“REGULATING FOR PLURALISM IN THE ERA OF DIGITAL CONVERGENCE: 
THE ISSUES OF MEDIA CONCENTRATION CONTROL AND THE FUTURE OF 
PUBLIC-SERVICE BROADCASTING”,

Workshop 24: “Regulating Communications in the Multimedia Age”.

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Introduction

In December 1997 the European Commission (EC) published its controversial Green Paper on the convergence between broadcasting, telecoms and IT and its regulatory implications. This document stimulated an animated debate about the future of broadcasting regulation in the age of the digital ‘convergence’. The Green Paper was followed up in July 1998 by a report on the public consultation exercise that it had launched. The issues raised by the Green Paper were discussed at the European Audiovisual Conference, hosted by the UK Presidency of the European Union, at Birmingham, 6-8 April 1998. Further, broadcasting in the digital age was the subject of a 1998 report from the EU’s High Level Group on Audiovisual Policy.

The EC’s Green Paper opened by noting that ‘there is broad agreement that developments in digital electronics and software are creating the technological potential for a new approach to the delivery and consumption of information services’. However, it immediately added ‘that there is less agreement on how much these developments will change existing practices and over what time-scales’. Opinion broadly divides, the Green Paper observed, between those who consider that convergence will lead to the complete and rapid collapse of traditional boundaries between the telecoms, IT and media industries, and those who feel that the specificity of existing separate sectors will continue to differentiate them and that the media in particular will retain a special role ‘as the bearer of social, cultural and ethical values within our society, independent of the technology relied upon to reach the consumer’.

The Green Paper broadly suggested that the logic of the former position is that regulation will have to converge, leading to a single ‘horizontal’ regulatory model for the entire ‘converged’ communications sector, whilst the logic of the latter position is that regulation of the economic conditions and content of information services should be kept distinct to safeguard non-economic public interest goals as well as promote economic efficiency. The Green Paper actually proposed three alternative approaches to reform: a) to build on existing frameworks, i.e. the existing ‘vertical’ regulation of telecoms and broadcasting; b) to create a new

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1 For the last three years Peter Humphreys has been researching regulatory policies concerning media concentration in the UK and Germany. The research has been made possible by the British Economic and Social Research Council, Grant No. L 12625109. Some of the publications resulting from this research are referenced in other notes.


5 European Commission, Green Paper on ...Convergence, Brussels: December 1997, p. 5.
‘horizontal’ regulatory framework for the converging services to coexist with the frameworks applied to traditional telecoms and broadcasting services, i.e. a ‘horizontal/vertical’ mix; and c) to move towards a comprehensive framework applying similar regulatory approaches to all three sectors, i.e. the ‘horizontal’ model. The Green Paper stressed the economic benefits of convergence and the importance of establishing the most appropriate regulatory framework to achieve them.

This paper has the following structure:

- First, it sets out the main lines of the regulatory policy debate stimulated by the above mentioned European Commission Green Paper on convergence, arguing that the document – whilst reflecting a mix of divergent viewpoints within the Commission – has an overall pro-market, pro-industry bias;
- Secondly, it argues that the convergence debate neglects to address the issue of increasing media concentration, which is a grave omission because industrial convergence is an area of convergence where developments are indeed proceeding apace;
- Thirdly, it discusses the future of public service broadcasting from the viewpoint that the need for well-financed, comprehensive public-service broadcasting has increased, not decreased, in the ‘converged’ multimedia communications environment not least as a pluralistic counterbalance to the concentrated power of the large private media concerns. However, the paper explains how an overemphasis, in the EU framing of the agenda, on the market and competition policy may lead towards a more narrowly circumscribed future role for Europe’s public-service broadcasters.

The paper aims to prompt thinking about how the crucial goal of pluralism might be safeguarded in the converged environment.

The question of the appropriate direction of regulation for the ‘converging’ communications sectors.

Currently, there is a whole spectrum of different regulatory regimes from computing, largely unregulated, through telecoms, to broadcasting, still extensively regulated. Computing and the Internet is clearly subject to little effective regulation. Broadcasting and telecoms still have very different regulatory regimes. As the EC’s Green Paper was being drafted, telecommunications was ‘gearing up for full liberalisation’, with regulations concentrating on a limited range of matters such as fair conditions for market entry (common licensing rules, etc.), maintenance of the public interest (e.g. basic universal service requirements), interconnection and interoperability of services and networks, and competition policy generally. From its 1987 Green Paper on telecommunications, through a whole series of legislation, culminating in its introduction of a timetable for the full liberalisation of telecoms markets by 1 January 1998 (with certain delays in some Member States), the EU has been in the vanguard of this far-reaching process of opening up European telecoms markets. Within the space of a decade the European telecoms sector has been transformed – in the words of the convergence Green Paper - from ‘one characterised by rigid and inefficient monopoly to a sector facing full and vigorous competition’. This transformation, the Green Paper observed, ‘owes its beginnings to an earlier phase of convergence – that between telecommunications and computing.’ Essentially, under the impact of this convergence, the regulatory traditions of the telecoms sector gave way to the free market conditions that had always prevailed in the
computing sector. Telecommunications liberalisation is now ‘widening choice and lowering prices’  

The EU’s 1989 essentially deregulatory and market liberalising ‘Television Without Frontiers’ Directive, amended recently in 1997, has taken broadcasting an important step in the same direction. National regulatory developments since the 1980s had in any case seen the national-level deregulation and liberalisation of broadcasting markets, the appearance of multi-channel private television, and an increasing commercialisation of the broadcasting sector. Nonetheless, broadcasting remains characterised, much more than telecommunications, by disparate national rules and procedures covering matters such as licensing, media ownership and control, foreign ownership, and - in very clear distinction to telecoms - also media content. Extensive regulatory obligations continue to exist, particularly for public broadcasters. This, of course, is because broadcasting policy has traditionally been all about fulfilling national social and cultural goals. Furthermore, broadcasting is crucially significant for the formation and expression of public-opinion; it is vital therefore that it promotes and reflects pluralism.

At first sight, the principal purpose of the EC’s Green Paper was to address in an open and objective manner the appropriate direction of regulation for the converging communications environment. However, it can be argued that driving the whole exercise was DG XIII’s desire to achieve the right ‘regulatory mix’ to gain the desired economic benefits such as growth, jobs, competitiveness, and the take-off of the Information Society in Europe (see below). The Green Paper stated that there should be ‘no regulation for regulations sake’, but noted that views differ about the extent of requirement for regulation. Specifically, the Green Paper drew attention to the way that convergence challenges traditional regulatory policy in a number of ways. The key question is that of regulatory consistency. While the Green Paper recognised that services can retain their specific characteristics regardless of their means of conveyance, it also underlined that: ‘regulating essentially similar services differently, particularly on the basis of the technology used to deliver the service, could represent discriminatory treatment which might hold back competition, investment and the provision of services.’ Interestingly, a September 1997 draft of the Green Paper – prepared by DG XIII, representing the industry position, presumably before DX, defending the cultural interest, had made its in put into the document (see later) - asked: ‘Why should a broadcast television

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6 European Commission, Green Paper on ...Convergence, Brussels: September 1997, p. 5.
7 Directive 89/552/EEC.
8 Directive 97/36/EC.
This raises the question of whether the optimal degree of regulatory consistency, rationality and coherence would be best served by having a single regulator for the converged communications sector? Convergence arguably challenges the practice of separating the telecommunications and broadcasting regulators in most of the Member States. The EC’s Green Paper did not go so far as to actually recommend the creation of a single regulator for the converged communications sectors, but it did contain a bias towards “horizontal” (i.e. cross-sectoral) regulation. Thus, a detailed analysis of the Green Paper by Wolf Sauter, presented in a 1998 working paper of the Centre for European Legal Policy at the University of Bremen, shows how the Green Paper was “an attempt to achieve a consensus around a coherent regulatory approach …based on ….a new comprehensive horizontal regulatory approach.” However, in reporting the consultation exercise launched by its Green Paper the Commission was compelled to admit that most commentators preferred an evolutionary rather than a revolutionary approach and many of those expressed a preference for building on existing regulatory structures. This represented a further check on DG XIII’s radicalism, and the consultation process was re-launched. In the view of many of the respondents to the Commission’s consultation will undoubtedly continue to have a unique relevance for the expression and formation of opinion, and therefore a ‘fundamental role…for ensuring democratic pluralism, diversity and the sharing of culture’. Obviously, this key democratic pluralist role is not matched in telecoms and computing and it must be ultimately the most important reason for broadcasting’s continued distinctive sector-specific regulation, and particularly for sector-specific measures to promote continued pluralism and diversity in the broadcasting field. There are strong grounds to fear that the outcome of the unification of regulatory bodies would be that broadcasting would end up being regulated according to the liberalised telecommunications model. Such an outcome would be entirely inappropriate because of broadcasting’s central importance to democratic pluralism.

**Technological and economic agenda-setting**

Although its more controversial ideas have been – at least temporarily – checked, the convergence Green Paper exemplifies how the concept ‘convergence’ has tended to be discussed in highly technical and economistic terms, reflecting a strong bias towards agenda

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14 The European Commission’s Green Paper has not been alone in drawing attention to the fragmentation and arguably unnecessary complexity and diversity of regulatory structures in the communications field. For instance, Richard Collins and Cristina Murroni have presented a cogent and carefully argued argument for dispensing with the existing ‘confusing and plurality of regulators in the UK’. Richard Collins and Cristina Murroni, *New Media, New Policies*, Oxford: Polity Press, 1996, p. 186


16 European Commission, *Summary of the Results of the Public Consultation on the Green Paper…*, Brussels: July 1998. Further opinions were invited on three key issues, namely: access to networks and digital gateways; creating the right framework for investment, innovation and European content production, distribution, and availability; and ensuring a balanced approach to regulation.


setting in favour of industrial and commercial interests. Essentially, we are talking about the possibilities for the digitalised integration of the previously separate functions of broadcasting, telecommunications and computing. In the purely technical respect, convergence is undoubtedly becoming a reality; in the future, PC and Internet-based services will be offered through television, and broadcasting will be provided via the PC and the Internet. Moreover, the communications industry is converging. As the EC’s Green Paper documented, communication companies are clearly already acting on the opportunities provided by digital convergence. Firms from the previously separate fields of telecoms, computing and media are actively ‘seeking cross-product and cross-platform development as well as cross-sector shareholding.19 However, the policy debates surrounding convergence reflect a technologically and economically deterministic discourse. Certain themes tend to predominate. Thus, convergence is regarded as inexorable and its extensive impact is taken for granted. However, both the extent and the speed of the convergence of the functions of broadcasting, computing and telecoms, are still very much open questions. Similarly pluralism of offerings is somehow guaranteed. Yet, pluralism is not guaranteed.20

What is beyond doubt, is that the future direction of convergence will actually partly be shaped by regulatory policy decisions. An obvious danger, therefore, arises from the fact that currently the regulatory policy debate is heavily influenced by perceptions of what is technologically and economically desirable. Carole Tongue MEP maintains that the EC’s concept of ‘convergence’ ‘should be clearly recognised as a political term – an adjunct of neoliberal economic theory’.21 Tongue draws attention to the Green Paper’s provenance, notably the fact that:

‘although the Green Paper was finally submitted by the European Commission’s DG XIII (Industry and Telecoms) and DG X (Culture and Media), it was largely the work of the telecommunications directorate DGXIII together with [industry] consultants KPMG. The initiative was headed by Commissioner Martin Bangemann, whose main brief is to create a liberalised environment for industry22

According to Tongue, DGXIII’s first draft of the Green Paper, based on a KPMG report, was actually returned to the drawing board by Commission President Jacques Santer on the grounds that DGXIII had not consulted DG X on a matter that clearly concerned it. Nonetheless, Carole Tongue argues persuasively that the final text predominantly reflected the initial views of DGXIII.23 Overall, the Green Paper tended to echo industry’s arguments that convergence with telecommunications must lead to the liberalisation of the audiovisual sector.

DG XIII’s first draft of the Green Paper was very straightforwardly biased towards economic and technological determinism and the need for radical pro-market regulatory reform in

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20 It is true, the Green Paper itself (p. 14) notes that of the three stages of convergence, namely technology, industry (ie. mergers and alliances) and services and markets, it is in this latter sphere that ‘there is less certainty regarding the likelihood and/or timing of a full convergence’.
21 Carole Tongue, Culture or Monoculture? The European Audiovisual Challenge, 1998 pamphlet, p. 32.
22 Ibid, p. 33.
response to convergence. However, even after DG X’s culture and broadcasting policy orientated in-put, the revised draft of the Green Paper still arguably contained a barely disguised bias towards the view that that convergence will require a slimmed down regulatory framework, which will promote the economic benefits of convergence and which is conducive to Europe’s competitiveness in the global economy. The economic and technological determinism of the first draft was certainly toned down in the second, presumably the result of DG X’s ‘inserts’ and ‘deletions’. However, an enduring de-regulatory bias is reflected in the fact that the Green Paper devoted considerable space to discussion of existing and potential barriers to convergence, and to a number of very important technical regulatory issues designed to promote competitive markets and investment in the new services, but hardly any attention to the future substance of public interest regulation, at least in as much as it relates to pluralism. Admittedly, the Green Paper did recognise the special role of public-service broadcasting – as established by the ‘Amsterdam Protocol’ – but it also raised some very uncomfortable questions for public-service broadcasters. These remain on the policy agenda, as this paper will explore later.

The Green Paper’s pro-market and technologically determinist bias was entirely consistent with the Commission’s approach to the Information Society in earlier policy documents. The theme of the Information Society was first identified in the EC’s White Paper *Growth, Competitiveness and Employment: The Challenges and Ways forward into the Twenty First Century.* Its on broadcasting was then highlighted in the Commission’s *Strategy Options Green Paper of April 1994* which was preoccupied with the uncompetitiveness of Europe’s audiovisual production sector. The principal remedy was to pursue with energy the creation of a more competitive and liberalised European audiovisual industry. The ‘Bangemann Report’ of May 1994 – very much the convergence Green Paper’s precursor - reflected similar concerns: it emphasised both the high stakes of the ‘Global Information Society’ and the need for market-liberalisation in the communications sectors so that Europe might remain competitive and reap the promised economic rewards.

The free market bias of the Green Paper naturally attracted criticism from European journalists’ organisations. The European Federation of Journalists’ response noted the Green Paper’s ‘market orientation’ and faulted it for failing to take sufficient account of cultural, social and democratic imperatives’. The UK National Union of Journalists noted that the Green Paper’s ‘primary concern appears to be the creation of an economic and regulatory framework conducive to a flourishing private sector multi-media environment, rather than to explore the social and cultural benefits for citizens of a dramatic increase in the potential of communications technology’. The NUJ response speculated that ‘this “supply-side” bias may be a consequence of the Green Paper originating from Directorate General XIII (Industry and

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24 Protocol no. 32 on the system of public broadcasting in the Member States, annexed to the Amsterdam Treaty. This recognises that public service broadcasters are of special cultural importance and that they are entitled to public funding.


Telecommunications) with belated amendment to incorporate the views of Directorate General X (Culture and Media)’ and recommended that ‘the emphasis should have been reversed’. It may be argued that these criticisms come from predictable enough sources, but credence is leant to their accusations of a pro-industry, pro-market bias by the tribute paid to the Green Paper by Rupert Murdoch. At the Birmingham Audiovisual Conference in April 1998 Rupert Murdoch applauded the Green Paper as ‘a positive first step in policy development with its emphasis on market solutions and competition law’.

### Media Concentration and the Issue of Pluralism

One issue, quintessentially to do with the cultural, social and democratic role of the media, is conspicuous for its absence from the debate: namely, media concentration. The issue of media concentration and the need to regulate for a pluralism of media controllers was regarded by the European Commission’s convergence Green Paper as already being dealt with by ‘other Community action’ (which will be explored later) and therefore beyond its scope. However, this media concentration issue was a grave omission from the convergence debate not least because industrial convergence is an area of convergence where developments are indeed proceeding apace. Digital convergence has helped to stimulate a new wave of media concentration. Over the course of the 1980s and 1990s there has occurred a marked trend towards the growth of multinational, multimedia conglomerates. Media concentration has occurred horizontally, vertically and diagonally (‘cross-media’), as firms have sought to benefit from economies of scale and scope, to take advantage of synergies, and to exploit as many outlets as possible for media products. Caroline Pauwels has drawn attention to the fact that over the recent period, there has been a steady and significant increase in the number of cases handled under the EU’s merger control regulation. In the audiovisual sector, for instance, she notes that there were 7 cases in 1995 and 6 cases in 1996, as against 2 in 1991 and 2 in 1993. Of the 38 cases in the telecoms sector over the period 1991-98, Pauwels notes that there were 7 in 1995, 8 in 1996, and 12 in 1997, as against only 1 in 1991, 2 in 1993, and 3 in 1994. According to Pauwels, of the 181 alliances concluded in the communications industry in 1995/96, a quarter could be placed under heading of ‘convergence alliances’.

Currently firms appear to be reacting to the new stimulus of digital convergence by extending their activities across the previously distinct computing, telecoms and media sectors. Convergence offers service providers in the previously separate telecoms, media and IT sectors to offer each other’s services over their own networks. The EC Green Paper on convergence draws attention to a number of major horizontal mergers such as that between Canal Plus and Nethold that have been inspired by the high cost of new digital technologies. It

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31 Alfonso Sánchez-Tabernero, Media Concentration in Europe: Commercial Enterprise and the Public Interest, Düsseldorf: European Institute for the Media, 1993. Media Monograph No. 16. For a shorter overview see Peter Humphreys, Mass Media and Media Policy in Western Europe, Manchester: MUP, 1996, chapter 6.
33 Ibid, p. 108.
notes too that convergence has specifically encouraged vertical M & As, such as the Bertelsmann-AOL alliance, motivated by market positioning and the search for access to new skills. Other motives for M & As include industry’s desire to hedge against the uncertainties that are naturally attached to the demand for the new services, the impact of internationalisation, the desire to move into higher margin areas of the value chain, and of course the search for economies of scale and the desire to stave off competition. According to the EC’s Green Paper, ‘in 1996 more than 15% of the total value of global acquisitions and mergers (US $ 1 trillion) was generated by activity in what can broadly be termed information and communications industries’. Some other prominent examples of mergers and joint ventures explicitly catering to convergence were: Kirch-Bertelsmann’s MSG (blocked by the EU Commission in 1994), US West-Time Warner, and BT-BSkyB (the Green Paper lists a number of others as well).

In the USA companies are clearly anticipating the ‘converged’ markets of the imminent future by energetically forming strategic alliances and what have been termed ‘market networks’ for the digital era. One development that has caused some alarm to traditional broadcasters is Microsoft’s obvious interest in diversification into the television sector. Microsoft has joined up with the US network NBC to launch MSNBC, a cable news channel linked to MSNBC Online, an on-line internet service. Microsoft has also acquired some cable TV interests (such as Comcast) in the USA, and reportedly made overtures to BSkyB in the UK, all of this apparently with a view to the provision of interactive services via the TV set.

In Europe, a classic example of a giant company’s expansion strategy for the era of convergence is provided by the German multinational, multimedia conglomerate Bertelsmann. Bertelsmann is one of the world’s very largest communications companies with international interests in book and magazine publishing and the press as well as in the audiovisual sector. According to the European Audiovisual Observatory’s 1997 yearbook, Bertelsmann was second only to Time Warner in terms of turnover. Bertelsmann’s European broadcasting interests increased with the 1997 merger of its broadcasting and film production subsidiary Ufa with the Luxembourg-based broadcasting company CLT. It had a major presence in the German private television sector with interests in a number of channels amounting to a significant share of the audience and advertising market. In a report for the European Broadcasting Union (EBU), Bertram Kunert, a researcher at the European Institute for the Media, has demonstrated how Bertelsmann’s recent strategy has been ‘focused on maximum integration of value-added activities in the areas of digital television and the Internet.’ Bertelsmann joined forces with its principal rival in German private commercial broadcasting, the Kirch group, and Deutsche Telekom, in a strategy to launch a digital TV platform. Also, Kunert shows how ‘by linking up with AOL to form AOL-Bertelsmann and acquiring CompuServe’s German and European operations at the end of 1997, the Bertelsmann group

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39 However, in 1998 the European Commission blocked this alliance – as with MSG in 1994 - on competition policy grounds.
has, in addition, become a key player in the provision of Internet access.’ Bertelsmann is developing specialist information and multimedia services, its aim being to have ‘a presence at all levels of the multimedia value chain.’

In the field of digital TV, the running has been made by large private media corporations which already dominate their respective markets for analogue pay-TV: notably, BSkyB in the UK, and Canal Plus in France, Spain and Italy. In Germany, the key players have been KirchGruppe, Bertelsmann and Deutsche Telekom, though – as just noted - their successive attempts to produce a German digital pay-TV alliance have been blocked by the EC on competition grounds (and the prospects for pay-TV appear poor in Germany by comparison to these other countries by virtue of the abundance of multi-channel ‘free TV’). From their analogue operations, the established pay-TV companies already have the conditional access technology, subscriber management systems and a subscriber base to build on. Competition has been provided by newcomers to pay-TV, notably leading ITV companies Carlton and Granada (Ondigital) in the UK, and by the mixed private/public-service consortium TPS and AB Sat in France. Nonetheless, the number of companies involved in providing digital TV platforms is limited to an oligopoly of Europe’s leading private TV enterprises. These companies have the potential to exploit a ‘gate-keeping’ monopoly control over new digital services, through their ownership of the conditional access system (CAS) that regulates the access of consumers to pay-TV services and the access of content providers to the audience they seek. John Birt, Director General of the BBC, has drawn attention to the importance of the digital gate-way thus: ‘The battle for control of and a share of the enormous economic value passing through that gate-way, will be one of the great business battles shaping the next century … [N]o group should be able to abuse control of that set-top box to inhibit competition.’

Now it might be argued that the dangers of increased market dominance and the barriers to market entry represented by the corporate strategies of giant communications enterprises, might be adequately regulated by routine competition law and the application of competition rules to key ‘gateways’ in the digital media environment: the conditional access systems, subscriber management systems, and electronic programme guides. Clearly, media operators must be prevented from using their control of these gateways in anti-competitive or discriminatory ways. The viewpoint that competition policy will suffice in ensuring against media dominance certainly comes across strongly from the EC’s Green Paper on convergence, which stresses the role of competition policy in keeping markets competitive in the converged communications environment. The Green Paper pointed to some major competition cases in the converging communication sector already handled by DG IV. In both the MSG and Nordic Satellite Distribution cases major mergers were blocked because ‘the combination of market players in the converging markets and market positions which they were likely to hold in the future would have led to a foreclosure of a market on a lasting basis’. Moreover, as already

42 In his MacTaggert lecture, quoted from an edited extract in The Guardian, 24 August 1996, p. 27.
noted, since the publication of the Green Paper, DG IV has blocked a renewed attempt by Bertelsmann and Kirch to form an alliance for digital pay-TV.

However, in the media field to rely on competition policy alone is problematic. Traditionally, pluralism in broadcasting has been supplied by additional sectoral-specific anti-concentration controls. Notably, private broadcasters have been subject to strict shareholding limits (e.g. as in Germany) and/or cross-media ownership limits (e.g. as in the USA and Britain). These broadcasting-specific controls have reflected the fact that the media are not ‘an industry like any other’; but that they have a special significance for democracy, pluralism and culture. The need for special restrictions on media ownership – on pluralism grounds - might diminish in the converged communications environment of the future, but this is pure speculation. Until it is clear that the new structures of communication do indeed guarantee pluralism and diversity, there remains a case for retaining media-specific anti-concentration restrictions.

In the recent period, though, the trend has been for governments to fashion regulatory policies that deliberately facilitate the expansion strategies of giant communications companies within their areas of jurisdiction. The US Telecommunications Act of 1996 is an excellent example of a measure which, though nominally designed to promote greater competition and diversity, deliberately encourages the expansion of leading companies across the converging communications sectors. Similarly, recent ESRC funded research at Manchester University has revealed the ready encouragement that governments in Germany and Britain have given to the corporate expansion strategies of their domestic media industries. All too readily politicians have apparently uncritically accepted the industry argument according to which domestic ownership rules require extensive liberalisation in order to promote the new technologies and to provide indigenous media interests with a fair chance of competing in increasingly internationalised markets. Illustratively, in a position paper pressing for a more liberal regulatory framework the giant German multimedia company Bertelsmann referred to rules limiting its expansion in German private broadcasting as ‘discrimination against domestic interests’ (Inländer-diskriminierung).

In Britain, a number of leading media companies established an ad-hoc lobby – the British Media Industry Group (BMIG) – specifically to pressure government to liberalise media ownership rules which, they claimed, impaired their ability to compete internationally. Under very intense industry pressure, in both countries governments enacted legislation in 1996 relaxing extensively their controls on media concentration.

In view of the national trends towards the deregulation of media concentration controls, in the context of the diminishing scope for national regulation in the age of transfrontier media operations and the ‘deregulatory competition’ that has arisen between nations and regions for media investment, the EU presents itself as an obvious locus of harmonising re-regulation. So far, its only practical scope for controlling media concentration has been its competence for dealing with those competition cases that have an obvious ‘community interest’, i.e. a pan-

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44 ‘Regulating for Media Pluralism’, Economic and Social Research Council, Grant No. L 12625109.
European dimension. The Commission has been able to block mergers like MSG (in 1994) or the more recent Bertelsmann (CLT-Ufa)/ KirchGruppe/Deutsche Telekom digital alliance (in 1998) on the ground that they threatened to foreclose access to the German market. Generally, though, it had been left to national legislators and regulators to safeguard media pluralism - as well as economic competition in the media - through national media-specific regulation. However, as just explained, the recent trend has been towards de-regulation of these media-specific rules and much talk about greater reliance on competition rules.

After much prompting from the European Parliament, the European addressed the question of media concentration and pluralism in a 1992 Green Paper.\(^{47}\) This document acknowledged the problem of media concentration, but it was clear that the Commission’s prime concern was the way that disparities between Member State rules might impede the proper functioning of the internal market in broadcasting introduced by the Television Without Frontiers directive of 1989.\(^{48}\) In 1994 the Commission reported on the consultation process it had conducted, concluding that there was support for moving towards drafting a directive. The Commission then set about this task\(^ {49}\) However, it soon proved to be fraught with difficulty. Interests were clearly polarised. On the one side were ranged the advocates of a liberal media ownership regime, notably the large communications conglomerates and their national and European-level interest groups. On the other side stood advocates of a relatively strict directive to limit media monopolies, notably European parliamentarians and media unions and journalists’ associations. Moreover, the draft directive got plainly bogged down by the internal politics of the Commission with certain Directorates General representing divergent views.\(^{50}\) Powerful media groups lobbied hard, and apparently successfully, against the proposed European rules. However, while the EC draft directive’s progress towards a European regulatory framework for controlling media concentration remains stalled, the pressure for further liberalisation of Europe’s communication sectors mounts in the context of a ‘convergence’ debate that regards the important issue of media concentration in the EU as being dealt with ‘by other Community action’.

**The Future of Public Service Broadcasting**

Given the scope for dominance of the digital age by those giant private companies capable of making the risky and costly technological leap, it can be argued that public service broadcasting will have a crucial function to act as a guarantor of pluralism, a pluralistic counter-balance to the largely unfettered media power of private corporations. Contrary to popular wisdom, a persuasive case can be made that well-funded, comprehensive public service broadcasting will be more necessary, not less necessary, in the multi-channel digital age. Thus, Andrew Graham and Gavyn Davies have argued that the new technologies strengthen, not weaken, the case for public-service broadcasting, on three essential grounds:

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the danger of media concentration;
the fact that commercial broadcasting cannot adequately meet all communications needs; and,
the fact that no set of rules, regulations or laws can entirely correct the deficiencies of a commercial system.\textsuperscript{51}

However, the EC Green Paper on convergence raised some fundamental questions about the future of Europe’s public-service broadcasters and their funding. DG XIII’s September 1997 draft of the Green Paper, while noting that convergence ‘does not reduce the validity of public interest objectives’ nonetheless asked, in view of the expected ‘abundance of audiovisual offerings….whether regulation is still required to address these objectives or whether they might be effectively achieved by normal market activity?’\textsuperscript{52}

The December final draft of the Green Paper was more moderate but still noted that ‘abundance’ of delivery systems posed a ‘challenge…to regulation based on scarcity’. Furthermore, convergence posed a ‘challenge to [traditional] distinctions between public and private activities.’\textsuperscript{53} The Green Paper noted that ‘[public service] obligations have traditionally fallen on a single designated organisation [i.e. the public broadcasters]….However, the possibility of offering voice telephony services over a computer or a television, or the ability to use the Internet to read, watch or listen to broadcasters’ programming illustrates the possibility that new platforms may play a role in meeting such obligations.’ A related possibility, the Green Paper continued, was that different organisations - both public and private, and organisations from outside the traditional sector - might be allowed to undertake these public service obligations. ‘Where specific support in the form of industry or even public funding is available for the provision of such services, the issue arises, \textit{inter alia}, as to whether that mechanism would need to be open to any organisation willing to be designated as fulfilling public interest obligations.’\textsuperscript{54} Moreover, the Green Paper suggested that ‘public authorities would need to monitor on a continuing basis the extent to which desired policy objectives [i.e. the public service mission] are being achieved by normal market activity, including the impact of other media, and whether, as consequence, regulatory obligations on broadcasters might be lightened.’\textsuperscript{55} It is true, the Green Paper’ final draft also contained an obvious sweetener for the public broadcasters (presumably inserted at the behest of DG X). The Green Paper noted that in the converging communications environment public broadcasters might actually ‘enhance their current role and provide new sources of revenue alongside current funding’. Indeed, ‘the regulatory framework should allow [them] to take advantages of these new opportunities’. However, the Green Paper observed that public funds should not be used ‘to leverage and cross-subsidise these new activities or the use of new technological platforms…’since ‘…such practices would be subject to the Treaty rules on competition’.\textsuperscript{56}

\textsuperscript{54} \textit{Ibid.}, p. 28.
\textsuperscript{55} \textit{Ibid}, p.29.
\textsuperscript{56} \textit{Ibid.} p. 29.
If the Green Paper reflected a mix of contradictory inputs from DG XIII and DG X, then the intervention of DG IV (Competition Policy) really set the cat among the pigeons. In September 1998 DG IV produced a discussion paper that sought to clarify the position regarding the principles underpinning the future funding of public-service broadcasters. According to this discussion paper, ‘...the increased competition in the [broadcasting] sector led to a growing number of complaints being submitted to the Commission by private broadcasters in different Member States concerning possible infringements of Article 92 of the EC Treaty, mostly in relation with the State financing schemes established in favour of public broadcasters’. Article 92, it might be recalled, is the article in the EC Treaty relating to the anti-competitive state aids. Since 1992 a number of such complaints had stacked up at DG IV. The private sector complainants were generally arguing that public broadcasters were taking unfair advantage of their public funding and that this distorted competition in broadcasting markets to their disadvantage. Private broadcasters – and their political allies - were now questioning whether public broadcasters should be able to supplement their licence funding with commercial revenues, and whether the public broadcasters should be allowed to offer new services that competed with private broadcasters (e.g. should they be allowed to use their licence fee funding to establish new channels like children’s channels and news channels?).

The discussion paper opened by actually underlining the crucial role of public-service broadcasters. DG IV stated clearly its ‘opinion that media pluralism has to be considered as a public interest of the Member States and a legitimate Community objective, as highlighted by the Protocol [to the Amsterdam Treaty]’. Interestingly, the paper made the precise point that public-service broadcasting’s contribution to pluralism and the objective supply of information was crucial not least in view of ‘the current level of concentration in the sector’. However, the discussion paper then went on to pursue the suggestion contained in the convergence Green Paper (see above) that in future public-service broadcasting might be funded by means of public tender open to all potential operators. More immediately worrying for most of western Europe’s public-service broadcasters, the discussion paper seemed to question the dual funding of public-service broadcasting, namely the existing state of affairs in most European countries whereby public broadcasters have been accustomed to supplement state funding (usually a licence fee system) with advertising revenue. The paper clearly favoured reserving market revenues exclusively to commercial broadcasters. Public broadcasters might be allowed to compete on the market, but only through dedicated channels or subsidiaries which would not receive direct or indirect subsidies from the public service broadcaster. The discussion paper did not rule dual funding impermissible, but it indicated that such systems could expect to receive DG IV’s close scrutiny in competition cases. Moreover, the discussion paper also underlined the need for Member States to clarify their understanding of the public service remit. In doing so, the DG IV discussion paper recognised the Member States’ competence in this matter, but reminded them that there was an EU competition policy dimension to the issue and that the Commission had the duty to assess the ‘proportionality’ of the remit and its funding. The discussion paper did not see the need to limit the public service remit to services not rendered by private sector, but it did want to see the remit clearly specified ‘in an official act of the Member State’. In dual-funding

58 Ibid., p. 3
59 The BBC’s approach to commercial operations would therefore pass this test.
broadcasting systems – where public broadcasters were in direct economic competition with private broadcasters - the Commission would assess whether the scope of the remit was consistent with its competition policy. In doing so, the discussion paper suggested that DG IV would not regard programme genres such as sport and entertainment shows as public service broadcasting, and that it would not necessarily so regard films and drama.

Finally, it is useful to consider the position on these issues expressed recently by the EU High Level Group of experts, which was established in 1997 to reflect on the Community’s audiovisual policy. During 1998, the High Level Group published its report The Digital Age: European Audiovisual Policy. The High Level group was chaired by Marcelino Oreja Aguirre, the European Commissioner responsible for Culture and Audiovisual Policy. Unsurprisingly, therefore, the report reflects a rather different balance to the EC’s convergence Green Paper, reflecting DG XIII’s bias towards industry, and DGIV’s discussion paper, with its apparent bias towards the commercial sector. Thus, in his foreword to the High Level Group’s report, Oreja stresses ‘the need to ensure balance between the free play of market forces and the preservation of the general public interest’. The report devotes its first section to the ‘role of the media for society and democracy’. The report proclaims itself to be based on the ‘incontestable’ premise that modern democratic society requires communication media which:

- ‘are widely available and accessible;
- reflect the pluralistic nature of such a society and are not dominated by any one viewpoint or controlled by any one interest group’;
- make available the information necessary for citizens to make informed choices about their lives and their communities’; and,
- ‘provide the means whereby the public debate which underpins free and democratic societies can take place, means that the market will not necessarily deliver on its own.’

The report explicitly states that ‘the audiovisual is not an industry like any other….it has a major influence on what citizens know, believe and feel’. It stresses that the ‘traditional European approach’ has been to ensure pluralism in the audiovisual sector, among other ways, by protecting the broadcasters from control by certain private interests or the state and by striking a balance between the interests of private broadcasting and public-service broadcasting. The report contrasts this approach with that adopted in the United States: ‘…it has never been assumed in Europe that the broadcasting and audiovisual sector should be treated as an economic subject only or that the market would per se guarantee a pluralistic service’.

The stress that this report places on pluralism is welcome. At the same time, however, the High Level Group’s report stresses the need to promote the new technologies and the need to encourage the market players who are investing in them. The report contains more than a hint that the control of media concentration may therefore have to be de-prioritised. Concluding the section on ‘technological developments and their impact on the audiovisual media’, the

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60 The Digital Age: European Audiovisual Policy. see note 4.
61 The High Level Group is composed of a further nine members with expertise in the audiovisual field, some from the private sector, others from the public sector (ie. regulators and public-service broadcasters).
62 The Digital Age: European Audiovisual Policy, p. 6.
report notes that ‘abuse of dominance must be avoided, both for democratic and economic reasons’. However, the report immediately goes on to suggest that ‘the Commission must be prepared, in its application of Community competition law, to take account of the special characteristics of the audiovisual sector. It must send a clear and consistent message of encouragement to those market players who are developing digital television services, without whose investments the digital television market, which is important for Europe, cannot prosper’.64

As for the future of public-service broadcasting, the report notes the increasingly controversial nature of the issue, notably the ‘wide divergencies between the views expressed by public and private broadcasters on their respective roles and on the public policy approach that should be taken at the European level.’ Members of the High Level Group itself came variously from public and from private sector backgrounds, therefore it is hardly surprising that ‘different points of view were expressed in the group’. What emerges therefore rather fudges any attempt to resolve the core dispute. On the one hand, the report underlines what would seem to be its support for the comprehensive role of the public-service broadcasters in providing a diversity of programme types, including the supply free of charge of quality entertainment. The report states clearly that public-service broadcasters should be involved in the new digital developments.65 On the other hand, the report points to the need to clarify the basic principles and funding arrangements for public-service broadcasting. Member States, it suggests, should be called upon to define their public-service broadcasters’ public interest remits.

**Conclusion**

This paper has explained how DG XIII – in very close relation to the telecommunications industry – attempted through the convergence Green Paper to establish an EU agenda for further radical reform of communications regulation towards what might be termed an economic and technologically deterministic ‘telecommunications model’. The impulse for radical change was moderated to some extent first by the involvement of DG X – representing traditional cultural and broadcasting policy concerns - and then checked by the finding that the balance of opinion that became clear from the consultation exercise launched by the convergence Green Paper was in favour of an evolutionary approach. Nonetheless, the final draft of the convergence Green Paper retained a marked pro-market bias and notwithstanding the findings of the consultation exercise it can be argued that the Green Paper undoubtedly helped frame the convergence policy agenda in a pro-market, liberalising direction, by focusing on chosen themes, by posing some searching questions, by avoiding certain other issues.

One major omission – on the grounds that it was the being dealt with by ‘other Community action’ – was the control of media concentration. This paper identified a trend towards national-level de-regulation of the control of media concentration as governments accepted industry arguments that the expansion of large communication concerns was required for their international competitiveness and to encourage technological innovation. At the EU level, however, ‘other Community action’ was failing to produce an EU standard model of media

64 _Ibid._, p.p. 11-12.
concentration control. Meanwhile, the convergence debate – with its focus on market and competition policy solutions – threatens to marginalise the EU media concentration debate.

Given the trends towards media concentration and de-regulation of the rules constraining it, the role of public-service broadcasting – with its mission to reflect and promote pluralism - will be a crucial counterbalance to the concentrated media power of large private enterprises. That public-service broadcasting has a certain role in the future is widely accepted at least at the moment. The increasingly hotly-contested issue, though, remains: What kind of public-service broadcasting? Commercial broadcasters clearly want to see the public-service broadcasters concentrating on providing a more residual service than has been traditional in Western Europe. Their compliants to DG IV, on competition grounds, are testament to this ambition. In this connection, Murdoch used the 1998 European Audiovisual Conference in Birmingham as the most recent occasion to remind the world of his views about the BBC. In his view:

‘..if unhealthy concentration does exist today, it exists not in the private sector but with state broadcasting. In the UK no one challenges the power of the BBC, nor other countries their own state broadcasters. …..The BBC is by far and away the biggest media owner in the UK. With the combination of its £2 billion annual guaranteed income from a compulsory poll tax and vast commercial freedom there is absolutely no chance of its being driven out of business by satellite broadcasters or anybody else’.

For its part, the BBC clearly conceives an expanded role for itself in the digital era and worries that its annual income – currently pegged to the retail price index – will not be adequate to ensure its ability to maintain a comprehensive public-service presence in all the areas it wants to. The UK Broadcasting Act 1996 acknowledged the key role for public broadcasters in the digital era by giving the BBC preferential treatment in the distribution of frequencies for digital terrestrial television. Partly, this policy must have been motivated by the UK government’s desire to see the successful launch of digital terrestrial television; there was a need for programme services for the new digital ‘multiplexes’ and the BBC is, after all, an attractive ‘brand’ that could be expected to entice viewers to ‘go digital’. Partly, this policy was motivated by the government’s recognition of the BBC’s crucially important contribution to UK broadcasting production (incomparably greater than that of the new private operators); indeed the BBC is undoubtedly seen by policy makers as a ‘national champion’ in the digital age. Partly, though, it was also motivated by the BBC’s core public-service role as a guarantor of pluralism. Of course, the ability of the BBC – and Europe’s other public broadcasters – to face the challenge of the digital age will ultimately depend on their being adequately financed. That is precisely why the EC debate about their future funding is so important, not to mention DG IV’s future rulings.

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