged public interest programmes, such as, but not exclusively, public service broadcasting channels. In order to be reasonable, must carry obligations should be necessary and proportionate in the light of

the public interest objectives pursued, and also limited to distribution networks used by a significant number of end-users as their principal means to receive radio and television broadcasts (European Parliament and the Council, 2002b: article 31(1)). However, it is up to the member states to determine which public interest programmes will benefit under the national must carry regime.

Besides must carry obligations, certain technical features of digital television services are prominent in the scope of the regulatory framework on electronic communications - what should be interpreted as sending a clear signal of the relative growing importance of today's digital television platforms for the distribution of and access to audiovisual content. Additionally motivated by cultural diversity and media pluralism considerations, they have resulted in a number of instruments that address specific issues in digital television and radio:

- The promotion of open application programming interfaces (APIs) in digital interactive television services and equipment in order to facilitate the interoperability of digital interactive television services (European Parliament and the Council, 2002a: article 18);
- Remedies specifically for conditional access systems in digital television and radio (European Parliament and the Council, 2002c: article 6);
- Remedies that can open-up access to networks and associated services, notably electronic programme guides, under the control of a provider with significant market power (European Parliament and the Council, 2002c: article 8).

Given the growing importance of the Internet, either fixed or mobile, as a distribution channel for audiovisual and online content, the EU's stance with regard to net neutrality is bound to determine yet another frontier in the distribution of audiovisual and online content, which may have an impact on cultural diversity.¹⁷ Internet infrastructure operators would like to manage capacity in a way that would allow them to charge a premium for best quality of service delivery of online content. At present, as long as such practices are not discriminating between content providers, they are permissible under the EU framework for electronic communications. The proposals for a reform of the EU regulatory framework for electronic communications would strengthen network neutrality and limit Internet infrastructure operators' discretion on what is 'legitimate' network management (European Commission: 2013a; European Parliament: 2014).

The increasing convergence between television and the Internet has also given rise to another debate emerging at the crossroads of network regulation and cultural policy for audiovisual content, notably on the 'findability' of general interest content and search neutrality. In its *Green Paper on Media Convergence*, the Commission (2013b) highlighted that even when general interest content is available, discovering it can be a potential challenge for viewers in an enhanced multichannel environment for various reasons, e.g. excessive filtering and personalisation mechanisms, business decisions of equipment manufacturers, and so on. Regulatory solutions could lie in the extension of must-carry rules with 'must-be-found' rules, or the adoption of a EU approach to 'due prominence' rules for electronic programme guides (which strikes a thin balance between content and access regulation; cf. van der Sloot, 2012a; 2012b). In its *Resolution on Connected TV*, the European Parliament (2013b) called on the Commission to evaluate both the necessity of revising the AVMS Directive and the telecommunications package with respect to rules on findability and non-discriminatory access to platforms.

3.3. Other relevant EU policies and funding in the audiovisual field

Leaving regulation aside, there are a range of EU actions that either stimulate diverse cultural expressions in the audiovisual and online sectors through funding or flag new political directions relevant to cultural diversity. Flowing from its subsidiary competence to support creativity in the audiovisual sector under article 167(4) TFEU, the EU has been funding since 1991 various MEDIA (*Mesures pour Encourager le Développement de l'Industrie Audiovisuelle/Measures to encourage the development of the audiovisual industry*) lines of action that are aimed at strengthening the European audiovisual industries. The achievements of MEDIA are highlighted in the EU's official report to UNESCO on measures to protect and promote the diversity of cultural expressions in the framework of the 2005 UNESCO Convention: 'About 300 new films are supported yearly by MEDIA, representing one out of two European films distributed in Europe outside their country of origin' (European Commission, 2012).

In addition to supporting the pre-production and distribution phases of European films as well as training, new action lines have been initiated to reflect emerging technologies, such as Video on Demand (VoD) (ibid.). The present framework programme 'Creative Europe' (2014-2020) has integrated audiovisual sector initiatives in a cross-sectoral cultural funding scheme with a budget of €1.46 billion (European Parliament and Council: 2013). Also, as discussed elsewhere in this volume, the EU promotes the digitisation and digital preservation of cultural expressions as well as access to digital collections through the *Europeana* portal - a European hub for digital culture, including audiovisual collections (European Commission 2012). The Commission further coordinates through soft instruments the preservation of the national film heritage and supports cooperation between member states to this end.¹⁸

The European Parliament has been very active where audiovisual policy intersects with cultural diversity, for example by recognising minority interests in audiovisual policy (cf. Morcillo Laiz, 2006). Through its political statements it has also accentuated a modern view of cultural diversity in the audiovisual sector, for example in stressing that 'community media are an effective means of strengthening cultural and linguistic diversity, social inclusion and local identity' (European Parliament, 2008).

This said, EU enlargement can be considered an engine of democratic media transition in the accession and candidate countries in Europe. However, it should be noted that values such as cultural diversity and media pluralism do not flow automatically from the EU *acquis* but need an overall enabling environment to develop. In the audiovisual and online sectors the promotion of cultural diversity is generally limited to what EU regulation prescribes, which is not sufficiently building essential institutions of democratic media systems, and available opportunities for access to funding. The EU's limited cultural competences partially inhibit a more nuanced approach to the promotion of diverse cultural expressions and plurality of opinion, at least in the traditional broadcast media in the enlargement countries.

4. Conclusion: 'United in diversity'

Whereas the EU's culture-related intervention in the field of audiovisual content has significantly expanded in the past four decades (taking the *Sacchi* case as the point of departure), its main powers are derived from its economic integration objective. The EU has only marginal competences as regards the cultural and democratic functions of the media, which is important to keep in mind when assessing the contribution of the EU to the promotion of cultural diversity in the audiovisual and online sectors. From today's vantage point, it is clear that the competences that the EU institutions could wield from economic integration have shaped member states' audiovisual policies to a significant extent. In parallel, cultural protectionism remains a defining undercurrent in member states and – with respect to

external actions – determines the EU’s approach to the audiovisual sector. EU policy contributions to cultural diversity in the audiovisual and online sectors can be broadly distinguished in sector-specific regulation and a range of stimulating activities mainly through the provision of funding for the attainment of cultural objectives.

Both the TWF Directive in 1989 and the AVMS Directive contain a few provisions that aim for the protection of cultural diversity and that form part of the minimum harmonisation of regulation. Admittedly, the AVMS Directive, which succeeded the TWF Directive, still has, as its main objective, to ensure the freedom to provide audiovisual services in the internal market. However, in doing so, it contributes to cultural diversity in the EU in three ways: first, by ensuring the free circulation of audiovisual services, second, by promoting (independent) European works, and third, by preserving, in an environment characterised by exclusive rights, the public’s right to access events of major importance to the society and broadcasters’ right to use short extracts to cover in their general news programmes events of high interest to the public.

The important impact that networks, as the resource through which content is delivered, can have on cultural policy, has widely been recognised in the EU’s electronic communications regulatory framework. The impact of the regulation package on e-communications on both the audiovisual and online sectors likely exceeds the impact of the EU audiovisual media policy. Even though the primary policy objectives underpinning this framework consist of the promotion of competition, the development of the internal market, and consumer protection, cultural considerations have received attention. Convergence and the all-purpose Internet have transformative power in the audiovisual and online sectors that can be greatly facilitating for imparting and receiving cultural expressions. This in turn underscores the role of regulation of the transport layer in the protection of cultural diversity and media pluralism for which end-to-end connectivity, interoperability and a healthy measure of network neutrality may become equally enabling as traditional instruments in cultural policy, such as must-carry obligations and European quotas.

The open Internet holds the potential to liberate cultural expression from traditional gatekeepers, for example the aggregation function of television channels, but new gatekeeper positions emerge, such as search engines and Internet portals that may mount walls against unaffiliated content, i.e. content from third providers. Net and search neutrality will therefore undoubtedly become major attention points in the EU’s policy discussions in the coming years, and the regulatory focus might shift from overcoming scarcity on the supply-side (broadcasters’ investment capacity, air waves, cable capacity and so on) to scarcity on the demand-side (users’ time and attention) (Helberger, 2012: 69). As put by Raboy, ‘[t]oday’s policy issues must address the problems raised by information abundance and the need to be sure that the available cornucopia of information is meaningfully accessible to citizens and not only packaged as marketable commodities or targeted to elites’ (Raboy: 2007).

The growing personalisation of media offerings – for which an increasing amount of personal data is being collected and processed, often without the individual being fully aware of it – will require adequate responses at the EU level. A healthy balance will need to be struck between, on the one hand, allowing such filtering mechanisms where they empower citizens and help them to navigate efficiently through today’s information abundance and, on the other hand, constraining them, where they risk fragmenting public spheres to unacceptable levels. This will require a careful consideration of personalisation and filtering in the information value chain, but might also necessitate a stronger focus on the demand side of cultural diversity, for instance, through media literacy programmes or greater transparency about the (editorial) decisions that shape the media menu from which we choose and the way in which it is presented to us. If not, EU citizens risk becoming ‘lost in diversity’, instead of being ‘united in diversity’.

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¹ Treaty on the European Union, OJ C326, 26/10/2012, p. 13.

² Charter of Fundamental Rights of the European Union, OJ C326, 26/10/2012, p. 391.

³ Consolidated version of the Treaty on the Functioning of the European Union, OJ C326, 26/10/2012, p. 47.

⁴ There are only a few European-wide successful television channels, however, an increasing number of audiovisual media services operate across borders. The pan-European television industry is the result of a corporate strategy that centralises formats and production in order to scale television business and reap cost-efficiencies, often in an investment-friendly member state, e.g. Luxemburg (cf. Iosifidis, Steamers and Wheeler, 2005: 83f.).

⁵ Recital 5 of the Audiovisual Media Services Directive (European Parliament and Council, 2010).

⁶ For a substantive discussion of article 167 TFEU, cf. Craufurd Smith, 2004: 19f.

⁷ CJEU, Case 155/73, *Sacchi*, [1974] ECR 409.

⁸ At that time this was not undisputed, especially with regards to public service broadcasting and the prerogative of member states' cultural policy, cf. Böttcher and Castendyk, 2008: 846.

⁹ For a discussion of the relevant case law since *Sacchi*, see Centre for Media Pluralism and Freedom, 2013: p. 44f.

¹⁰ See for instance the Pan-European Forum on Media Pluralism and New Media (<http://www.mediapluralism.eu>), the European Citizens' Initiative for Media Pluralism (<http://www.mediainitiative.eu>), and Access Info Europe & Open Society Media Programme's Ten Recommendations for Transparency of Media Ownership (<http://www.access-info.org/en/media-transparency>).

¹¹ Referring to public service media recognises that the public service remit does extend to activities beyond broadcasting, such as online media and within certain limits on-demand access to public service media content.

¹² Protocol (No. 29) on the system of public broadcasting in the Member States, OJ C326, 26/10/2012, p. 312.

¹³ On the complex issues arising from the application of EU state aid rules to the financing of public service broadcasting organisations cf. Donders in this volume.

¹⁴ On the notion of 'European works', see article 1(1)(n) AVMS Directive, and Chavannes and Castendyk, 2008: 846.

¹⁵ There is no legal definition of an 'independent producer' but recital 71 of the AVMS Directive lists criteria for member states to take into account.

¹⁶ However, recitals 49 and 52 provide further guidance and list the following examples: the Olympic Games, the football World Cup and the European football championship.

¹⁷ Also, the Internet broadband capacity targets formulated in the Digital Agenda for Europe are important for the audiovisual and online sectors (European Commission: 2010), since most audiovisual and online content requires sufficient bandwidth.

¹⁸ Pursuant to the Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, OJ L323, 9/12/2005, p. 57.