

European-level measures for promoting cultural diversity in broadcasting: quixotic tilting in a new technological era?

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Introduction

If the title of this article manages to conjure up images of Don Quixote de la Mancha and Sancho Panza, on horseback, with laptop cases strapped onto their armour, tilting at broadcasting masts and satellite dishes instead of at windmills, then it has clearly served its figurative purpose. In keeping with such images, the central argument of this article is that some of the European-level regulatory provisions typically and traditionally relied upon for the promotion of cultural diversity in broadcasting are ill-suited to that purpose and that they appear increasingly incongruous in the context of new technological realities. Creative thinking is required at the regulatory level in order to bring an end to the current conceptual entrapment and to render the promotion of cultural diversity more effective than is presently the case. Evidence of such creative thinking can be detected, *inter alia*, in a number of recent standard-setting texts adopted by the Council of Europe's Committee of Ministers.

This article will first examine a number of provisions which are customarily invoked in assessments of the effectiveness of European audiovisual regulation in promoting cultural diversity. It will then focus on the potential of selected alternative regulatory and other mechanisms for enhancing cultural diversity in a new communications environment. Finally, the continued relevance and feasibility of the objective of promoting cultural diversity in the current era of technological flux will be evaluated. As befits an article in a yearbook, an ancillary aim of this article is to flag and comment on several important developments in European audiovisual regulation that occurred in 2007.

I. THE USUAL SUSPECTS

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

As a result of the pronounced efforts undertaken by the European Union and the Council of Europe to synchronise their respective standard-setting measures pertaining to the audiovisual sector,² much of the content of the two IGOs' flagship instruments dealing with transfrontier

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² Explanatory Report to the European Convention on Transfrontier Television, paras. 39, 40. See further: Daniel Krebber, *Europeanisation of Regulatory Television Policy: The Decision-making Process of the Television*

broadcasting is strikingly similar.³ Thus, the EU's Television without Frontiers Directive (TWF)⁴ and the Council of Europe's European Convention on Transfrontier Television (ECTT)⁵ both contain provisions for the promotion of European audiovisual works. Given the broad congruence between Articles 4 and 5, Television without Frontiers Directive, and Article 10, ECTT, only the former will be dealt with here.

Television without Frontiers Directive

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

Article 4

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

Article 5

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

The cited Articles tend to be regarded as the main provisions in the Television without Frontiers Directive which, by design or in effect, serve the goal of promoting cultural diversity in broadcasting.⁶ As no other Article in the Directive deals with cultural diversity *per se*, it is perhaps predictable that the Articles promoting European, and independent European, works might, by default, be considered to be the most relevant. However, upon

without Frontiers Directives from 1989 & 1997 (Nomos Verlagsgesellschaft, Baden-Baden, 2002), esp. Chaps. 4, 5 & 6.

³ See further: Tarlach McGonagle, "Workshop Report", in Susanne Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules* (Strasbourg, European Audiovisual Observatory, 2006), pp. 47-59, at 47-49; Pierre Goerens, "Interplay Between Relevant European Legal Instruments – ECTT and TVwF Directive: Competition or Complementarity?", in *ibid.*, pp. 1-11.

⁴ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298/23, 17 October 1989, and amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ L 202/60, 30 July 1997.

⁵ Council of Europe (1989), *European Convention on Transfrontier Television (1989), ETS No. 132, as amended by its Amending Protocol* (1998), ETS No. 171, which entered into force on 1 March 2002.

⁶ Note, for example, their thematic coupling during the latest formal process of revision of the Television without Frontiers Directive: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005.

closer scrutiny, the perceived relevance of Articles 4 and 5 turns out to be somewhat specious as the (intended and actual) contribution of these Articles to the goal of promoting cultural diversity in broadcasting is actually quite limited.

Articles 4 and 5 have been roundly criticised by many commentators for being little more than EU cultural protectionism unconvincingly dressed up as promoting creativity and cultural diversity.⁷ In reality, they pursue dual economic and cultural objectives, but those objectives are not evenly weighted. The actual wording of relevant preambular Recitals and of the Articles themselves, as well as the *Realpolitik* of their drafting history, all suggest that Articles 4 and 5 were really conceived of as protective economic measures, designed to support the European audiovisual industry in the face of US dominance of global audiovisual markets. Conversely, the cultural credentials of Articles 4 and 5 appear questionable. They constitute particularly blunt instruments as regards their purported cultural objectives for a number of reasons: they lack any qualitative criteria; they lack any stipulations about time-scheduling and they lack any requirement to reinvest percentages of *profits* in new, independent European production. Such shortcomings increase the likelihood of mere *pro forma* compliance with Articles 4 and 5 by cost-conscious broadcasters who might prefer to meet their obligations by transmitting cheap, low-quality programming at off-peak hours. The reporting system concerning Articles 4 and 5 is primarily statistical, which makes it very difficult to gauge the qualitative impact of the provisions. Furthermore, in the absence of what have been termed “public, precise and transparent indicators”, it can be a problematic exercise to determine the exact extent to which States actually discharge their relevant obligations.⁸

In light of the foregoing comments about the architectural design of Articles 4 and 5 being primarily quantitative, those Articles could appear to be predicated on a deterministic understanding of television broadcasting. A proper evaluation of the effectiveness of the provisions would necessitate due consideration of attitudinal complexities in viewing processes/reception analysis. It would also need to be informed by awareness of changing patterns of media usage (eg. the emergence of new participatory paradigms in broadcasting; increasing audience preferences for user-generated content, etc.).

The myth that Articles 4 and 5 constitute important vectors for cultural diversity can also be exposed by referring to the Articles’ Eurocentric focus. If they were properly concerned about the promotion of cultural diversity, they would have to embrace the belief that cultural diversity is valuable in and of itself and thus a source of societal enrichment. Based on the assumption that audiovisual content is capable of expressing cultural identities, traditions and aspirations, the prescription of measures protecting/promoting *European* audiovisual content, as opposed to *extra-* or *non-European* audiovisual content, would be difficult to reconcile with such a profession of faith in the inherent value of cultures. On such a reading, the Articles could be perceived as implying a disconcerting hierarchisation of cultures and a *de facto* relegation of non-European cultures to a status of inferiority. However, given that the motivation for the protective/promotional measures for European audiovisual works is

⁷ See further: Tarlach McGonagle, “The Quota Quandary: An Assessment of Articles 4-6 of the Television without Frontiers Directive”, in David Ward, Ed., *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate Publishing Limited, forthcoming, 2008); Irini Katsirea, “Why the European broadcasting quota should be abolished”, 28 *European Law Review* (No. 2, 2003), pp. 190-209; Jackie Harrison & Lorna Woods, “Television Quotas: Protecting European Culture?”, 12 *Entertainment Law Review* (No. 1, 2001), pp. 5-14.

⁸ *Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the “TV without Frontiers” Directive), as amended by Directive 97/36/EC, for the period 2001-2002 (2004/2236(INI))*, European Parliament Committee on Culture and Education, Rapporteur: H. Weber, Doc. No. A6-0202/2005, 21 June 2005, para. 7.

primarily economic – and not to promote cultural diversity as such, this criticism can hardly be sustained. To hold otherwise would be to fault Articles 4 and 5 for failing to fulfil goals imputed to them, but which they do not actually hold. The foregoing conceptual contradictions highlight the dangers involved in considering Articles 4 and 5 to be default measures for the promotion of cultural diversity.

Audiovisual Media Services Directive

In December 2007, the protracted process of modernising the Television without Frontiers Directive drew to a close with the publication in the *Official Journal of the European Communities* of the so-called Audiovisual Media Services (AVMS) Directive.⁹

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

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

⁹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332/27 of 18 December 2007.

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

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

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

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

Article 3i's all-important first paragraph clearly steers a middle course between the two most opposing positions that could have been taken, i.e., to extend the application of Articles 4-5, Television without Frontiers Directive, fully to on-demand audiovisual media services, or not at all.¹⁰ It is relevant to note in this connection that the Court of Justice of the European Communities (ECJ) had already held in the *Mediakabel* case that Articles 4 and 5 of the Television without Frontiers Directive *do* apply to near-video-on-demand services.¹¹ The new obligation in Article 3i can more accurately be described as promotional rather than prescriptive. Member States are obliged to “ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote [...] the production of and access to European works”, but only “where practicable and by appropriate means”. Such a qualification could easily render the obligation ineffective. It would be all too

¹⁰ For a short overview of the different positions considered during the review of the Television without Frontiers Directive with a view to its modernisation, see: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005, pp. 2-3; European Commission Expert Group, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, May 2005, p. 5.

¹¹ Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, Judgment of the Court of Justice of the European Communities (Third Chamber) of 2 June 2005, ECR I-4891. The essence of the Court's reasoning can be found in para. 51 of the judgment.

easy for States seeking to shirk this obligation to argue that the pursuit of the objective of promoting the production of and access to European works is not practicable in a complex and ever-changing technological environment.

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

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

II. OTHER SUSPECTS AND OTHER PROSPECTS

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

Public Service Broadcasting

The Protocol to the Treaty of Amsterdam on the system of public broadcasting in the Member States recognises that it is largely for each Member State to confer, design and organise the remit for PSB in their own countries.¹² It also sets out that State funding for PSB must be tied to the fulfilment of the broadcasters’ public service remit. Further guidance on the question of State funding for PSB is provided by the European Commission’s Communication on the

¹² Protocol to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, OJ C 340/109 of 10 November 1997.

application of State aid rules to public service broadcasting¹³ and the criteria established by the ECJ in its *Altmark* judgment.¹⁴ The Commission recently launched a public consultation on the future framework for State funding of PSB.¹⁵ The development of the public service remit in the new media environment has been identified as one of the important focuses of the consultation exercise.¹⁶ It is beyond the scope of this article to examine in any detail the European (i.e., EU and Council of Europe) regulatory framework in which PSB operates. Instead, it will address the specific objective of PSB's promotion of cultural diversity, especially in the new media environment. It will examine relevant issues through the prism of recent Council of Europe texts.

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

to promote the values of democratic societies, in particular respect for human rights, cultures and political pluralism; and with regard to its goal of offering a wide choice of programmes and services to all sectors of the public; promoting social cohesion, cultural diversity and pluralist communication accessible to everyone.¹⁷

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

In their programming and content, public service media should reflect the increasingly multi-ethnic and multicultural societies in which they operate, protecting the cultural heritage of different minorities and communities, providing possibilities for cultural expression and exchange, and promoting closer integration, without obliterating cultural diversity at the national level.¹⁸

It should be noted that the Recommendation understands cultural diversity in an open, inclusive way – there is no question of the notion being restricted to European cultural diversity, as in the aforementioned regulatory measures prescribing the transmission of European audiovisual works. This is clear from para. 24 of the Recommendation, which

¹³ Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04).

¹⁴ Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Judgment of the Court of Justice of the European Communities of 24 July 2003, Rec.2003, p.I-7747, esp. paras. (87, 88), 89-94. For further discussion, see Prof. Tony Prosser's contribution to this volume.

¹⁵ As announced in the European Commission's press release, "State aid: Commission launches public consultation on the future framework for State funding of public service broadcasting", IP/08/24, 10 January 2008. See also: Review of the Communication from the Commission on the application of State aid rules to public service broadcasting (n.d.), available at:

<http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_questionnaire_en.pdf>.

¹⁶ *Ibid.* See, in particular, s.2.2.1 of the second-named document in the previous footnote.

¹⁷ Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007, Preamble.

¹⁸ *Ibid.*, para. 23.

states: “Public service media should promote respect for cultural diversity, while simultaneously introducing the audience to the cultures of other peoples around the world”.

PSB is currently in a state of transition, but as Karol Jakubowicz has noted, “there was hardly a time in the eight decades of PSB’s existence when it was not ‘in transition’”.¹⁹ He describes the challenges constantly faced by PSB as being “at once conceptual and contextual”: different understandings of the role of PSB and the fact that “changing contexts of PSB operation have always affected the shape, nature and objectives of that media institution and positioned it in society and on the media scene in a variety of ways”.²⁰ The current state of transition has been triggered by technological, market-related and socio-cultural trends.²¹ How PSB engages with these new trends will largely determine its future. Broadcasting technologies are becoming inexorably digitised and converged. If PSB is to retain its previous (or even current) level of influence in this new technological environment, it is imperative that it develops into an effective player across diverse media types and formats. Relevant initiatives are being actively encouraged at the European level, notably in the standard-setting work of the CM that came to fruition in 2007.

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

Public service media should play a particular role in the promotion of cultural diversity and identity, including through new communication services and platforms. To this end, public service media should continue to invest in new, original content production, made in formats suitable for the new communication services. They should support the creation and production of domestic audiovisual works reflecting as well local and regional characteristics.²²

The CM’s Recommendation on measures to promote the public service value of the Internet, adopted towards the end of 2007,²³ picks up on this theme. Its central objective is to prompt States authorities, where appropriate in cooperation with all interested parties, to take all necessary measures to promote the public service value of the Internet, *inter alia* by “upholding human rights, democracy and the rule of law [...] and promoting social cohesion, respect for cultural diversity and trust” in respect of the Internet and other ICTs. States authorities are expected to draw on the guidelines appended to the Recommendation in their efforts to realise its central objective. The guidelines have five main focuses: human rights and democracy; access; openness; diversity, and security. The guidelines’ focus on diversity strives for equitable and universal involvement in the development of Internet and ICT content. As such, it encourages, *inter alia*:

- the development of a cultural dimension to digital content production, including by public service media;
- strategies and policies geared towards the preservation of digital heritage;

¹⁹ Karol Jakubowicz, “Public Service Broadcasting: A Pawn on an Ideological Chessboard”, in Els De Bens, Ed., *Media Between Culture and Commerce* (Bristol, UK & Chicago, USA, Intellect, 2007), pp. 115-141, at 116.

²⁰ *Ibid.*

²¹ See, *ibid.*, at 120.

²² CM Recommendation Rec(2007)3 on the remit of public service media in the information society, *op. cit.*, para. 19.

²³ Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet, 7 November 2007.

- participation in “the creation, modification and remixing of interactive content”;
- measures for the production and distribution of user- and community-generated content;
- capacity-building for local and indigenous content on the Internet;
- multilingualism on the Internet.

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

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

Must-carry provisions

So-called “must-carry” obligations,²⁴ i.e., (regulatory) provisions mandating access to electronic communications networks for certain parties, subject to certain conditions, have considerable potential for the promotion of cultural diversity in broadcasting. However, the exploitation of that potential tends to occur at the national and sub-national levels. This is partly because the most important supra-national regulatory provisions governing must-carry are based on notions of “general interest objectives”, which are left for determination by States authorities. The extent to which cultural diversity is inferred into such general interest objectives therefore depends on how well-disposed States authorities are towards the goal of promoting cultural diversity.

At the European level, the main regulatory provisions governing must-carry obligations are to be found in the EU’s Universal Services Directive.²⁵ The key provisions are set out in Article 31, which is devoted exclusively to the topic. Article 31(1)²⁶ reads:

²⁴ For an overview of current issues affecting “must-carry” obligations, see, generally, Susanne Nikoltchev, Ed., *IRIS Special: To Have or not to Have Must-carry Rules* (Strasbourg, European Audiovisual Observatory, 2005), and in particular, Sabina Gorini & Nico van Eijk, “Workshop on Must-Carry Obligations: Summary of the Discussion”, in *ibid.*, pp. 1-5.

²⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Services Directive), OJ L 108/51 of 24 April 2002. For commentary, see: Nico van Eijk, “New European Rules for the Communications

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

Must-carry obligations can prove of enormous importance to PSB, especially by helping to ensure its universal availability. The importance of must-carry provisions for ensuring the continued availability of PSB is heightening considerably in an increasingly digitised broadcasting environment. This realisation prompted the Council of Europe’s CM to urge in 2003 that must-carry regulations continue to be “applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes” via diverse digital platforms.²⁷ The CM’s concern would appear to have escalated since then. In its Recommendation on media pluralism and diversity of media content, adopted at the beginning of 2007, it stated:

Member states should envisage, where necessary, adopting must carry rules for other distribution means and delivery platforms than cable networks. Moreover, in the light of the digitisation process – especially the increased capacity of networks and proliferation of different networks, member states should periodically review their must carry rules in order to ensure that they continue to meet well-defined general interest objectives. Member states should explore the relevance of a must offer obligation in parallel to the must carry rules so as to encourage public service media and principal commercial media companies to make their channels available to network operators that wish to carry them. [...]²⁸

The potential of must-carry provisions for PSB and for the promotion of cultural diversity was adverted to, albeit somewhat indirectly, in the leading ECJ case to date dealing with must-carry obligations, *United Pan-Europe Communications Belgium SA v. Belgium*.²⁹ For instance, the Court accepted that the national legislation at issue in the case “pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region”.³⁰ The Court proceeded to state that such legislation “guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of

Sector”, *IRIS plus – Supplement to IRIS – Legal Observations of the European Audiovisual Observatory*, 2003-2, at 5-6.

²⁶ Article 31(2) recognises the ability of States to determine appropriate remuneration (if any) in respect of measures taken in accordance with Article 31, provided that all network providers are treated in a non-discriminatory manner and that procedures governing remuneration (where it is provided for) are proportionate and transparent.

²⁷ Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting, 28 May 2003, Appendix, para. 21.

²⁸ Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007, para. 3.3.

²⁹ Case C-250/06, Judgment of the Court of Justice of the European Communities (Third Chamber) of 13 December 2007.

³⁰ *Ibid.*, para. 42.

their culture”.³¹ Although not explicitly referred to as “the promotion of cultural diversity in the broadcasting sector”, that is actually what was at issue in the case at hand.

Conclusion

An intrinsic argument for (the promotion of) cultural diversity is ill-served by the current over-reliance on Eurocentric and commercial regulatory approaches to the issue. A more thorough exploration of the potential of alternative regulatory provisions, such as those governing public service broadcasting and must-carry mechanisms, is required. In addition, measures promoting the effective participation of persons with diverse cultural identities in all stages and aspects of broadcasting activities, as well as in relevant regulatory structures and processes, need to be prioritised. Again, a keen awareness of this point is to be found in the various standard-setting texts adopted by the Council of Europe’s CM in the course of 2007.

As this article is still a work in progress,³² so too is its conclusion. The foregoing analysis has sought to demonstrate that the promotion of cultural diversity in broadcasting, as a regulatory and policy objective, is likely to prove increasingly difficult to realise in the future due to the rapid and ongoing nature of technological development and resultant changes in patterns of media usage. Nevertheless, the diminishing feasibility of the objective does not necessarily mean that the objective is not worth pursuing through regulatory mechanisms, or that efforts to do so are merely quixotic. At least not yet.

³¹ *Ibid.*, para. 43.

³² The author was recently awarded a research grant by the Broadcasting Commission of Ireland in order to undertake more extensive research on this topic. Full details of that research project will be available in due course at: <<http://www.ivir.nl/staff/mcgonagle.html>>.