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Specific Concerns of the Constitutional Law Regarding Digitalisation*

In contrast to the introduction of commercial television from Western Europe – heavily influenced by the Constitutional Court – the shift to digital broadcasting is not primarily directed by constitutional considerations. It seems that economic advantage – perceived or real – relating to the shift, pressure emanating from the European Union, together with the obligations of the international management of broadcasting frequencies proved sufficient for the digital media system to be developed.[1] However, the lack of conflict in matters of fundamental rights can also be explained by the fact that the decisions passed by the constitutional court and basically accepted in the 1980s (which created the interpretational-dogmatic foundations of media freedom) provided a suitable framework for the development of the digital media system – in spite of their having been born in a completely different technical and economic environment. At the centre of the discussion on the regulation of digital media there remain such old issues as ensuring pluralism, problems of access, the constitutional position of the civil service, the liberalisation of advertising regulations and the evolution of effective means of child protection.

Digitalisation and all future technical and economic processes based on this (convergence) exercise, with no conceptual change, will strongly influence the whole constitutional regulation of the media and the extent of state intrusion into the operation of the media. The multiplication of available services and increasing interactive potential particularly affect the framework of constitutional accountability. The task of the legislator is primarily to find answers to the old questions which fit into the new, digital environment. This study examines, based on West European examples, the tasks and opportunities related to the development of the media system. It attempts to place specific regulatory issues into an integral interpretation framework relating to the freedom of the media, and it also attempts to evaluate the principles and solutions related (or, in many cases, defined) by European Community Law from the point of view of the freedom of the media. In many cases this leads to a reconsideration of the interpretational framework.

Digitalisation has accelerated the process which can be described as the liberalisation of the media market and has made it more noticeable, a process which had already, in practice, begun much earlier with the spread of cable and satellite broadcasting. The first step in the process is, perhaps, also the most important one from the constitutional point of view: the disappearance of the state's media monopoly gives an opportunity to private (commercial and civic) broadcasting companies to enter the market. This step was implemented by the constitutional court in the majority of West European states, and these judgements create, at the same time, a framework for commercial broadcasting.[2] The multi-channel broadcasting model involving real competition from the media market and with higher audience numbers with more choice evolved in the 1990s, mainly with the development of cable and satellite technology, further tightened the ability of both the state's legislators and controllers to create a media system and constitutional space. Digitalisation basically develops the multi-channel broadcasting model still further, and, as a result of these, there will appear even more multi-channels. Interactive digital content can considerably modify the media habits of the audience in the longer term but digitalisation will probably not change at all "the structure nor the conditions of ownership of the television branch"[3]. The European Union Committee summarised this in a consultative document in 2003 on Supervising Community Policy for Television to the effect that: "the main patterns of the audiovisual sector: business models, transmission modes, consumer, consumer electronic goods, etc., have remained largely constant in recent years after undergoing deep changes in the 1990s."[4] The digital shift has not questioned the basically dual structure of the media system in any of the countries which undertook media regulation reform.

1. The digital shift as the means of implementing constitutional media regulation

It is widely accepted that the reason for detailed regulation of radio and television broadcasting is the result of a frequency shortage, but that this shortage will disappear with the digital shift. The frequency shortage, however, is not the basic reason for the need for media regulation and no more than one factor in its scope.[5] In addition, if the constantly growing frequency needs of the telecommunications sector are taken into consideration, the shortage would at most be eased and the importance of its regulating role would decrease. The reason for regulation is, rather, the constitutional obligation of the legislator to

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construct a framework for the operation of the media system which guarantees the effective presence of a variety of opinions and a choice of content, the broadest range of perspectives in society. Variety is very necessary if mature individual opinions and individual expressions of opinion are to thrive, and so, for "the normal process of progressive social changes" [6]; the freedom of the media operates as a function of the freedom of opinion.[7] The constitutional regulation of the media – which is basically related to the instrumental interpretation of the freedom of opinion[8] - will in time oblige the legislator to create a plural media system which guarantees members of society the opportunity to choose from among various opinions and values to form their own opinions.

The requirement of pluralism does not mean general authorisation for the legislator to interfere into the media system. What is needed is a regulatory aim which requires regular inspection of the regulatory tools appropriate to the current characteristics of the media system as well as to a given medium: "the specific obligation concerning the development of the media system depends on how endangered the processing ability is.[9] However, one consequence of establishing a plural media system is that controlling intervention into the operation of the media is more limited. State interference is only necessary if a plural media system and democratic public opinion – according to the Hungarian Constitutional Court – are absent. The measure of press freedom depends on the features of current mass communication, and the question of whether the regulation referring to a permission system providing the marketization of broadcasters can be regarded as necessary in a democratic society has been answered by the European Court of Human Rights (ECHR) according to the analysis of the precise technical and economic circumstances of media service published in *Informatzionsverein Lentia*.[10]

As a result of the digital shift, a media system has come into existence which will have a much greater opportunity to implement a constitutional ideal based on the free competition of opinions than had the analogue system, and it will produce "democratic public opinion" with even less state interference than today". From this we can infer the constitutional obligation of a state, whose task is not to inhibit, but rather to guarantee the legalisation of opportunities latent in the technical development.

The ECHR in its Radio ABC judgement of 1997 found it "surprising" that only two frequencies were available to broadcast commercial radio in the region in question[11] The Court described this decision of frequency management as a limitation of freedom of opinion, although, finally, it did not pronounce on whether the limitation could be reconciled with the Convention on Human Rights. From the fact that the Court expressed this doubt it can be inferred that the state's responsibility extends to guaranteeing the technical conditions for broadcasting as well as ensuring the effectiveness of the technically available capacity.

The state's responsibility related to this primarily occurs in connection with the enforcement of those rules that inhibit the exploitation of technical opportunities. These rules provide speaking opportunities for fewer people in all cases through a separate medium than could be available due to the features of the system. Even if there are further constitutional reasons for regulating entry into the market, in maintaining these regulations the legislator hinders the subjective right of freedom of opinion more widely than necessary. If we examine freedom of opinion from an objective/institutional standpoint, we can conclude that the legislator uses such regulatory instruments for creating a plural media system and for processing "democratic public opinion" which realise constitutional regulatory aims without interruption. With the artificial restriction of broadcasting capacity, a situation emerges which violates both the freedom of opinion and media freedom.

It cannot be claimed that the expansion of broadcasting capacity in itself is effective in guaranteeing the development of a plural media system, since the variety of opinions and choice of content are not a necessary consequence of a large number of services.[12] The expansion of capacity significantly increases the opportunities for certain broadcasters to enter the market and, with this, the opportunity for different opinions to appear.[13] Creating the conditions ensuring the expansion of capacity is a solution that limits the development of the plural media system to the minimum and limits individual freedom of opinion the least. Even if it is not sufficient in itself to guarantee the compliance of the aims of constitutional media regulation, it is still a precondition for moderating further regulation. From the regulation of the media, in addition to mitigating the restriction on available capacity, it should even be the state's responsibility to promote the formation of the most appropriate technical environment possible with the available tools – for example, by supporting and participating in appropriate international agreements and by encouraging universality. All in all, the state should, in every way possible, contribute to developing conditions which limit as much as possible its own freedom of movement in relation to limiting freedom of opinion.

2. The sharing of terrestrial broadcasting capacity

It is unquestionable that digitalisation greatly contributes to ensuring pluralism in the media system with the multiplication of the range of services and with decreasing regulatory interference it increases the opportunities for the public appearance of different opinions and values. However, the expansion of capacity has brought about the biggest change in terrestrial broadcasting. Media policy and media regulation in the analogue environment dealt with terrestrial broadcasting as a platform of major importance. In the analogue environment, terrestrial broadcasting meant access to the largest possible audience for media companies and provided free content for the audience. This platform was highly important from the state's point of view, since, with the sharing of capacity and by its decision on the conditions for broadcasting licences, the state was able to enforce its political ideas more firmly than with other platforms.

In a digital media system the terrestrial platform loses its importance – to a varying extent, depending largely on the cycle of the digital shift. Terrestrial broadcasting is, to some degree, not attractive to broadcasters since the audience which has access to content from only this platform is decreasing. Moreover, that sector of the audience which can be reached has less purchasing power. Digital technologies provide more and more effective ways for the audience to avoid commercials, and this encourages the broadcasters to develop new market models and alternative financial solutions. The appearance of terrestrial pay-channels also re-interprets the importance of the terrestrial platform. The analysis by Marsden and Ariño shows that, even though the broadcasting networks which are effective substitutes for terrestrial broadcasting, it is not likely that universal access could be provided by the digital platform without the terrestrial broadcasting platform.[14] The definition of the function of a digital terrestrial platform eventually requires a regulatory decision: this platform can provide a certain basic information service with relatively limited content or, with a wider choice of content it can try to compete with the cable- and IP-based platforms.[15] In the latter case, such a process develops when the state gradually relaxes the conditions for market entry for certain content providers.

The legislator has to take a stand on the question of whether the state – through some authorised institution – should provide the

available capacity for certain broadcasting services in a digital media system or whether platform operators will be authorised to choose content services. Many examples can be seen both world-wide and in Europe for both solutions and also for a mixture of the two.[16] Both solutions can be accepted from a constitutional point of view. Permission is basically one of those regulatory instruments which bring the practice of media freedom into line with technological potential.[17] As digital terrestrial capacity is not available with unlimited access, and as it falls within the jurisdiction of the state, then some method of selection is constitutionally justified. A procedure which ensures that applicants' have equal opportunities is, after all, one of the instruments for developing a plural media system, independent of the fact that, as a result of selection, the broadcaster is authorised to provide either a content service or a content service package.

In respect of the selection of a platform operator, the whole structure of the content service is formed not by the regulatory agent but by the platform owners themselves - and eventually by the power of the market. The regulator has a further opportunity to influence, indirectly, the content offered with the permission of the platform operator, and foreign regulatory solutions also ensure that this opportunity is used.[18] Due to technical developments such as new compressing technology and transmitter network architecture, the closer the number of content services transmitted on a terrestrial platform comes to the content available on different transmitter networks, the less can permission for services be explained. In addition, this solution places great responsibility on the regulatory agency in connection with the development of economically viable services as well as of a strong market. Developing a media system can have more than one constitutional solution[19], and the regulatory sharing of terrestrial capacity – in addition to conditions which provide equality of opportunity in selection – can be maintained in relation to certain content services. Based exclusively on a model representing market entry, the measure of intervention cannot be judged; in order to do so, a specific regulatory system for market entry should be considered.

The operators of terrestrial digital platforms can acquire the ability to use the so-called multiplex capacity. The multiplex service is basically a technical service which transforms the electronic signals of different content services into a digital signal branch. This procedure concerns the realisation of the aims of constitutional media regulation if the broadcaster himself can decide on sharing the digital capacity of certain multiplex capacity and about the selection of the content service contained in a multiplex package. This solution is followed by the British, Austrian and Dutch regulators, can be found in the law of certain German states (Länder) and partially – in respect of one part of broadcasting capacity – in Italian and Spanish regulation.[20] A tender covering the management of the platform and the associated sharing of frequencies also guarantees validity from the point of view of media policy regarding multiplex services and is the last point of intervention into the indirect formation of the media market.

In constructing a tender based on foreign examples, the conditions are partly technical (for instance, the range etc of coverage, the network-building schedule as well as requirements of technical quality) and partly they reinforce the consumers' interests. In addition, points of view also, typically, appear on the platform which touch upon the content offer which appears on the platform, which create obligations either indirectly connected to the multiplex offer – concerning variety and preferences in national content – or stimulate clear and effective competition among content broadcasters. Permits relating to terrestrial platforms still provide the opportunity for the state – for regulatory purposes – to regulate separately the relationship between platform operator and content broadcaster in respect of a specific platform operator. Multiplex licences *must carry* relevant instructions for content broadcasters offering conditions which are fair, parity-based and non-discriminatory in providing access, relevant to public service programme broadcasters, perhaps for capacity provided for other analogue programme broadcasters, for programme broadcasters and other content services, technical quality, an electronic programme guide and also for the variety of content offers.[21]

3. Regulation of the relations between platform operators and content broadcasters

The disappearance of the permit, which is a public law requirement for media market entry, implies that the digital media system is, after all, made up of private legal contracts between private people. A given platform's operator – whether digital terrestrial, cable, satellite or other – himself decides on the sharing of transmission capacity, on the selection of content services appearing on the platform and on the conditions for appearing on the platform. The state fulfils its obligations related to the developing of a plural media system by using serious, balanced influence over matters involving private rights instead of using public rights and public power. The regulation of a digital media system is a special combination of public and private law regulation.[22] The importance of platform operators, who are the compilers of programme packages and specialist editors, derives from the fact that, in spite of the pluralism of the media system, the wide range of content offers as a whole can decline in contrast to the large number of content broadcasters, if programme packages are unbalanced and discriminate against certain opinions or content types – that is discriminate by exclusion from programme packages, by discriminative pricing in relation to broadcasting quality. The European Union's codification limits the powers of member-states in relation to regulatory tools, so avoiding risks arising from this situation.

One of the widely used features for regulation between platform operator and content broadcaster is the so-called "*must carry*" obligation. According to the *must carry* regulatory model the platform operator has to use part of the capacity for transmitting programme services which are specified by the regulator, whilst the remaining capacity – whilst still observing any further restrictions on capacity sharing – can be used freely.[23] The general measure of constitutional media regulation cannot be overlooked when defining the obligations of *must carry*: regulatory intervention is only necessary when the aims of constitutional media regulation cannot be achieved without interference. The arrangement of programme packages is basically done according to the editorial freedom of the platform operator. No content broadcaster has the right to appear with its service on any platform, with the possible exception of the public services broadcaster. Therefore, the *must carry* obligations are adjusted to the interests of the audience and of the plural media system, not to the content broadcasters, and they basically serve the aim that the minimal content offer – which is not overextended by public service and local content in this case – necessary for individual opinion-forming could reach the audience on every platform. The question of whether the diversity of the content offer makes the extension of *must carry* obligations into certain commercial services necessary, depends partly on the features of the given media system – for instance, on the position of the public service programme broadcasters, from the obligations connected to certain commercial services providing the progress of inner pluralism – and partly on the regulations related to the sharing of the remaining

capacity. According to *Reinemann* there is a "correlative relation"[24] between the *must carry* obligations and the opportunities related to the sharing of the further capacity left for the platform operator: "The more the constitutionally required diversity of opinions on the area of *must carry* takes place, the more the requirements related to areas outside *must carry* can be decreased."[25]

The regulatory extension of *must carry* is basically influenced by the public broadcasting law.[26] According to the policy of universal broadcasting, transmission requirements can only affect those programme transmitting networks that are used by a considerable proportion of the end-users as a main tool for receiving radio and television programmes. The obligation has to be rational, has to be related to clearly defined public aims, has to be proportional and transparent and it must be inspected regularly. The public regulation related to transmitting obligations does not hinder the validation of constitutional points of views.

Further regulation of the relationship between platform operators and content broadcasters is only justified if the lack of such regulation would endanger the development of the plural media system. Especially in foreign regulations, such a requirement related to terrestrial platforms appears in which the platform operator guarantees the conditions of fair and effective competition among content broadcasters and also uses conditions based on equality and fair-play for the sharing of capacity.[27] German regulations require that the fees to be applied should be published in connection with the sharing of digital cable capacity.[28] Such orders increase the implementation of diverse content offers with the transparency of capacity sharing and with a definition of the basic conditions, but they are neither sufficient nor necessary for its implementation. The non-discriminatory economic conditions of capacity sharing do not, in themselves, ensure the appearance of non-marketable content. At the same time, in a multi-channel and "multi–platform" media model the limitation of conditions used for economic content broadcasters is constitutionally not essential since increasing capacity gives opportunities to more broadcasters to enter the market (at least, in theory) and the large number of content broadcasters on certain platforms considerably reduces the danger of harming diversity, even without this limitation.

Beside the stressful transmitting obligations of network operators, the new British Communication Law also regulates *must offer* obligations so that all the relevant digital services – used as a main tool for receiving television programmes by the majority of end-users – are broadcast on telecommunication networks to reach a wider audience.[29] The *must offer* obligations are basically stressful for those content broadcasters who – as commercial broadcasters – also fulfil public service obligations.[30] The appearance of *must offer* can be traced back to the fact that digitalisation strengthens competition among different platforms and at the same time the implementation of the start of a new platform can be a refusal of access of content for the new platform's operator by the broadcasters offering the highest audience range content service. A successful platform cannot be started without such content. The new platform's operator's intention of access to the content is only supported constitutionally if the lack of access endangers the given programme package and the diversity of the platform. According to this, the platform operator, besides the public services, can perhaps succeed with such an intention against a content broadcaster who has to endorse inner pluralism.

European broadcasting regulations intervene very deeply in regulatory questions originally concerning the area of media regulation, when the European Commission 2003/311/EC recommendation[31] defines a market needing the, probably *ex-ante,* broadcasting regulation as a "broadcasting transmission service, to deliver broadcast content to end-users." (market 18) According to this – the broadcasting – regulability in broadcasting law can place specific obligations on the programme broadcaster – as on the electronic broadcaster service – which can, in a specific market, exercise major power. The programme broadcaster with major market power can be obliged by the regulatory agency to ensure access which is transparent, non-discriminative and at controlled prices. Regulation, however, carries strong interpretation difficulties: the access obligation ordered by the regulatory agency is valid, according to the broadcasting law definition of "access", for the availability of the features and/or services in order to give electronic broadcasting service.[32] - but the programme broadcasters acquire access to the programme broadcaster network to provide a programme service and not an electronic broadcasting service. Access policy excludes the programme broadcasters', the content broadcasters' intention of access.[33] In the practice of the law, this contradiction is not present; the national regulatory agencies fulfilled their obligation for market analysis and in many cases punitive obligations were imposed on the programme broadcaster.[34]

Behind the interpretation problem explained above lies the unrecognized coinciding of the viewpoint of broadcasting and of media regulations. In the view of the "market 18" broadcasting law – the relationship between the programme transmitters and programme broadcasters[35] – is directed to deal with matters of broadcasting law, ultimately the conditions for market entry, and so regulation touches upon the implementation of the aims of constitutional media regulation. The fact that regulatory instruments formally belong to broadcasting law does not mean that specific means are not appropriate for confirming the constitutional position. As public broadcasting regulation is exclusive, in the sense that relationship networks under its regulation cannot be applied under other regulations in accordance with the public law; in the case of interruption this is necessary from a constitutional point of view but is not covered by public broadcasting regulation, and so the two points of view and norm systems come into conflict with each other. Such conflict can result if the constitutional point of view requires further regulation concerning programme broadcasters who have no major market power, or if exclusively economic-type features operating as the basis of market power do not define precisely the programme broadcasters drawn under the regulation from a constitutional point of view. The situation is worse if the obligations that can be imposed on the programme broadcasters according to broadcasting law are not suitable or not sufficient to validate the constitutional point of view. Partly, the earlier *must carry* obligations are to avoid these possible conflicts that can be ordered according to the broadcasting law independently of market power. The conclusion can be drawn in relation to *must carry* that the danger of injuring diversity is low on multi-channel platforms; it makes it possible in respect of the real features of a media system that the actions of the regulatory agency related to market 18 are appropriate for the measure of the constitutional media regulation. However, this is not sufficient reason for the decision of the European Committee – which was probably not fully thought through – to order the application of the regulatory system used among the transmitting broadcasters for dealing with the relationships within themselves for defining the conditions of entry into the market for programme broadcasters.

3.1. The "bottle-neck" of digital programme broadcasting

A generally accepted topic of the discourse on digital media was the fact that the diversity of digital media systems is primarily defined by access opportunities. Access can be interpreted as accession to different elements

of the infrastructure for content services, and this is the basic condition for the audience to acquire different information. Access could become – again[36] – an important keyword for media regulation since a defining feature of digital television is the expansion of the media value-chain with such new services – standing in the centre of disputes on digital television regulation – which function like a peculiar, unavoidable filter between content broadcaster and audience. The bottle-neck feature of the services in question derives from the fact that these are the "control strategic points"[37] of the digital television infrastructure; "we are talking about such services, the availability of which is regarded as of public interest from the point of view of access conditions."[38] Each of these services crucially influences the content services' chances to reach the public, and thus also the content offer available for the audience. The access opportunities of the member of the market, eventually indirectly effect the implementation of the aims of constitutional media regulation, the development of the plural media system.[39] Clearly, in such a position are the platform operators – discussed in the previous paragraph – , and companies dealing with the composition and marketing of different programme packages. The media value-chain is further extended with additional elements also influencing access. These are mainly conditional access systems, application programme interfaces and electronic programme guides.

Conditional access systems make possible the coding for paying digital content and access to the content for the entitled licence holders. The use of different digital content services supposes the provision of such a surface (application programme interface) that secures data change – mainly interactive – between a given service and the device. The electronic programme guide makes it possible for the user to choose from different digital contents. These services – also known as *middleware* services – are considered by European telecommunication regulation to be part of the telecommunication infrastructure, and regulation keeps these services within its power. Two instruments are provided for their regulation. The first is an instruction for access guaranteed by conditions which are independent of the power of the broadcasting market, which are fair, appropriate and non-discriminatory; the second is the support of the application of open rules which safeguard permeability among the technical instruments. These solutions greatly differ from the general concepts of public broadcasting regulation, which affords the opportunity to intervene in the relationships among market players and in the relationships with consumers, but only in such exceptional cases when intervention would promote effective competition, depending on the company's position in the market. The policies themselves explain the different regulations as being necessary for ensuring "the free flow of information, media pluralism and cultural diversity."[40]

Community regulations lay down, in the case of conditional access systems, of application interfaces and of electronic programme guides that it should be possible for member states to ensure that enterprises providing these services - access to services – for all programme broadcasters under fair, appropriate and non-discriminatory conditions.[41] Consequently, the regulation stipulates that access should be obligatory for specific content broadcasters, equality of opportunity in defining the conditions of access, but it does not necessarily guarantee the same conditions for content broadcasters with different types of content. Feintuck and Varney however, point out that the more precise contents of these conditions are defined neither by public regulation, nor by law practice: "these obligations can be nailable for the contractors, but cannot be well-defined enough to assure the parties on how the regulation influences the results of their negotiations."[42] As a result, it is difficult to judge whether the requirements mean the effective regulation of certain services.

From a constitutional point of view the regulation solution appearing in community law primarily raises the question whether defining the conditions of access in such a way would mean a sufficient guarantee for realising diversity of content. In spite of the fact that access policy specifically refers to media pluralism as the reason for regulation, regulation is, basically, an economic-based approach and not basic law-based.[43] The fair, appropriate and non-discriminatory conditions of an agreement between companies in themselves do not necessarily lead to diversity of content. They do not guarantee the possibility for all opinions to appear, and, in addition, for the appearance of minority opinions and the of content appropriate for the interests of a narrower audience disadvantaged by the non-discriminatory conditions. The "fair-play" and the "appropriate conditions" in relation to pluralism can be interpreted in such a way that the conditions of access are defined by the social and communicative importance of the content service and not by economic significance. According to Reinemann, this regulatory model only accords with freedom of the media with such an interpretation where access has to be secured based on the measure of diversity.[44] In his opinion this would not only result in assuring the access of certain content broadcasters based on the equality of opportunities, but also in the "active support of structurally disadvantaged communicative values"[45], and the definition of the conditions of access of the content services cannot exclusively be based on the economic interests of *middleware* services. Community regulation, therefore, does not exclude this interpretation, but the legislator and the regulatory agency of the member state has a great responsibility to ratify the constitutional point of view. Varney shows that, in connection with this situation, member- state implementation "creates dissatisfaction" and national legislators failed to execute the necessary actions for guaranteeing diversity.[46]

According to the EU Commission, the requirement for a successful digital broadcasting (TV services) is to create access to *middleware* services for everyone, the formation and application of common.[47] Individual arrangements which cannot cooperate and are attached to specific broadcasters will lead to the collapse of the market; they harm the interests of the consumer (since a change of broadcaster means extra cost, which eventually forces the household to buy new equipment) and they will finally block improvement to the digital broadcasting market. The openness of platforms significantly determines the range of available services and of applications, and with this it also determines consumer behaviour and market opportunities. Considering all of this, electronic broadcasting framework policy forces member-states to encourage the operation of open platforms. Member-states have to encourage the content broadcasters to use open application programme interface, the manufactures of appliances to make appliances that use open standards, the owners of the application programme interface to give incentives to provide the information necessary to cooperate with the application programme interface in a honest, sensible and non-discriminatory way. Today there are more than ten European countries where the Multimedia Home Platform open standard is used.[48]

4. Ways for competition law and broadcasting law to create a media system

The processes and phenomena described last paragraph finally lead us to the question of whether the aims of constitutional media regulation can be realized by means of competition law or of broadcasting law. The legislator has considerable freedom to choose specific regula-

tory means to implement constitutional aims, and the constitutional scale exclusively allows post-control concerning regulatory means, ranking specific means besides proportional intervention whether they are suitable or not for developing a plural media system. From a constitutional point of view – regardless of formal, but incidental, codifying requirements – it is not significant whether specific instruments can otherwise be found in media law, in broadcasting law or in competition law, and also whether specific regulatory competences related to these are exercised by a broadcasting agency, a competition agency or an agency formed from their integration. As opposed to competing fields of law, the difficulty of the media law in a narrow sense which is, typically, related to the media-act, is greatly due to the fact that, in contrast to the broadcasting law and competition law which are used to numerical, measurable results, the efficiency of media regulation, as well as the realization of the plural media system, cannot be calculated objectively; the realisation of the specific criteria of the aims of regulation (defined for the most part on the basis of assumptions) cannot, in general, be determined.

In many cases, competition law – both at community and at member-state level – appeared to be an effective means for developing a plural media system.[49] Today it is widely accepted – although this is based rather on supposition than measured data – that effective market competition and implementation of content diversity have no indirect relation.[50] According to authors who are competent in media regulation, the ineffectiveness of general competition law is currently based on the "cartel- and media law basic aim divergence"[51]. Whilst the aim of general competition law is to protect effective market competition; the evaluation and economic superiority of power endangering this aim is based on economic considerations, and the branch regulation of the media eventually tries to create conditions to realise a diverse content offer. The pluralism of opinion can also be endangered by actions and situations which cannot be condemned by competition law, e.g. the endogenous growth of the enterprise; nor does effective competition guarantee that certain servers represent different political, ideological and cultural viewpoints. However, several foreign examples show that the branch regulation of media market concentration approaches general competition regulation - at least in its regulatory methods.[52]

As we could see, the European broadcasting regulation expanded its own authority to a significant part of the regulatory means which basically influence the media structure. This fact, together with a number of incidental conflicts between broadcasting law and the expectations of media regulation deriving from it, can also originate from one of the regulating principles of the regulation of the info-communicational sector. From the second half of the 1990s this regulatory principle became a major factor in the discourse about the regulation of the info-communicational sector and it significantly influenced the development of the European regulation of information-communication. The preamble to the guidelines, as well as the definition of the objective effect of the regulation, guarantee that "the frame regulation (...) does not extend to the content of services on the networks of electronic information-communication provided by the use of electronic information-communication services, so on the financial services and on services in connection with certain information society.[53]

The consistent separation of infrastructure and of content regulation cannot be realized. The European Commission itself points out that, while broadcasting networks and associated services, independently of technology and regardless of transmitted content, could be regarded under the same conditions, at the same time content has to correspond with the features of the given content service and the aims of the general interest connected to this service.[54] At the "intersection" of the two regulations a further regulatory problem arises which is indirectly connected to the development of the media system: the content appearance in the infrastructure, that is, access of the content broadcaster to the capacity available for the infrastructure operator. The sharing of capacity used for the transmission of content services crucially influences the dominance of viewpoints of constitutional law and the aims of media policy related to the media system. Regardless of whether regulation takes place either via formally information-communication or via media-law means and instruments – or even via those of competition law or copyright law – these constitutional requirements have to be fulfilled. Although only in a preamble of the framework guidelines, public regulation takes these requirements into consideration: "the separation between the regulation of transmission and the regulation of content does not prejudice taking into account the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection."[55]

The separation of content and infrastructure regulation is not implemented consistently at a further point in community regulation. "The access guidelines also refer to "the offer considering the selling of the content service package of the radio- or of the television programme" as a content service, which is not covered by a common framework regulation of the electronic broadcasting network and of the electronic broadcasting service.[56] At the same time, directives of neither community law nor of that of the member-state can separate the activities of the platform operator in terms of constructing a programme package and transmitting signal. The construction of the programme package is a "secondary content-selecting, an aggregating service"[57], a special content service, that the construction of a special content regulation should be applied to, which defined the framework of editing activity. Currently, however, this content service which bears the features of the content servers and of the editor is subject to the regulation aiming at the regulation of infrastructure. The *must carry* instructions and the addressees of the access obligations related to the market 18 regulation are "enterprises serving information-communication networks used for the distribution of television and radio programmes" in spite of the fact that these regulatory means do not affect any activity of signal transmission – which, in a given situation, is performed by the same enterprise – rather, the activity of putting together a programme package. Consequently, with the separation of content and the regulation of infrastructure (which was performed consistently and carried out beyond the level of the underlying principles in detail regulations) even the virtual conflicts of the means and competencies of media regulation would be avoided, and later, from the point of view of the development of the media system, it is constitutional law, neither community law nor economic law which would be decisive. This would create a clearer situation, even if regulatory intervention, in line with the point of view of broadcasting law, basically fulfils the rationale for intervention – i.e., that it is necessary from the constitutional standpoint.

Varney, to avoid such conflicts, offers a solution which goes outside the regulatory problems of the info-communication sector: he finds the extension of community competencies necessary in order for community law regulation to take into consideration the public policy dimension related to media regulation.[58] The conflicts of different systems with different points of view could be avoided if the legislator during implementation by member-states would carefully and deliberately consider the constitutional views with the development of the media system; he would take the opportunity provided in community law by the clause on Culture in the Treaty of Rome which refers to pluralism and the public interest.

Notes

* The Hungarian State Eötvös Stipendium made possible the comparative analysis. The proposals concerning the revision of the Regulatory Framework and the Commission's new Recommendation for market definition were not published at the closing date of this essay. The new Recommendation doesn't regard the market 18, as a market, which needs ex ante regulation. Although the new definition of "access" solves some problematic issues, generally, the constitutional concerns, which are shown in this essay, still exists.

1 The European Union Committee recommended to the member states – but did not instruct – that the beginning of 2012 would be the last date for analogue transmitting. The RRC06 Radio Telecommunication Conference and the agreement concluded in June 2006 require the end of analogue transmission (UHF can be used until 2015 and VHF until 2020) and so this tightens the opportunities for a national regulatory agency in relation to the necessity for the shift.

2 For a resumé see: Holznagel, Bernd:. Rundfunkrecht in Europa. Auf dem Weg zu einem Gemeinrecht europäischer Rundfunkordnungen. Tübingen, 1996.

3 Brown, Allan: Implications for Commercial Broadcasters. In: Brown, Allan - Picard, Robert G. (eds): Digital Terrestrial Television in Europe. London, 2005 p. 99

4 CEC – Commission of the European Communities: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – The future of European Regulatory Audiovisual Policy [COM (2003) 784 final]

5 Hoffmann-Riem, Wolfgang: Regulierung der dualen Rundfunkordnung. Baden-Baden, 2000, p. 91
Marsden, Christopher - Ariño, Monica: From Analogue to Digital. In: Brown, Allan - Picard, Robert G. (ed) op. cit. p. 24

6 McQuail, Denis: A tömegkommunikáció elmélete [The theory of public communication]. Budapest, 2003 p. 153

7 The concept of *„dienende Freiheit"* [serving freedom] was introduced by the German constitutional court (see BVerfGE 57, 295, 320.) and was consequently put into practice. The concept has also influenced the national constitutional court's practice, and it even appears in the practice of the European Court of Human Rights.

8 The instrumental and constitutive interpretation of freedom of opinion see: Bayer, Judit: A háló szabadsága. Az internet tartalmának szabályozási problémái a véleménynyilvánítás szabadsága tükrében. Budapest, 2005
Halmai, Gábor: A kommunikációs jogok. Budapest, 2002 pp. 26-37

9 Hoffmann-Riem, Wolfgang op. cit. p. 109

10 Case of Informationsverein Lentia v. Austria, Ser. A 276 (No. 36/1992/381/455-459)

11 Case of Radio ABC v. Austria (No. 109/1996/728/925)

12 See later

13 Wagner, Christph - Grünwald, Andreas: Rechtsfragen auf dem Weg zu DVB-T. Planungssicherheit beim Übergang zur digitalen Rundfunkübertragung. Berlin, 2002 p. 54

14 Marsden, Christopher - Ariño, Monica op. cit p. 23

15 BIPE Consulting: Digital Switchover in Broadcasting, Final Report (Study for the European Commission) http://europa.eu.int/information_society/topics/telecoms/regulatory/studies/documents/final_report_120402.pdf [01.12.2007] According to the report, even 300 programme services transmissions can be handled by terrestrial transmission in addition to the appropriate technical development which could mean a real alternative for satellite platforms also.

16 About the regulatory solutions of the EU Member States see Analysys Limited: Public policy treatment of digital terrestrial television (DTT) in communications markets. 2005 http://ec.europa.eu/information_society/policy/ecomm/info_centre/documentation/studies_ext_consult/index_en.htm [01.12.2007.]

17 See 37/1992. (VI. 10.) AB regulation.

18 See later

19 See BVerfGE 73, 118, 159; 37/1992. (VI. 10.) AB regulation.

20 In other countries – for instance in France, in Sweden, in Finnland – the selection procedure still considers certain content services.

21 See the English Broadcasting Act 1996 Section 8, and the Austrian Privatfernsehgesetz § 24

22 Feintuck, Mike - Varney, Mike: Media Regulation, Public Interest and the Law. Edinburgh, 2006 p. 224

23 Reinemann, Susanne: Zugang zu Übertrtagungswegen, Franfurt am Main, 2002 p. 146

24 After Hubertus Gersdorf see ibid p. 147

25 Ibid p. 147

26 The Directive of the European Parliament and the Council on universal services 2002/22/EC and the users' rights relating to electronic communications networks and services. (Universal Service Directives) Article 31.

27 See the English Broadcasting Act 1996 Section 11. and the Austrian Privatfernsehgesetz § 25

28 See Rundfunkstaatsvertrag § 52

29 Communications Act 2003 Section 272.

30 Especially the service Channel 3, Channel 4 and Channel 5.

31 The European Committee's recommendation in the section of electronic communication probably on the offers and services from market that belong under the ex-ante regulation from 11. February 2003, in accordance with the 2002/21/EC directive of the European Parliament and Council that is a directive on a common regulatory framework for electronic communications networks and services. (2003/311/EC)

32 Access Directive Article 2. a)

33 Same conclusion by Garzaniti, Laurent: Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation. London, 2005 p. 17.; Schütz, Raimund - Attendorn, Thorsten: Das neue Kommunikationsrecht der Europäischen Union – Was muss Deutschland ändern? In: MultiMedia und Recht Beilage 2002/4, http://www.alm.de/fileadmin/Download/Gutachten%20GSDZ/Gutachten_emr_Satellit.pdf [01.12.2007]

34 Member States' provisions see http://ec.europa.eu/information_society/policy/ecomm/article_7/index_en.htm [01.12.2007]

35 The Austrian regulation does not relate the tasks of market analysis to the telecommunication authority but to the media regulatory agency.

36 The interpretation of access see Price, Monroe E.: A televízió, a nyilvános szféra és a nemzeti identitás. [The television, the public sphere and national identity] Budapest, 1998

37 Nolan Dermot is quoted by Varney, Eliza: Regulating the Digital Television Infrastructure in the EU. Room for Citizenship Interests? In: SCRIPT-ed, 2006 June p. 226

38 Schulz, Wolfgang: Ausweitung der Zugangsverpflichtung auf EPGs und Diensteplattformen? In: Nikoltchev, Susanne (ed): Die Regulierung des Zugangs zum digitalen Fernsehens. Strassburg, 2004 p. 51

39 Varney, Eliza op. cit. p. 230

40 On a common regulatory framework for electronic communications networks and services 2002/21/EC directive (Framework Directive) (31) preamble paragraph and Article 18 (1); Access Directive (10) preamble paragraph

41 The access to, and interconnection of, electronic communications networks and associated facilities 2002/19/EC directive (Access Directive) Article 6. (1) paragraph and Appendix I.

42 Feintuck, Mike - Varney, Mike op. cit. p. 226

43 Feintuck, Mike - Varney, Mike op. cit. p. 234; Varney, Eliza op. cit. p. 236

44 Reinemann, Susanne op. cit. p. 149

45 Reinemann, Susanne op. cit. p. 149

46 Varney, Eliza op. cit. p. 236

47 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications [COM(2003) 410 final]

48 http://www.mhp.org/about_mhp/who_is_using_mph/index.xml [01.12.2007]
See also Näränen, Pertti: Az európai digitális televíziózás: a jövő szabályozási megoldásai [The European digital broadcasting. The solutions of the future regulations] In: Médiakutató 2003/2

49 In details see Trafkowski, Armin: Medienkartellrecht. Die Sicherung des Wettbewerbs auf den Märkten der elektronischen Medien. München, 2002; Schüll, Ralf: Schutz der Meinungsvielfalt im Rundfunkbereich durch das europäische Recht, unter besonderer Berücksichtigung des europäischen Wettbewerbsrechts. Bern, 2006

50 For instance Feintuck, Mike - Varney, Mike op. cit.; Gounalakis, Georgius: Medienkonzentrationskontrolle versus allgemeines Kartellrecht. In: Archiv für Presserecht 2004/5.; Trafkowski, Arminzn op. cit.; Varney, Eliza op. cit.
Standing on the opposite side, for instance Beck, Hanno: Medienökonomie. Berlin/Heidelberg, 2005; Knothe, Lebens: Rundfunkspezifische Konzentrationskontrolle des Bundeskartellamts. On: Archiv für Presserecht 2000/2.

51 Knothe, Lebens op. cit. p. 127

52 Trafkowski, Armin op. cit. p. 235

53 Framework Directive (5) preamble paragraph and Article 2. c)

54 See CEC – Commission of the European Communities: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age. COM(1999) 657 final.

55 Framework Directive (5) preamble paragraph

56 Access Directive (2) preamble paragraph

57 Nemzeti Hírközlési Hatság (National Communications Authority): A kábeles műsorelosztási piac átfogó, jövőbe mutató elemzése az ex-ante és ex-post szabályozás indokoltságának és lehetőségének bemutatása céljából. 2006. http://www.nhh.hu/index.php?id=hir&cid=1069 [01.12.2007]

58 Varney, Eliza op. cit. p. 240