Promoting cultural diversity in the Irish broadcasting sector:
an assessment of international standards and best practices
with a view to their operationalisation in an Irish context

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The key objective of this study was to assess appropriate strategies for operationalising cultural diversity in the Irish broadcasting sector. The study grounds this exercise in a detailed analysis of relevant international standards and their implications for law- and policy-making at the national level. The analysis aims to clarify key concepts and terminology employed (not always consistently) in international and European normative standards.

There are several main reasons for the increasing importance of cultural diversity for the Irish broadcasting sector: sudden and significant demographic and socio-cultural changes; a broadcasting environment characterised by rapid technological change, and a legislative environment that is also undergoing considerable change. Given the recent – and continuing - nature of these complex contextual changes, there has been a lack of research assessing their individual and combined impact on cultural diversity in the broadcast media. This study engages with each of these dynamics and aims to contribute to debate about the future development of relevant regulatory policies.

A central theme in this study has been the need to clarify the meaning and scope of cultural diversity before it can be meaningfully applied in the (Irish) broadcasting sector. The concept, as used in international law- and policy-making circles, is complex and vague. Its relationship with other contiguous concepts, eg. linguistic diversity and media pluralism, is at once overlapping and divergent. This study has sought to clarify the content of the concept by first setting out the rationales for the promotion of cultural diversity. The rationales, grouped as intrinsic, identity, non-discrimination/equality, democratic, societal and economic, were intended to structure the subsequent analysis. When cultural diversity or other "operative public values" are justified in terms of multiple rationales, it is important not to lose sight of each of those rationales when devising – and later – evaluating strategies designed to give expression and effect to the values in question.

Another definitional difficulty that had to be navigated by this study is the meaning and scope of the broadcast media. The term, "media", can be described as a convenient, amalgamated term that comprises content, outlets, structures and

processes alike. Moreover, different types of media have different objectives, capacities, functionalities, reach, impact and working methods. The term "broadcast media" denotes the same complex of dimensions, but the range of outlets or forms of distribution involved is more limited. Nevertheless, changing technological paradigms and patterns in public and social communication mean that more traditional conceptions of "broadcast media" are being stretched to include new forms of broadcasting which are becoming increasingly prevalent in the digital environment. Given the depth of differentiation within the broadcast media sector, and its rapid and ongoing evolution, suitable strategies for the promotion of cultural diversity within the sector must engage adequately with the key themes of differentiation and evolution.

The study explores a wide selection of international legal and policy instruments that are either centrally or tangentially relevant to both cultural diversity and its promotion in the media. This exploration was informed by both the rationales for promoting cultural diversity and the specific features of the pursuit of that goal in the media/broadcasting sector. The profound ongoing technological, social and economic changes within the sector and their relevance for the promotion of cultural diversity were centrally implicated.

This study is primarily (and deliberately) international in scope. Drawing on its international and comparative national focuses, it considers whether various legal and non-legal measures designed to operationalise cultural diversity would be suitable for replication in an Irish context. The study's brief analysis of the main provisions in Irish legislation dealing with the promotion of cultural diversity in the broadcast media provides important contextualization for this enquiry. The study then outlines the usefulness, but also the inherent limitations, of an approach based on indicators of progress towards the operationalisation of cultural diversity in the broadcasting sector. Indicators are increasingly being relied on in international circles in order to measure (different aspects of) media diversity. Despite the appeal of their potential to clarify complex and vague policy objectives, existing indicator-based systems should not be adopted in Ireland without due prior evaluation and reflection. In order for any set of indicators to be viable, it would have to be convincingly established that they are:

contextually embedded, specifically targeted, realistic and credible, transparent and verifiable, and dynamic.

The central recommendation of this study is that a forum should be created for high-level, inclusive and engaged discussion of the policy goal of promoting cultural diversity within the Irish (broadcast) media sector. A number of supplementary recommendations have been formulated to flesh out specific focuses and details of this central recommendation with a view to ensuring that it would be suitably tailored to, and of practical relevance for, the Irish broadcasting sector.

In order to provide practical impetus to the envisaged forum for promoting cultural diversity in the Irish broadcasting sector, a concrete model is proposed. It is based on the Cultural Diversity Network (CDN) in the United Kingdom (discussed in Section II of the study), but subject to the firm proviso that a number of the CDN's design and procedural features could be examined and adjusted with a view to enhancing the effectiveness of the proposed Irish initiative. It is crucial that such an exercise be conducted by the widest possible range of relevant actors – including not only the media themselves, but also regulatory authorities and policy-makers – in order to ensure comprehensive and multilateral input. The proposed approach should also disaggregate and engage with the different dimensions of (cultural) diversity, the different (and changing) dimensions of the broadcast media and the crucial interface between cultural diversity and the broadcast media.

INTRODUCTION

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The study is informed by perspectives of various actors (eg. government, regulatory authority, broadcasters (i.e., public service, private sector and local/community), civil society/the viewing public (reflecting its increasing constitutive diversity). It also comprises an evaluation of selected best practices in other European jurisdictions.

The multi-faceted nature of this study has helped to provide contextualised information and analysis from which a set of indicators tailored to the specificities of the Irish broadcasting sector could be developed.

I. OVERVIEW OF RELEVANT INTERNATIONAL LEGAL STANDARDS[1]

Introduction

Culture has been described as "an overworked concept with little semantic precision",[2] and cultural rights as "the Cinderella of the human rights family".[3] To continue in the same metaphorical vein, the objective of promoting cultural diversity could be considered a jaded ideal, worn-out by unfulfilled ambition and under-appreciation. Preambular provisions of treaties and non-binding standard-setting texts routinely refer to the objective of promoting cultural diversity, but only intermittently attempt to prise open the notion or provide for its concrete application. In recent years, however, the substantive sections of a variety of normative texts at European and international levels have begun to explore the content and scope of cultural diversity, as well as its relationship with "traditional" and "new" media technologies alike. The purpose of this section is to examine what cultural diversity actually entails; explain why it ought to be promoted, and assess the important role of the media (traditional and new) in advancing that aim. As such, it seeks to engage with the challenges of operationalising cultural diversity.

Contextualisation: Theory and Practice

Defining Culture and Cultural Rights

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[1] This section of the study draws in places on earlier work by the author, including "The Promotion of Cultural Diversity via New Media Technologies: An Introduction to the Challenges of Operationalisation", *IRIS plus* (Supplement to *IRIS – Legal Observations of the European Audiovisual Observatory*, 2008-6) and "European-level measures for promoting cultural diversity in broadcasting: quixotic tilting in a new technological era?", in Pia Letto-Vanamo, Ed., *Mikä Osa Yleisöllä? Yearbook of Communication Law 2007*, Institute of International Economic Law (KATTI), Faculty of Law, University of Helsinki, Finland (2008), pp. 119-136.

[2] Asbjorn Eide, "Cultural Rights as Individual Human Rights", in A. Eide *et al.*, Eds., *Economic, Social and Cultural Rights* (2nd Edition) (The Netherlands, Kluwer Law International, 2001), pp. 289-301, at 290.

[3] G. Filibek, as cited in Halina Niec, "Casting the foundation for the implementation of cultural rights", in Halina Niec, Ed., *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights* (United Kingdom, UNESCO, 1998), pp. 176-189, at 176. See also in this connection, Yvonne Donders, *Towards a Right to Cultural Identity?* (Antwerpen/Oxford/New York, Intersentia, 2002), pp. 65 *et seq.*

Culture is, as has already been suggested, a very nebulous concept, which explains why international instruments rarely seek to define its content or scope. One notable exception to this general reluctance is the UNESCO Universal Declaration on Cultural Diversity (2001),[4] the Preamble of which reaffirms that culture should be regarded as:

> the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

Even if they are in short supply in international instruments, attempted definitions of "culture" are important because they can serve as a basis for defining and determining the scope of cultural rights.[5] In the past (again as already hinted in the Introduction, *supra*), cultural rights have suffered from relative neglect and their development has proved somewhat stunted as a result. This relative neglect can be attributed to a number of factors, all of which concern perceptions about the status of cultural rights. For example, for as long as the view was entertained that a dichotomy existed between so-called first and second generations of human rights, i.e., civil and political rights on the one hand and economic, social and cultural rights on the other hand, cultural rights tended to be located in the latter category. Nowadays, the dominant view is that all human rights are interdependent and interrelated[6] and purported qualitative distinctions between both sets of rights (e.g. the assumption that economic, social and cultural rights do not give rise to firm State obligations) are consequently dismissed.[7] In any case, cultural rights would be best understood as spanning both categories, as will be demonstrated, *infra*. Whether cultural rights should be classed as

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[4] Adopted unanimously by the UNESCO General Conference at its 31st session on 2 November 2001. For a detailed overview of UNESCO's other standard-setting and activities in the realm of culture, see generally: Yvonne Donders, "The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions" in Hildegard Schneider & Peter van den Bossche, Eds., *Protection of Cultural Diversity from a European and International Perspective* (Antwerp, Intersentia, 2008), pp. 1-30.
[5] See generally: Adam Kuper, *Culture: The Anthropologists' Account* (Cambridge, Massachusetts/London, England, Harvard University Press, 1999).
[6] World Conference on Human Rights – The Vienna Declaration, 1993 (esp. Article 5).
[7] See further: Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Second Edition) (Oxford, Oxford University Press, 2008), Chapter 3; Cees Flinterman, "Three Generations of Human Rights", in Jan Berting *et al*., Eds., *Human Rights in a Pluralist World: Individuals and Collectivities* (Westport & London, Netherlands Commission for UNESCO/Roosevelt Study Center/Meckler, 1990), pp. 75-81.

individual or collective rights has also tended to be a perennial subject of debate.[8] A balanced view has been proposed which styles cultural rights as individual rights with a powerful collective dimension. Very often, cultural rights are primarily regarded as minority rights. While it cannot be gainsaid that cultural rights are indeed of vital importance for persons belonging to minorities who wish to protect and develop their cultures, it is inaccurate to claim that cultural rights are the preserve of minorities: dominant societal groups also have very valid and vested interests in maintaining their cultures.[9] It is therefore more correct to speak of the enhanced value of cultural rights for persons belonging to minorities than to claim exclusivity of relevance.

Next to the UNESCO Declaration – with its specific focus on cultural *diversity* – other more general international human rights instruments also contain occasional references to various rights associated with the enjoyment of culture, but without attempting to provide a comprehensive definition of the concept. For instance, Article 27(1) of the Universal Declaration of Human Rights reads: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".[10]

Pursuant to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), persons belonging to ethnic, religious or linguistic minorities shall not be denied the right *inter alia* "to enjoy their own culture". In order to uphold this right, "positive measures of protection" are required "not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but

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[8] For a representative view of both sides of the debate, see, respectively: Asbjorn Eide, "Cultural Rights as Individual Human Rights", in A. Eide *et al*., Eds., *Economic, Social and Cultural Rights* (2nd Edition) (The Netherlands, Kluwer Law International, 2001), pp. 289-301; Lyndel V. Prott, "Cultural Rights as Peoples' Rights in International Law", in James Crawford, Ed., *The Rights of Peoples* (Oxford, Clarendon Press, 1988), pp. 93-106.

[9] See generally: Asbjorn Eide, "Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes", in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague, Martinus Nijhoff Publishing, 2002), pp. 83-97; Wolf Mannens, "The International Status of Cultural Rights for National Minorities", in P. Cumper & S. Wheatley, Eds., *Minority Rights in the 'New' Europe* (Great Britain, Kluwer Law International, 1999), pp. 185-196.

[10] For commentary on Article 27, UDHR, and its drafting history, see, Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l'homme* (Louvain, E. Warny, 1964), pp. 252-257; Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit*., pp. 139-144; Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration and Beyond* (Leiden/Boston, Martinus Nijhoff Publishers, 2007).

also against the acts of other persons within the State party".[11] Thus, Article 27, ICCPR, not only sets out positive obligations for States, it also envisages the horizontal application of those obligations to other actors. Furthermore, "ensuring the survival and continued development" of minority identities is linked to the enrichment of "the fabric of society as a whole" – an important argument for cultural diversity.[12]

The UN Human Rights Committee, which oversees the implementation of the ICCPR, generally tends to find that Article 27 has been violated when an impugned measure has an impact so substantial that it in effect denies the complainant the right to enjoy his/her cultural rights.[13] More specifically, where "the use of a minority language press as means of airing issues of significance and importance" to a particular minority community, "by both editors and readers", is deemed to be "an essential element" of the minority's culture, an interference with the use of the minority language press can lead to a violation of Article 27.[14] This reasoning is applicable *mutatis mutandis* to broadcasting and other types of media.

For its part, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), formulates the right of everyone to participate in cultural life, to benefit from scientific progress and its applications and to enjoy intellectual property rights.[15]

For present purposes, cultural rights will be understood as a cluster of rights, and as including distinct cultural rights as well as cultural dimensions to a range of other human rights.[16] The exercise of cultural rights therefore entails the right to maintain and develop one's cultural identity, lead particular lifestyles, participate in cultural life and assemble, associate and organise for cultural purposes. The right to participate in cultural life implies the ability to access and exploit cultural heritage (including as

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[11] United Nations Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27), Doc. No. CCPR/C/21/Rev.1/Add.5, adopted on 8 April 1994, para. 6.1.
[12] *Ibid*., para. 9.
[13] *Länsman et al. v. Finland*, Communication No. 511/1992, Views adopted on 26 October 1994, para. 9.5.
[14] *Mavlonov & Sa'di v. Uzbekistan*, Communication No. 1334/2004, Views adopted on 19 March 2009, para. 8.7.
[15] For commentary on Article 15, ICESCR, its drafting history and application, see, Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit*., pp. 144-162.
[16] *Ibid*., p. 73.

recorded in audiovisual formats). Cultural heritage has been described as "a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time".[17]

Defining Cultural Diversity

When examining the notion of cultural diversity, it is important to avoid terminological entrapment. It is not sufficient to monitor the frequency with which the precise term, "cultural diversity", appears in normative human rights texts at the international level. One must instead look beyond the term and ensure that terminological variants and adjacent notions are also identified and examined. Thus, "cultural pluralism", will often be relevant, given its semantic congruence with "cultural diversity". Furthermore, "cultural heritage" and "cultural rights" can also usually lay claim to relevance, due to their relationship with "cultural diversity", as set out, *supra*. The same is true of "linguistic diversity" and "media pluralism".[18]

Cultural diversity is not a right, as such, or at least not a right that is straightforwardly justiciable. For the purposes of this article, it will be treated as an operative public value, in the sense developed by Bhikhu Parekh. He labels "operative public values" those values "that a society cherishes as part of its collective identity and in terms of which it regulates the relations between its members", and which "constitute the moral structure of its public life and give it coherence and stability".[19] To describe cultural diversity as an operative public value is therefore to insist that it is more than just a guiding interpretive principle for law- and policy-making. It is to point to the need to operationalise the notion; to incorporate it into regulatory, policy-making and institutional structures and practices and thereby ensure that it is meaningfully applied. Although the term, "operative public value" is academic in origin, the

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[17] Article 2a, Council of Europe Framework Convention on the Value of Cultural Heritage for Society, CETS No. 199, 27 October 2005 (entry into force: pending).

[18] The multivalent character of the notion of cultural diversity is captured in Article 6 of the UNESCO Declaration on Cultural Diversity.

[19] Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd Edition) (New York, Palgrave Macmillan, 2006), p. 363.

approach it implies is broadly consistent with that envisaged by a number of standard-setting texts at the international level, which employ different terminology. For instance, cultural diversity is described as an "essential public interest objective" in CM Recommendation Rec(2003)9 to member states on measures to promote the democratic and social contribution of digital broadcasting. Irrespective of the precise terminology used, the challenges of operationalisation remain the same.

Rationales for the Promotion of Cultural Diversity

Various rationales are advanced for promoting cultural diversity in normative texts at the European and international levels.[20] For present purposes, they will be loosely grouped as follows: the intrinsic argument; the identity argument; the non-discrimination/equality argument; the democratic argument; the societal argument, and the economic argument. Each of these rationales will now be briefly considered in turn.

Intrinsic Argument

Simply stated, this argument holds that cultural diversity is valuable in and of itself. It is intrinsically beneficial. The argument derives from the view that every culture is an inherent source of wealth and that their co-existence ultimately leads to their mutual enrichment.[21]

Identity Argument

This argument is premised on the view that cultural diversity arises from the co-existence of a multiplicity of cultural identities and practices. As such, the identity argument can be grounded in concerns for individual and group dignity. If individuals and groups are denied the freedom to maintain and develop their identities, including

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[20] For a concise, but representative overview, see *ibid.*, pp. 165-178.
[21] The intrinsic argument is approximated in Article 1, UNESCO Declaration on Cultural Diversity, the Preamble to the UNESCO Convention on the Protection and Promotion of Cultural Expressions, and in a Eurocentric way in Article 151 EC.

through exercising their rights to freedom of expression, association, etc., their dignity can be adversely affected.

Non-discrimination/Equality Argument

This argument draws on the transversal effects of the right not to be subjected to discrimination: the right necessarily extends to cultural rights. If the principles of non-discrimination and equality were not applied in respect of cultural rights, the prospect of achieving cultural diversity in society would be seriously curtailed.

Democratic Argument

The non-discrimination/equality argument also feeds into the democratic argument, which prioritises participation in public life, including cultural life[22] and public debate.[23] As reasoned by Ed Baker, "Voice, more than vote, creates public opinion and provides the possibility of deliberation".[24] As the media are "the central *institution* of a democratic public sphere",[25] their role is crucial in promoting participation and cultural diversity. Access to cultural heritage is of considerable practical importance for democratic participation.[26]

Societal Argument

The societal argument holds that cultural diversity is "a source and factor, not of division, but of enrichment for each society".[27] It also holds that "a climate of tolerance and dialogue" is necessary for the realisation of this aim.[28] In other words, pluralistic tolerance is a precondition for cultural diversity, which in turn enhances societal cohesion and stability.

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[22] Article 15, Council of Europe Framework Convention for the Protection of National Minorities (FCNM), ETS No. 157, 1 February 1995 (entry into force: 1 February 1998).
[23] European Commission, White Paper on a European Communication Policy, COM(2006) 35 final, Brussels, 1 February 2006, pp. 5-6.
[24] C. Edwin Baker, "Viewpoint Diversity and Media Ownership", 60 *Federal Communications Law Journal* (No. 3, 2009), p. 651-671, at p.654.
[25] (emphasis per original), *ibid*.
[26] Article 12, Council of Europe Framework Convention on the Value of Cultural Heritage for Society, *op. cit*.
[27] Recital 8, Preamble to the FCNM, *op. cit*.
[28] *Ibid*.

Economic Argument

This argument acknowledges the economic importance of the culture industries.[29] Creativity and diversity (cultural and linguistic) can stimulate economies and (labour) markets. Such acknowledgements complement a strictly human rights-based approach and make for a more multi-faceted approach to cultural diversity. Another dimension to this argument implicates cultural heritage, the active protection of which has been identified as "a central factor in the mutually supporting objectives of sustainable development, cultural diversity and contemporary creativity".[30]

The applicability of each of the above rationales is potentially subject to a common limitation: the question of whether the promotion of cultural diversity should entail the promotion of intolerant or repressive cultures. As noted by Davina Cooper: "in its enthusiasm to challenge disadvantage and to celebrate variety, diversity politics comes unstuck when it is confronted with less attractive ways of living and being".[31] The question is vexed and it has generated extensive academic discussion, in particular in political science, cultural and legal studies.[32] Whereas a proper exploration of this discussion is beyond the scope of the present study, it remains important to acknowledge this potential limitation on the scope of cultural diversity. It can, for instance, assume great practical importance when the details of resource allocation or distributive policies are being worked out by policy-makers.

Enabling Cultural Diversity

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[29] This argument features strongly in relevant EU texts, but its relevance is also readily acknowledged in other texts, such as those emanating from the Council of Europe (e.g. CM Declaration on cultural diversity, para. 2.2) and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[30] Article 5, Council of Europe Framework Convention on the Value of Cultural Heritage for Society, *op. cit.*

[31] Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge, Cambridge University Press, 2004), p. 40.

[32] For example, see generally: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York, Oxford University Press, 1995); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second Edition) (New York, Palgrave Macmillan, 2006); McGoldrick, Dominic, "Multiculturalism and its Discontents", 5 *Human Rights Law Review* (No. 1, 2005), pp. 27-56.

As affirmed by various pertinent texts, the attainment of cultural diversity in society presupposes the existence of a favourable enabling environment for the effective exercise of cultural rights.[33] Cultural diversity can only be achieved when pluralism is safeguarded at societal level, meaning that groups are able to develop and express their cultural identities and to practise their distinctive cultures both in public and in private. This thinking also finds clear expression in the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM). It recognises the link between the freedom to exercise cultural rights, societal pluralism and cultural diversity, *inter alia*, in the following provisions:

> Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity; (Recital 7, FCNM)

> The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage. (Article 5(1), FCNM).

The right to freedom of expression is a prerequisite for the exercise of cultural rights and for the enablement of cultural diversity.[34] As stated succinctly by the Council of Europe's Committee of Ministers: "Cultural diversity cannot be expressed without the conditions for free creative expression, and freedom of information existing in all forms of cultural exchange, notably with respect to audiovisual services".[35] This approach also logically requires that expressive and dialogical fora are available and accessible on a non-discriminatory basis. By extension, the media, as vectors of culture and cultural identities, are capable of making a major contribution to the promotion of cultural diversity. This observation applies, *mutatis mutandis*, to new media technologies, as will be demonstrated in the next section.

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[33] Article 5 of UNESCO's Universal Declaration on Cultural Diversity and Section 3 of the Council of Europe's Committee of Ministers' Declaration on Cultural Diversity (2000).

[34] See further: Article 6, UNESCO Declaration on Cultural Diversity. It reads: "Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to means of expression and dissemination are the guarantees of cultural diversity."

[35] CM Declaration on Cultural Diversity, *op. cit.*, para. 1.2.

The Normative Framework

The foregoing section elucidated the meaning of cultural diversity; explored the (often overlapping) rationales for its promotion; identified the most important features of a favourable enabling environment for the realisation of cultural diversity, and introduced the importance of freedom of expression and the media for the promotion of cultural diversity. This section will sketch the normative framework for the promotion of cultural diversity at the European and global levels. Selected focuses within that normative framework which deal specifically with the role of new media technologies in the advancement of cultural diversity, will be examined accordingly.

Council of Europe

Various Council of Europe treaties serve to promote cultural diversity, either directly or indirectly. The Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: European Convention on Human Rights or ECHR)[36] does not explicitly provide for the protection of cultural rights and an initiative proposing to draft an additional protocol to the Convention on cultural rights in the 1990s never came to fruition.[37] However, given that cultural rights include a range of different rights, as outlined, *supra*, it is clear that the ECHR does, in practice, afford cultural rights a considerable degree of protection. Indeed, the growing recognition of cultural rights by the European Court of Human Rights accounts in large measure for what has been termed the Court's "burgeoning minority rights jurisprudence".[38] This case-law focuses on issues such as non-discrimination/equality, enjoyment of a particular way of life, association, religion, education and expression. The present analysis will sketch the interface between this case-law and Article 10, ECHR, which safeguards the right to freedom of expression as follows:

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[36] ETS No. 5, 4 November 1950.
[37] For an overview of the process, see: Patrick Thornberry & Maria Amor Martin Estebanez, *Minority Rights in Europe* (Germany, Council of Europe, 2004), p. 205.
[38] Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights" 24 *Human Rights Quarterly* (2002) 736-780.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

As noted above, pluralism and diversity are contiguous concepts. The European Court of Human Rights has considered the nature of pluralism on numerous occasions. It has repeatedly found that pluralism demands a certain balancing of majority/minority interests and the democratic accommodation of the latter. This finding is often expressed as follows:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[39]

This finding is firmly anchored in the principle of pluralism, for which freedom of expression is a prerequisite.[40] According to the Court:

[…] pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.[41]

The Court has also consistently held that the State is the "ultimate guarantor" of the principle of pluralism, especially "in relation to audio-visual media, whose

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[39] *Young, James & Webster v. United Kingdom*, Judgment of the European Court of Human Rights of 13 August 1981, Series A No. 44 p. 25, para. 63; *Chassagnou & Others v. France*, Judgment of the European Court of Human Rights of 29 April 1999, para. 112; *Gorzelik & Others v. Poland*, Judgment of the European Court of Human Rights (Grand Chamber) of 17 February 2004, para. 90.
[40] *Gorzelik & Others v. Poland*, *op. cit.*, para. 91.
[41] *Ibid.*, para. 92.

programmes are often broadcast very widely".[42] This important finding points to positive obligations on the part of States authorities in order to uphold pluralism in the (audiovisual) media sector. It is best explained by the democratic argument discussed above. As the Court has also held: "groups and individuals outside the mainstream [must be able] to contribute to the public debate by disseminating information and ideas on matters of general public interest […]".[43]

Similarly, the Court has found that all sections of the public must be able to receive a wide range of information and ideas. This principle is nicely illustrated in the recent case, *Khurshid Mustafa & Tarzibachi v. Sweden*.[44] The Court acknowledged that it was of "particular importance" for the applicants, as an immigrant family from Iraq living in Sweden, to be able to receive a wide range of information (i.e., not just political and social news, but also "cultural expressions and pure entertainment") from their country of origin in order to be able to maintain contact with their native culture and language.[45]

The judgment is also noteworthy for the Court's readiness to focus not only on "the substance of the ideas and information expressed, but also the form in which they are conveyed".[46] It found that the applicants:

> might have been able to obtain certain news through foreign newspapers and radio programmes, but these sources of information only cover parts of what is available via television broadcasts and cannot in any way be equated with the latter.[47]

As such, the Court recognises that the mere existence of other expressive or informational opportunities is not sufficient: they must also be viable opportunities in the sense that they are suited to the expressive or informational purpose of the

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[42] *Informationsverein Lentia & Others v. Austria*, Judgment of the European Court of Human Rights of 24 November 1993, Series A No. 276, para. 38.
[43] *Steel & Morris v. United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 15 February 2005, para. 89.
[44] Judgment of the European Court of Human Rights (Third Section) of 16 December 2008. For a short case-note, see: "Eviction: Satellite Dish", E.H.R.L.R. 2009, 2, 268-270.
[45] *Ibid.*, para. 44.
[46] See, *inter alia*, *Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 23 May 1991, Series A no. 204, para. 57; *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A no. 298, para. 31.
[47] *Khurshid Mustafa & Tarzibachi v. Sweden*, *op. cit.*, para. 45.

individual or group concerned. One of the upshots of this finding by the Court is that the availability of culturally diverse content in other media does not remove the need for culturally diverse content in the audiovisual sector.

One of the early treaties elaborated by the Council of Europe was the European Cultural Convention. It is deliberately general in character and was designed to "foster […] the study of the languages, history and civilisation of the others and of the civilisation which is common to [all nationals of States Parties to the Convention]".[48] It is an important point of general reference, but it does not specifically address the potential contribution of the media to the promotion of cultural diversity (or, needless to say, that of new media technologies).

Article 10 of the European Convention on Transfrontier Television (ECTT), is entitled "Cultural objectives", but its focus is very Eurocentric and does not explicitly embrace the promotion of cultural diversity *per se*. Rather, it seeks to promote European works/production by requiring broadcasters to devote the majority proportion of their transmission time to European works (Article 10(1)) and to get States to "look together for the most appropriate instruments and procedures to support, without discrimination between broadcasters, the activity and development of European production, particularly in countries with a low audiovisual production capacity or restricted language area" (Article 10(3)). As such, its contribution to the promotion of cultural diversity is limited and specific.

The importance of protecting and promoting cultural heritage and audiovisual heritage for ensuring a favourable enabling environment for the promotion of cultural diversity has already been explained, *supra*. Two Council of Europe treaties dealing specifically with those issues are the Framework Convention on the Value of Cultural Heritage for Society[49] and the European Convention for the Protection of the Audiovisual Heritage.[50]

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[48] European Cultural Convention, ETS No. 18, 19 December 1954 (entry into force: 5 May 1955), Preamble (Recital 5).
[49] *Op. cit*.
[50] ETS No. 183, 8 November 2001 (entry into force: 1 January 2008).

The Framework Convention on the Value of Cultural Heritage for Society includes useful measures for promoting the protection of cultural heritage, like the requirement that States develop laws and policies for that purpose.[51] Specific emphases within the Framework Convention couple "access to cultural heritage" with "democratic participation" (Article 12) and "cultural heritage" with "knowledge". Such couplings underscore the importance of rendering cultural heritage accessible for the realisation of cultural rights and cultural diversity. A further coupling is of particular relevance for the promotion of cultural diversity by new media technologies: Article 14, entitled "Cultural heritage and the information society". It requires States Parties to "develop the use of digital technology to enhance access to cultural heritage and the benefits which derive from it", *inter alia*, by "encouraging initiatives which promote the quality of contents and endeavour to secure diversity of languages and cultures in the information society".[52]

The Convention for the Protection of the Audiovisual Heritage, as its name suggests, focuses on audiovisual material recording and expressing cultural heritage.[53] Its central aim is to:

> ensure the protection of the European audiovisual heritage and its appreciation both as an art form and as a record of our past by means of its collection, its preservation and the availability of moving image material for cultural, scientific and research purposes, in the public interest.[54]

This aim is informed by the realisation that "Europe's heritage reflects the cultural identity and diversity of its peoples"[55] and the recognition that "moving image

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[51] Article 5, Framework Convention on the Value of Cultural Heritage for Society.
[52] Article 14.a, *ibid*. Undertakings listed in subsequent sub-sections of Article 14 are as follows:
"b. supporting internationally compatible standards for the study, conservation, enhancement and security of cultural heritage, whilst combating illicit trafficking in cultural property;
c. seeking to resolve obstacles to access to information relating to cultural heritage, particularly for educational purposes, whilst protecting intellectual property rights;
d. recognising that the creation of digital contents related to the heritage should not prejudice the conservation of the existing heritage".
[53] For an overview of the Convention, see: Sabina Gorini, "The Protection of Cinematographic Heritage in Europe", *IRIS plus* (Supplement to *IRIS – Legal Observations of the European Audiovisual Observatory*), 2004-8.
[54] Article 1, Convention for the Protection of the Audiovisual Heritage.
[55] Recital 3, Preamble, *ibid*.

material",[56] as "a form of cultural expression reflecting contemporary society" and "an excellent means of recording everyday events […]",[57] is a valuable cultural resource meriting concerted protection by States. Importantly, the Convention anticipates the potential of future technological developments for enhancing the preservation of audiovisual heritage. Article 18 explicitly provides for the conclusion of new Protocols "dealing with moving image material other than cinematographic works […] with a view to developing, in specific fields, the principles contained in this Convention".

Two examples of treaties which contribute to the promotion of cultural diversity, without that objective necessarily being their central concern, are the European Charter for Regional or Minority Languages (ECRML)[58] and the Framework Convention for the Protection of National Minorities (FCNM). The Preamble to the ECRML acknowledges that:

> the protection and promotion of regional or minority languages in the different countries
> and regions of Europe represent an important contribution to the building of a Europe based
> on the principles of democracy and cultural diversity within the framework of national
> sovereignty and territorial integrity[59]

Article 11, ECRML, entitled "Media", sets out a range of specific undertakings to which States can commit in order to promote the use of regional or minority languages in different types of media. The undertakings involve varying degrees of onerousness and the choice between them offers States a lot of flexibility to determine the precise focus and extent of their commitments in respect of the media. Article 11(3) is noteworthy for addressing an often underappreciated factor in the promotion of cultural diversity in the media sector. It offers States the possibility to:

> undertake to ensure that the interests of the users of regional or minority languages are
> represented or taken into account within such bodies as may be established in accordance
> with the law with responsibility for guaranteeing the freedom and pluralism of the media.

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[56] "[M]oving image material" is defined in Article 2a of the Convention as "any set of moving images recorded by whatever means and on whatever medium, whether or not accompanied by sound, capable of conveying an impression of movement".

[57] Recital 5, Preamble, *ibid*.

[58] ETS No. 148, 5 November 1992 (entry into force: 1 March 1998).

[59] Recital 7, ECRML. See also, Explanatory Report to the ECRML, para. 11.

Article 12, ECRML, is entitled, "Cultural activities and facilities" and comprises a list of possible measures to be taken by States Parties with a view to enhancing cultural activities and facilities in regional or minority languages. The activities and facilities include "especially libraries, video libraries, cultural centres, museums, archives, academies, theatres and cinemas, as well as literary work and film production, vernacular forms of cultural expression, festivals and the culture industries, including **inter alia** the use of new technologies".[60] Thus, the exploitation of new media technologies is expressly envisaged for the development of cultural activities and facilities.[61]

Whereas the title of the FCNM may suggest a certain narrowness of focus, it actually addresses many issues concerning society as a whole, and not only persons belonging to national minorities. It pursues its central objective – the protection of national minorities - in a complex, majority-minority dialectic. In other words, it strives to assure the protection of national minorities within the broader context of pluralist society.[62] The importance of the FCNM has already been referred to in the context of the so-called "societal" argument for promoting cultural diversity. Other provisions of the FCNM provide further evidence of the strong linkage between the goals of promoting tolerance, intergroup understanding and cultural diversity, and in particular, the instrumental importance of the media in respect of each goal:

> The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media. (Article 6(1), FCNM)

> In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism. (Article 9(4), FCNM).

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[60] Bold text per original.
[61] For detailed commentary, see: Tom Moring & Robert Dunbar, *The European Charter for Regional or Minority Languages and the media* (Strasbourg, Council of Europe Publishing, 2008).
[62] This is evident from various preambular provisions and, more substantively, Article 6(1), FCNM.

In practice, the monitoring of the FCNM involves examination of behavioural and structural media regulation at national and sub-national levels. It also takes account of functional differences between different types of media, eg. public-service, community and commercial, each of which can contribute to the goal of promoting cultural diversity in different ways (see further, below). Although the actual text of the FCNM does not distinguish between traditional broadcasting and new media technologies, their functional differences are increasingly being explored in the official monitoring processes of the FCNM and also by the Council of Europe's Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN).[63]

The provisions of the Council of Europe treaties discussed in the preceding paragraphs are not necessarily directly binding on Ireland. As is clear from the following table, Ireland has not ratified a number of the treaties in question. In fact, of the selected treaties, it is only party to the European Convention on Human Rights, European Cultural Convention and the Framework Convention for the Protection of National Minorities.[64] Nevertheless, the foregoing provides a panorama of Council of Europe treaty-based standards dealing with relevant issues. Even if individual states have not ratified particular treaties featuring in that panorama, it cannot be gainsaid that those treaties remain the overarching legal framework within which more detailed policy-making by various organs of the Council of Europe takes place. Thus, even if all of the treaties are not directly applicable in Ireland in a formal legal sense, they are of clear political and contextual importance.

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[63] DH-MIN is an intergovernmental committee acting under the aegis of the Council of Europe and in the penumbra of the FCNM. The initiative centres on a Report and accompanying Comments: Tom Moring, "Access of national minorities to the media: new challenges", Report for the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)015; Tarlach McGonagle, "Comments on the report on 'Access of minorities to the media: new challenges'", Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)016; Karol Jakubowicz, "Comments on the report on 'Access of minorities to the media: new challenges'", Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)017, all dated 20 November 2006; Tom Moring & Tarlach McGonagle, "Analysis of Information provided by DH-MIN members on the Questionnaire on the access of national minorities to new media in the information society", Doc. No. DH-MIN(2009)003, 9 March 2009; all available at: http://www.coe.int/t/dghl/monitoring/minorities/5_IntergovWork/DH-MIN_WorkingDocuments_en.asp (last visited on 8 February 2010).
[64] It should be noted that Ireland has ratified the UN/UNESCO treaties discussed in this section: the ICCPR, ICESCR and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Figure 1: Tabular overview of Ireland's ratification of selected Council of Europe treaties

Treaty	(C)ETS No.[65]	Signature	Ratification
Convention for the Protection of Human Rights and Fundamental Freedoms	5	04/11/1950	25/02/1953
European Cultural Convention	18	19/12/1954	11/03/1955
European Convention on Transfrontier Television (as amended)	132 (171)	-	-
European Charter for Regional or Minority Languages	148	-	-
Framework Convention for the Protection of National Minorities	157	01/02/1995	07/05/1999
European Convention for the protection of the European Audiovisual Heritage	183	-	-
Framework Convention on the Value of Cultural Heritage for Society	199	-	-

Alongside the treaty-based standard-setting work of the Council of Europe concerning the promotion of cultural diversity via (new) media, a host of relevant standard-setting texts have also been adopted by its Committee of Ministers. These texts are not legally-binding on the Member States of the Council of Europe, but they are of political importance. They often map out ongoing or anticipated developments in relation to freedom of expression and the media at European and national levels. As such, they are regarded as an important means of ensuring the effective realisation of the right to freedom of expression throughout Europe.[66] The most important of the Committee of Ministers' standard-setting texts for present purposes will now be presented in tabular form:

Text	Topic
Declaration (2009)	Role of community media in promoting social cohesion and

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[65] Excerpt from Note by the Council of Europe Treaty Office (website: http://conventions.coe.int/):
"Conventions and agreements opened for signature between 1949 and 2003 were published in the "European Treaty Series" (ETS Nos. 001 to 193 included). From 2004, this Series is continued by the "Council of Europe Treaty Series" (CETS No. 194 and following)."

[66] Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights, 13 January 2010.

	intercultural dialogue
Declaration (2008)	Allocation & management of the digital dividend & the public interest
Rec (2007) 16	Promotion of public service value of the Internet
Rec (2007) 3	Remit of public service media in the information society
Rec (2007) 2	Media pluralism and diversity of media content
Declaration (2007)	Protecting role of media in democracy & in context of media concentration
Declaration (2006)	Guarantee of the independence of PSB in the member states
Declaration (2005)	Human rights and the rule of law in the Information Society
Rec. No. R (2003) 9	Promotion of democratic and social contribution of digital broadcasting
Political Message (2003)	Political Message to the World Summit on the Information Society
Declaration (2000)	Cultural diversity
Declaration (1999)	A European policy for new information technologies
Rec. No. R (99) 1	Measures to promote media pluralism
Rec. No. R (99) 14	Universal community service concerning new communication and information services
Rec. No. R (96) 10	Guarantee of independence of public service broadcasting
Declaration (1982)	Freedom of expression and information

Instead of conducting an itemised analysis of these CM texts, their essence will be examined in the context of public service broadcasting/media and, more generally, public service values. Beforehand, though, it is necessary to briefly signal the importance of relevant texts emanating from other limbs of the Council of Europe.

The promotion of cultural diversity via the media has regularly appeared on the agenda of European Ministerial Conferences on Mass Media Policy.[67] These Conferences, involving the participation of Ministers (or their delegates) with relevant portfolios at national level, have been held periodically since the mid-1980s. As such,

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[67] See generally, *European Ministerial Conferences on Mass Media Policy: Texts Adopted*, Media Division, Directorate General of Human Rights, Doc. No. DH-MM (2006) 4 (Strasbourg, 2006).

the Ministerial Conferences can be distinguished from the day-to-day activities of the Council of Europe. Their relevance stems from their purpose to map out future European media policy, supplemented by action plans for its implementation. In total, seven such conferences were convened under the auspices of the Council of Europe. The preparation of these Conferences and the implementation of resultant Action Plans are overseen by the Council of Europe's Steering Committee on Media and New Communication Services (CDMC) – an expert body comprising members nominated by Member States of the Council of Europe.[68] In order to reflect changing notions of the media, the most recent conference, held in Reykjavik in 2009, was calibrated differently - as the "1st Council of Europe Conference of Ministers responsible for Media and New Communication Services".[69]

The prioritisation of the objective of promoting cultural diversity in the digital environment, including the potential role of public service broadcasting, was emphatic in the Ministerial Conference held in Kyiv in 2005, especially in Resolution No. 2, adopted at the Conference: "Cultural diversity and media pluralism in times of globalisation". The Ministerial Conference held in Reykjavik in 2009 picked up on relevant themes, especially in respect of the potential role of public service media. The thrust of the approach taken in the texts adopted at the Reykjavik Conference is to consolidate and continue earlier and ongoing Council of Europe policy-making and standard-setting work in this area.

The Parliamentary Assembly of the Council of Europe has also adopted texts dealing with these issues, most pertinently its Recommendation 1848 and Resolution 1646, both dating from 2008 and both entitled, "Indicators for media in a democracy" (discussed in Section V, *infra*). Relevant themes also feature in a range of other texts, to varying degrees, including, Recommendation 1878 (2009), "Funding of public service broadcasting"; Recommendation 1855 (2009), "The regulation of audio-visual media services; Recommendation 1067 (1987) on the cultural dimension of broadcasting in Europe; Resolution 1313 (2003), "Cultural co-operation between Europe and the south Mediterranean countries"; Recommendation 1641 (2004),

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[68] Terms of reference of the Steering Committee on Media and New Communication Services (CDMC), n.d., available via: http://www.coe.int/t/dghl/standardsetting/media/CDMC/default_en.asp, para. 4(iv).
[69] *A new notion of media?*, 28-29 May 2009, Reykjavik, Iceland.

"Public service broadcasting", and Recommendation 1674 (2004), "Challenges facing the European audiovisual sector".

Public Service Broadcasting/Media

By virtue of its philosophy and mandate, public service broadcasting (or public service media, as they are increasingly being called in deference to the diversification of technological forms across which they (may) operate) is simultaneously an ideal agent to, and an ideal forum in which to, promote cultural diversity.[70] The promotion of cultural diversity is widely regarded as a general objective of PSB,[71] but it can also feature in a more detailed fashion among the more specific objectives of PSB.[72] For example, the CM's Recommendation on the remit of public service media in the information society emphasises that:

> In their programming and content, public service media should reflect the increasingly multi-ethnic and multicultural societies in which they operate, protecting the cultural heritage of different minorities and communities, providing possibilities for cultural expression and exchange, and promoting closer integration, without obliterating cultural diversity at the national level.[73]

It should be noted that the Recommendation understands cultural diversity in an open, inclusive way – there is no question of the notion being restricted to European cultural diversity, as in the aforementioned regulatory measures prescribing the transmission of European audiovisual works. This is clear from para. 24 of the Recommendation, which states: "Public service media should promote respect for cultural diversity, while simultaneously introducing the audience to the cultures of other peoples around the world".

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[70] For further analysis, see: Irini Katsirea, "Cultural Diversity in Broadcasting", in David Goldberg, Gavin Sutter & Ian Walden, Eds., *Media Law and Practice* (Oxford, Oxford University Press, 2009), pp. 463-499, at pp. 483-496.

[71] Preamble, Declaration on the guarantee of the independence of public service broadcasting in the member states, 27 September 2006; Preamble, Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting; Declaration on Cultural Diversity, 7 December 2000, para. 2.5.

[72] For an overview of relevant Council of Europe standards in this area, see: Susanne Nikoltchev, "European Backing for Public Service Broadcasting: Council of Europe Rules and Standards", in Susanne Nikoltchev, Ed., *IRIS Special: The Public Service Broadcasting Culture* (Strasbourg, European Audiovisual Observatory, 2007), pp. 7-15. For extensive examples in a range of European States, see the country overviews in *ibid*.

[73] *Ibid*., para. 23.

PSB is currently in a state of transition, but as Karol Jakubowicz has observed, "there was hardly a time in the eight decades of PSB's existence when it was not 'in transition'".[74] He describes the challenges constantly faced by PSB as being "at once conceptual and contextual": different understandings of the role of PSB and the fact that "changing contexts of PSB operation have always affected the shape, nature and objectives of that media institution and positioned it in society and on the media scene in a variety of ways".[75] The current state of transition has been triggered by technological, market-related and socio-cultural trends.[76] How PSB engages with these new trends will largely determine its future, but its engagement must also remain within relevant parameters set by EU law, e.g. rules and guidelines governing State funding for PSB and the relationship between such funding and PSB mandates. Broadcasting technologies are becoming inexorably digitised and converged. If PSB is to retain its previous (or even current) level of influence in this new technological environment, it is imperative that it develops into an effective player across diverse media types and formats.

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

> Public service media should play a particular role in the promotion of cultural diversity and identity, including through new communication services and platforms. To this end, public service media should continue to invest in new, original content production, made in formats suitable for the new communication services. They should support the creation and production of domestic audiovisual works reflecting as well local and regional characteristics.[77]

Public Service Values

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

[75] *Ibid.*

[76] See, *ibid.*, at 120.

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

The CM's Recommendation on measures to promote the public service value of the Internet,[78] picks up on this theme. Its central objective is to prompt States authorities, where appropriate in cooperation with all interested parties, to take all necessary measures to promote the public service value of the Internet, *inter alia* by "upholding human rights, democracy and the rule of law […] and promoting social cohesion, respect for cultural diversity and trust" in respect of the Internet and other ICTs. States authorities are expected to draw on the guidelines appended to the Recommendation in their efforts to realise its central objective. The guidelines have five main focuses: human rights and democracy; access; openness; diversity, and security. The guidelines' focus on diversity strives for equitable and universal involvement in the development of Internet and ICT content. As such, they encourage, *inter alia*:

- the development of a cultural dimension to digital content production, including by public service media;
- strategies and policies geared towards the preservation of digital heritage;
- participation in "the creation, modification and remixing of interactive content";
- measures for the production and distribution of user- and community-generated content;
- capacity-building for local and indigenous content on the Internet;
- multilingualism on the Internet.

The CM's Declaration on a European Policy for New Information Technologies also engages in a detailed way with the specific potential of new media technologies for stimulating cultural diversity. The most relevant section of the Declaration, section (iv) concerning diversity of content and language, includes the following aims:

- to encourage the development of a wide range of communication and information networks, as well as the diversity of content and language, so as to foster political pluralism, cultural diversity and sustainable development;
- to promote the full use by all, including minorities, of the opportunities for exchange of opinion and self-expression offered by the new information technologies;

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

- to acknowledge the usefulness of these technologies in enabling all European countries and regions to express their cultural identities;

- to encourage the provision of cultural, educational and other products and services in an appropriate variety of languages and to promote the greatest possible diversity of these products and services;

- […]

These engagements with the specificities of new media technologies and their identification of how they can serve the goal of promoting cultural diversity are welcome. They represent a significant step forward from numerous generalised affirmations of the potential of new media technologies for promoting cultural diversity (which, while welcome in their own right, offered little practical guidance as to how they actually promoted the goal).[79]

European Union

Under the Treaty of Lisbon, the European Union's commitments to human rights are strengthened considerably, including in ways which have implications for the promotion of cultural diversity. For instance, the proposed new Article 1a to the Treaty on European Union (TEU) sets out an extended range of foundational values of the Union, including respect for human dignity, human rights, minority rights, societal pluralism and non-discrimination.[80]

Relatedly, the reworked Article 2, TEU, states that the Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". Very significantly, the new Article 6.1 accords the Charter of Fundamental Rights of the European Union "the same legal value as the Treaties".[81] Under the new Article 6.2, the EU "shall accede" to the ECHR.[82] Article

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[79] CM Declaration on cultural diversity, Preamble & para. 2.3; CM Declaration on human rights and the rule of law in the Information Society, Section 3; Declaration of the Committee of Ministers on a European Policy for New Information Technologies, 7 May 1999, Preamble.

[80] It reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[81] See further in this connection: Declaration concerning the Charter of Fundamental Rights of the European Union, OJ C 306/249 of 17 December 2007.

6.3 affirms that fundamental rights, as guaranteed by the ECHR and resulting from the constitutional traditions of Member States, "shall constitute general principles of the Union's law".

One of the most important legal bases for the protection of cultural heritage and diversity (including languages) has heretofore been Article 151 of the Treaty establishing the European Community.[83] Article 151(1) states: "The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore".[84] Article 151(4) follows up on that commitment: "The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures".

Article 22 of the Charter of Fundamental Rights of the European Union[85] is entitled 'Cultural, religious and linguistic diversity'; it reads: "The Union shall respect cultural, religious and linguistic diversity". It is based on Article 6, TEU, and Article 151(1) and (4) of the EC Treaty.[86] Although the explicit reference to cultural diversity is welcome, 'shall respect' is a significantly weaker formulation than, for example, "guarantee", "secure" or "promote". As such, it involves a considerably lighter commitment for States. Second, the Explanatory Note does not spell out the essence or scope of cultural diversity, which suggests a non-committal attitude to – or wariness of - its actual or potential implications.

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[82] See further in this connection: Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, OJ C 306/155 of 17 December 2007; Declaration on Article 6(2) of the Treaty on European Union, OJ C 306/249 of 17 December 2007.
[83] Consolidated version, as published in the *Official Journal of the European Communities* of 24 December 2002, C 325/1.
[84] See also in this connection, Articles 149, 150 and the subsequent paras. of Article 151, *id*. See also: Rachael Craufurd Smith, "From heritage conservation to European identity: Article 151 EC and the multi-faceted nature of Community cultural policy", 32 E.L. Rev. (February 2007), pp. 48-69.
[85] Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1, and revised and published in the Official Journal of the European Communities of 14 December 2007, C 303/01.
[86] Explanations relating to the Charter of Fundamental Rights, OJEC of 16 December 2004, OJ C 303/17 *et seq*., and for Article 22 of the Charter, *ibid*., at p. 25.

The commentary on Article 22 provided by the EU Network of Independent Experts on Fundamental Rights is very brief and does not meaningfully engage with the treatment of relevant legal issues under international (human rights) treaties, including the ECHR.[87] The commentary does, however, usefully refer to the link between cultural diversity and broadcasting. It describes the "Television without Frontiers" Directive as being the text that is probably the closest to Article 22 of the Charter because of the instrumentality of its quota system for European works for preserving cultural creation and therefore diversity.

The quota system for European, and independent European, works has traditionally been set out in Articles 4-5, *juncto* 6, of the "Television without Frontiers" Directive. Those Articles tended to be regarded as the main provisions in the Directive which, by design or in effect, served the goal of promoting cultural diversity in broadcasting.[88] As no other Article in the Directive dealt with cultural diversity *per se*, it is perhaps predictable that the Articles promoting European, and independent European, works might, by default, be considered to be the most relevant. However, upon closer scrutiny, the perceived relevance of Articles 4 and 5 turns out to be somewhat specious as the (intended and actual) contribution of these Articles to the goal of promoting cultural diversity in broadcasting is actually quite limited.

Articles 4 and 5 pursued dual economic and cultural objectives, but those objectives were not evenly weighted. The actual wording of relevant preambular Recitals and of the Articles themselves, as well as the *Realpolitik* of their drafting history, all suggest that Articles 4 and 5 were really conceived of as protective economic measures, designed to support the European audiovisual industry in the face of US dominance of global audiovisual markets. The purported cultural objectives of Articles 4-5 suffered from a number of shortcomings: they lack any qualitative criteria; they lack any stipulations about time-scheduling and they lack any requirement to reinvest percentages of *profits* in new, independent European production. Such shortcomings

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[87] Florence Benoît-Rohmer, "Article 22 – Cultural, religious and linguistic diversity", in EU Network of Independent Experts on Fundamental Rights, *The Commentary of the Charter of Fundamental Rights of the European Union* (2006), pp. 197-199.
[88] Note, for example, their thematic coupling during the latest formal process of revision of the Television without Frontiers Directive: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005.

increased the likelihood of mere *pro forma* compliance with Articles 4 and 5 by cost-conscious broadcasters who might prefer to meet their obligations by transmitting cheap, low-quality programming at off-peak hours. The reporting system concerning Articles 4 and 5 was primarily statistical, which makes it very difficult to gauge the qualitative impact of the provisions.[89] All in all, it must be concluded that any contribution made by Articles 4 and 5 to the promotion of cultural diversity in broadcasting should be regarded as incidental to their primary focus, i.e., the separate objective of promoting European and independent European works. The two objectives are not necessarily mutually exclusive, but they should not automatically be equated with one another.

The preamble to the AVMS Directive is sprinkled with references to the goal of promoting cultural diversity in the European audiovisual sector: most saliently, Recitals 1, 4, 5, 8 and 48. Of these, the first four are, by and large, differently-crafted re-affirmations of the importance of cultural (and linguistic) diversity. Recital 48, for its part, deals more specifically with the goal of promoting cultural diversity specifically in respect of on-demand audiovisual media services. It states that because "On-demand audiovisual media services have the potential to partially replace television broadcasting […], they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity". It then suggests different possible support measures for European works, such as "financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides".

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[89] See further: Tarlach McGonagle, "European-level Measures for Promoting Cultural Diversity in Broadcasting: Quixotic Tilting in a New Technological Era?", in Pia Letto-Vanamo, Ed., *Mikä Osa Yleisöllä? Yearbook of Communication Law 2007*, Institute of International Economic Law (KATTI), Faculty of Law, University of Helsinki, Finland (2008), pp. 119-136; Tarlach McGonagle, "The Quota Quandary: An Assessment of Articles 4-6 of the Television without Frontiers Directive", in David Ward, Ed., *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate Publishing Limited, forthcoming, 2008); Irini Katsirea, "Why the European broadcasting quota should be abolished", 28 *European Law Review* (No. 2, 2003), pp. 190-209; Jackie Harrison & Lorna Woods, "Television Quotas: Protecting European Culture?", 12 *Entertainment Law Review* (No. 1, 2001), pp. 5-14.

Recital 48, as shored up by Article 3i, AVMSD,[90] carries over the logic that the promotion of European and independent European works constitutes an active contribution to the promotion of cultural diversity. It reads:

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

Article 3i's all-important first paragraph clearly steers a middle course between the two most opposing positions that could have been taken, i.e., to extend the application of Articles 4-5, Television without Frontiers Directive, fully to on-demand audiovisual media services, or not at all.[91] It is relevant to note in this connection that the Court of Justice of the European Communities (ECJ) had already held in the *Mediakabel* case that Articles 4 and 5 of the Television without Frontiers Directive *do*

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[90] Article 3i reads: 1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, *inter alia*, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.
2. Member States shall report to the Commission no later than 19 December 2011 and every four years thereafter on the implementation of paragraph 1.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.
[91] For a short overview of the different positions considered during the review of the Television without Frontiers Directive with a view to its modernisation, see: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005, pp. 2-3; European Commission Expert Group, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, May 2005, p. 5.

apply to near-video-on-demand services.[92] The new obligation in Article 3i can more accurately be described as promotional rather than prescriptive. Member States are obliged to "ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote […] the production of and access to European works", but only "where practicable and by appropriate means". Such a qualification could easily render the obligation ineffective. It would be all too easy for States seeking to shirk this obligation to argue that the pursuit of the objective of promoting the production of and access to European works is not practicable in a complex and ever-changing technological environment.

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

Whatever the precise depth of potential that Article 3i does hold for contributing to the goal of promoting the production of and access to European works, its usefulness for the advancement of cultural diversity generally suffers from the same inherent conceptual constraints as Articles 4 and 5, Television without Frontiers Directive, as

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

discussed, *supra*. It fails to articulate the goal of promoting cultural diversity in an inclusive way that would give due recognition to the importance of non-European audiovisual works (which, in practice, are often expressive of non-European cultures). It thereby fails to encourage, or even acknowledge the value of, audiovisual works emanating from non-European countries or their expression of the vitality and importance of cultural identities and imaginations which transcend, or are simply located beyond, Europe's political borders. Nevertheless, Article 3i and the Recitals to which it is linked do usefully provide illustrative/non-prescriptive examples of how cultural works can be promoted in respect of on-demand audiovisual services.

In light of the shortcomings of the Audiovisual Media Services Directive in terms of their exclusionary Eurocentricity, it is necessary to explore the suitability of other mechanisms for advancing cultural diversity in the broadcasting sector. Particular attention will be paid to the relevant potential of public service broadcasting (PSB), community broadcasting and must-carry provisions.

Public Service Broadcasting

The Protocol to the Treaty of Amsterdam on the system of public broadcasting in the Member States recognises that it is largely for each Member State to confer, design and organise the remit for PSB in their own countries.[93] It also sets out that State funding for PSB must be tied to the fulfilment of the broadcasters' public service remit. Further guidance on the question of State funding for PSB is provided by the European Commission's Communication on the application of State aid rules to public service broadcasting[94] and the criteria established by the ECJ in its *Altmark* judgment.[95] In 2008, the Commission launched a public consultation on the future framework for State funding of PSB.[96] The development of the public service remit in

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

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

[95] Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Judgment of the Court of Justice of the European Communities of 24 July 2003, Rec.2003, p.I-7747, esp. paras. (87, 88), 89-94.

[96] As announced in the European Commission's press release, "State aid: Commission launches public consultation on the future framework for State funding of public service broadcasting", IP/08/24, 10

the new media environment was identified as one of the important focuses of the consultation exercise.[97] Recently, the Commission adopted: (i) a new Communication on its State aid assessment criteria for cinematographic and audiovisual works[98] and (ii) a Communication on the application of State aid rules to public service broadcasting.[99] The latter Communication replaces the previous, identically-titled Communication adopted in 2001.

Community broadcasting

The status of community broadcasting has been considerably enhanced by two Resolutions adopted by the European Parliament in 2008. The Resolution entitled 'Community media in Europe' provides extensive analysis of the objectives, features and importance of community media.[100] Some of the Resolution's provisions deal specifically with community media's contribution to cultural diversity. For instance, the first substantive provision of the Resolution "Stresses that community media are an effective means of strengthening cultural and linguistic diversity, social inclusion and local identity, which explains the diversity of the sector". Subsequent provisions continue in the same vein, linking the role of community media to some of the rationales for promoting cultural diversity outlined in Section I of this study.

The Resolution, 'Concentration and pluralism in the media in the European Union', for its part, also extends recognition to community media as a distinct media type.[101] It recognises the importance of community media for ensuring overall pluralism in the European media landscape.

Must-carry provisions

January 2008. See also: Review of the Communication from the Commission on the application of State aid rules to public service broadcasting (n.d.), available at:
<http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_questionnaire_en.pdf>.
[97] *Ibid*. See, in particular, s.2.2.1 of the second-named document in the previous footnote.
[98] Communication from the Commission concerning the State aid assessment criteria of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001 (2009/C 31/01).
[99] Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance) of 2 July 2009 (2009/C 257/01).
[100] European Parliament Resolution of 25 September 2008 on Community Media in Europe (2008/2011(INI)).
[101] European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union (2007/2253(INI)).

So-called "must-carry" obligations,[102] i.e., (regulatory) provisions mandating access to electronic communications networks for certain parties, subject to certain conditions, have considerable potential for the promotion of cultural diversity in broadcasting. However, the exploitation of that potential tends to occur at the national and sub-national levels. This is partly because the most important supra-national regulatory provisions governing must-carry are based on notions of "general interest objectives", which are left for determination by States authorities. The extent to which cultural diversity is inferred into such general interest objectives therefore depends on how well-disposed States authorities are towards the goal of promoting cultural diversity.

At the European level, the main regulatory provisions governing must-carry obligations are to be found in the EU's Universal Services Directive.[103] The key provisions are set out in Article 31, which is devoted exclusively to the topic. Article 31(1)[104] reads:

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

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

[103] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive), OJ L 108/51 of 24 April 2002. For commentary, see: Nico van Eijk, "New European Rules for the Communications Sector", *IRIS plus – Supplement to IRIS – Legal Observations of the European Audiovisual Observatory*, 2003-2, at 5-6.

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

Must-carry obligations can prove of enormous importance to PSB, especially by helping to ensure its universal availability. The importance of must-carry provisions for ensuring the continued availability of PSB is heightening considerably in an increasingly digitised broadcasting environment. This reaslisation prompted the Council of Europe's CM to urge in 2003 that must-carry regulations continue to be "applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes" via diverse digital platforms.[105] The CM's concern would appear to have escalated since then. In its Recommendation on media pluralism and diversity of media content, adopted at the beginning of 2007, it stated:

> Member states should envisage, where necessary, adopting must carry rules for other distribution means and delivery platforms than cable networks. Moreover, in the light of the digitisation process – especially the increased capacity of networks and proliferation of different networks, member states should periodically review their must carry rules in order to ensure that they continue to meet well-defined general interest objectives. Member states should explore the relevance of a must offer obligation in parallel to the must carry rules so as to encourage public service media and principal commercial media companies to make their channels available to network operators that wish to carry them. […][106]

The potential of must-carry provisions for PSB and for the promotion of cultural diversity was adverted to, albeit somewhat indirectly, in the leading ECJ case to date dealing with must-carry obligations, *United Pan-Europe Communications Belgium SA v. Belgium*.[107] For instance, the Court accepted that the national legislation at issue in the case "pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that

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

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

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

region".[108] The Court proceeded to state that such legislation "guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture".[109] Although not explicitly referred to as "the promotion of cultural diversity in the broadcasting sector", that is actually what was at issue in the case at hand.

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO Declaration on Cultural Diversity elucidates and collates the various rationales for promoting cultural diversity, as outlined in the first section of this study. Its explanatory value is very helpful. It teases out important links between theory and practice. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions[110] represents a semantic and conceptual shift from the Declaration. The Convention shows greater attention for means than for ends and for the conviction that cultural diversity is instrumental in securing a range of cultural freedoms and exchange, including the free flow of cultural activities, goods and services.[111]

The Convention seeks to protect and promote the diversity of cultural expressions and to create an appropriate climate in which cultures can thrive. Other key goals are to strengthen awareness of and respect for such diversity at all levels and to encourage intercultural interaction and dialogue. The Convention also aims to stress the linkage "between culture and development for all countries, particularly for developing countries" and to "give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning". Of particular importance is its reaffirmation of "the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection

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[108] *Ibid*., para. 42.
[109] *Ibid*., para. 43.
[110] Adopted by UNESCO General Assembly on 20 October 2005 (entry into force: 18 March 2007).
[111] Hélène Ruiz Fabri, "Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles", R.G.D.I.P. 2007-1, 43-87, at 53.

and promotion of the diversity of cultural expressions on their territory" (see also, Article 5 of the Convention).

Article 2 sets out those "Guiding Principles": respect for human rights and fundamental freedoms; [State] sovereignty; equal dignity and respect for all cultures; international solidarity and cooperation; the complementarity of economic and cultural aspects of development; sustainable development; equitable access, and openness and balance.

Article 6 proceeds to explore a range of measures that States Parties may adopt with a view to protecting and promoting the diversity of cultural expressions. A list of illustrative examples of appropriate measures is preferred to a general definition of the same. The indicative list of measures includes: regulation; public financing; provision of opportunities for the "creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services"; ensuring effective access for "domestic independent cultural industries and activities in the informal sector" to "the means of production, dissemination and distribution of cultural activities, goods and services"; encouragement of [efforts of] non-profit organisations, public and private institutions, artists and other cultural professionals; establishment and support of public institutions, "as appropriate". Last, but certainly not least, "measures aimed at enhancing diversity of the media, including through public service broadcasting", are also contemplated.

Under Article 7 ("Measures to promote cultural expressions"), States Parties "shall endeavour to create in their territory an environment which encourages individuals and social groups" to carry out a number of activities. Reliance on weak wording like "endeavour" and vague aims like the creation of an environment which encourages certain action, does not augur well for the effective attainment of the aims in question. For example, the Article states that individuals and social groups should be encouraged:

> to create, produce, disseminate, distribute and have access to their own cultural
> expressions, paying due attention to the special circumstances and needs of women as

well as various social groups, including persons belonging to minorities and indigenous peoples;

Nevertheless, this reference to creation, production, dissemination, distribution and access to cultural expressions, like other similarly itemised references elsewhere in the Convention, is important as it implicates a range of actors at different stages of the generation and transmission of cultural expressions.[112] The explicit call for attention for the situational specificities of persons belonging to minorities is also welcome.

Having been ratified by the requisite 30 States, the Convention entered into force on 18 March 2007, less than 18 months after its adoption. Ireland ratified the Convention on 22 December 2006. The speed with which the requisite ratifications were achieved owes much to support for the Convention from Europe. The accession of the European Community to the Convention on 18 December 2006 proved a major catalyst for its entry into force, but active support for the Convention was also forthcoming from the Council of Europe. A Recommendation adopted by the Council of Europe's Committee of Ministers called on Member States to ratify, accept, approve or accede to the UNESCO Convention at the earliest opportunity, on account of "the commonality between the objectives and guiding principles" set out in the Convention and various Council of Europe instruments concerning culture and the media.[113] The Recommendation also declared that the Council of Europe would have due regard for the provisions of the Convention in its work and that it would "contribute to their implementation". While it is still too early to meaningfully evaluate the impact of the Convention, it is clearly of symbolic and political importance: it affirms the principle of State sovereignty in cultural matters and its general, multi-faceted approach to the diversity of cultural expressions represents an important counterweight to the predominantly commercial or trade-oriented approaches at the international level, e.g. under GATT and GATS.

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[112] See also: Hélène Ruiz Fabri, "Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles", *op. cit.*, at 73.

[113] Recommendation Rec(2006)3 of the Committee of Ministers to member states on the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, adopted on 1 February 2006.

Article 18 of the Convention provides for the establishment of an "International Fund for Cultural Diversity" which is to be financed by, *inter alia*, voluntary contributions by States Parties, "funds appropriated for this purpose by the General Conference of UNESCO", contributions from miscellaneous sources and "any interest due on resources of the Fund". A voluntary basis for financing the Fund can hardly be regarded as a secure basis, so until practice proves otherwise, it the existence of the Fund can only be viewed as precarious. [114] The practice to date amplifies the pessimistic note of the previous sentence: so far, only approx. USD 1.5 million has been donated to the Fund.[115]

It is, as of yet, too early to evaluate the real (initial) impact of the Convention. Much will depend, as Ruiz Fabri correctly points out, on the establishment and effectiveness of the Convention's organs;[116] State practice relating to the Convention, and the engagement of civil society.[117] She is also right, however, to insist that political and symbolic importance of the adoption and entry-into-force of the Convention should not be understated. The Convention constitutes a significant statement of principle that State sovereignty should apply to cultural matters and thereby a counterweight to forcefully commercial approaches to cultural activities, goods and services.[118] As detailed in the foregoing analysis, certain discrete emphases in the text of the Convention (eg. the link between diversity of cultural expressions and intercultural dialogue and understanding (Article 2); the need to pay due attention to the specific circumstances of persons belonging to minorities (Article 7(1)(a)); threats to cultural expressions (Article 8) and the potential of new technologies to enhance the diversity of cultural expressions) hold considerable promise. Repeated references to the different stages and processes involved in the production, transmission and reception of cultural expressions are also valuable insofar as they prompt a disaggregated approach to the realisation of the right to freedom of expression. This also facilitates

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[114] See further on this point, Rachael Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?", 1 *International Journal of Communication* (2007), pp. 24-55, at pp. 38 and 53.

[115] USD 2,391,489 (on 11 March 2010). Ireland has yet to contribute to the Fund. For further information, see: http://portal.unesco.org/culture/en/ev.php-URL_ID=40586&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on 2 May 2010).

[116] Hélène Ruiz Fabri, "Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles", *op. cit*., at 84.

[117] *Ibid*, at 85.

[118] *Ibid*, at 55 and 83.

the task of addressing bottle-necks in the different stages of cultural activity. However, in practical terms, the programmatic character of envisaged State obligations and the general absence of operationalising criteria that would facilitate their realisation are major hurdles to be cleared.[119] The enduring impact of the Convention is likely to be best measured in terms of symbolism and awareness-raising; its consistent resort to non-committal language, although somewhat offset by intermittently more specific, programmatic provisions, means that it is unlikely to lead to meaningful legal achievements.[120]

World Summit on the Information Society (WSIS)

The Declaration of Principles adopted at the Geneva Phase of WSIS brackets cultural diversity and identity with linguistic diversity and local content.[121] Its approach to the promotion of cultural diversity is content-oriented and technologically-informed. Like the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, WSIS explicitly links the wider goal of promoting cultural diversity to the discrete goals of promoting the production of, and accessibility to, different types of content in diverse languages and formats.[122] These goals are, in turn, linked to the goal of promoting wide and inclusive participation in the Information Society.[123] It also emphasises the instrumental role that technology can play in preserving cultural heritage, which it recognises as "a crucial component of identity

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[119] Rostam J. Neuwirth, "'United in Divergency?': A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", ZaöRV 66 (2006), 819-862, at 860; Hélène Ruiz Fabri, "Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles", *op. cit.*, at 72.

[120] C.f. Rachael Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?", *op. cit.*, p. 53.

[121] "Building the Information Society: a global challenge in the new Millennium", Declaration of Principles, World Summit on the Information Society, Geneva, 12 December 2003, Doc. WSIS-03/GENEVA/DOC/4-E, Section 8, paras. 52-54.

[122] *Ibid.*, para. 53, which reads: "The creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society, paying particular attention to the diversity of supply of creative work and due recognition of the rights of authors and artists. It is essential to promote the production of and accessibility to all content – educational, scientific, cultural or recreational – in diverse languages and formats. The development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas."

[123] *Ibid.*

and self-understanding of individuals that links a community to its past".[124] At the Tunis Phase of WSIS, signatory States committed themselves to "promote the inclusion of all peoples in the Information Society through the development and use of local and/or indigenous languages in ICTs" and to generally continue to "protect and promote cultural diversity, as well as cultural identities, within the Information Society".[125] In the context of follow-up work to WSIS, relevant issues continue to be addressed, *inter alia*, by the International Association for Media and Communication Research (IAMCR), under so-called Action-line C8 (Cultural diversity and identity, linguistic diversity and local content), and by UNESCO under Action-line C9 (Media).

Miscellaneous

Two final international initiatives, neither of which is legally-binding, are also worthy of note on account of their thematic relevance and political significance. The first is a set of Guidelines on the use of Minority Languages in the Broadcast Media, elaborated under the auspices of the OSCE High Commissioner on National Minorities in 2003.[126] The conceptual linkage between cultural and linguistic diversity has already been discussed, as has the contribution of minority rights protection to the promotion of cultural diversity. Both relationships are evident in the Guidelines on the use of Minority Languages in the Broadcast Media. The General Principles that inform the Guidelines are listed as: Freedom of Expression, Cultural and Linguistic Diversity, Protection of Identity and Equality and Non-Discrimination. The principle, "Cultural and Linguistic Diversity" is fleshed out as follows: "States should guarantee the freedom of choice by creating an environment in which a variety of ideas and information can flourish as communicated in various languages".

The second initiative is the Joint Declaration on Diversity in Broadcasting, adopted by the IGO specialised mechanisms for freedom of expression and/or the media, in

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[124] *Ibid*., para. 54.

[125] Tunis Commitment, World Summit on the Information Society, Tunis, 18 November 2005, Doc. No. WSIS-05/TUNIS/DOC/7-E, para. 32.

[126] Available at: http://www.osce.org/publications/hcnm/2003/10/31598_1160_en.pdf. For commentary, see: Tarlach McGonagle, "High Commissioner on National Minorities: International Guidelines on Use of Minority Languages in Broadcast Media", *IRIS – Legal Observations of the European Audiovisual Observatory*, 2004-1: 3.

2007.[127] The United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information adopt annual joint declarations on selected themes relating to freedom of expression. Their 2007 Joint Declaration examines general considerations such as regulatory principles and media governance, education and media literacy, transparency, and technological issues. It then prises open the notion of diversity as it applies to broadcasting, by examining, in turn, diversity of outlet, source and content. The usefulness of such a disaggregated approach will be explained in Section IV, below.

Conclusion

This section has briefly mapped emergent trends in European and international standard-setting texts seeking to promote cultural diversity. Those trends reveal broad congruence in their understandings of how the potential of new media technologies can be harnessed in order to advance the objective of cultural diversity. Engagement with the specific features of new technologies is essential, as is the unravelling of the concept, "cultural diversity", and its contextualisation in the broader perspective of culture and cultural rights. This section hopes to have provided some introductory orientation for more detailed engagement with the challenges of operationalisation.

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[127] Joint Declaration on Diversity in Broadcasting, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFOM, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 12 December 2007, available at: <http://www.article19.org/pdfs/igo-documents/mandates-broadcasting.pdf>.

II. ANALYSIS OF SELECTED BEST NATIONAL PRACTICES

Introduction

Whereas Section I provided an overview of the most important international and European legal standards which seek, in different ways, to promote cultural diversity in broadcasting, this Section will survey selected best practices at the national level. Such best practices typically include: constitutional and legislative provisions; broadcasting licensing mechanisms; funding schemes; policy initiatives; self- and co-regulatory initiatives; individual mission statements adopted by or for individual broadcasting organizations.

By way of transition between Sections I and II, the first focus of Section II will be on the coordination of national initiatives at the international level. Subsequent focuses will catalogue and comment on a selection of practices in various countries which appear to have proved successful in realizing their stated aim of promoting cultural diversity in broadcasting. First, there will be a brief stock-taking of existing studies and available compendia of best relevant practices at the European level. The suitability of best practices identified in this Section for adaptation to, or application in, an Irish context will be considered in Section IV, below.

Coordination of national initiatives at the international level

European Platform of Regulatory Authorities

The European Platform of Regulatory Authorities (EPRA), now comprising 52 regulatory authorities,[128] was established in 1995 and it is a forum which would be eminently suited to the promotion of cultural diversity in European regulatory circles. It is an independent platform whose primary function is to be:

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[128] In addition, the European Commission and the Council of Europe have standing observer status (see Article 4(3) of the EPRA Statutes).

- a forum for informal discussion and exchange of views between regulatory authorities in the field of the media;

- a forum for exchange of information about common issues of national and European media regulation;

- a forum for discussion of practical solutions to legal problems regarding the interpretation and application of media regulation.[129]

EPRA's remit excludes "the making of common declarations and the pursuit of national goals"[130] but that does not detract in any way from the inherent value of the forum for sharing information, ideas and experiences on relevant themes. However, despite this clear potential of the forum for advancing discussion on the promotion of cultural diversity in broadcasting (and thereby the goal itself), the topic has yet to inform EPRA's agenda in an explicit, sustained and significant way.

Broadcasting Regulation and Cultural Diversity

A more thematically specific initiative involving regulatory authorities at a European level should be noted at this juncture. In 2004, the Catalan Audiovisual Council (CAC) organised a conference on the theme, "Global Broadcasting, Cultural Diversity and Regulation", as part of the Barcelona Universal Forum of Cultures. The Conference concluded with the drafting and endorsement of the so-called Declaration of Barcelona by a number of broadcasting regulatory authorities (including the Broadcasting Commission of Ireland). The Declaration (see Appendix) is short in length and unfortunately also short on content. It affirms the importance of safeguarding cultural diversity in audiovisual content in the face of homogenising trends in broadcasting. It draws on the intrinsic, democratic and societal arguments for promoting cultural diversity (outlined in Section I, above).

It also states that "Regulatory authorities are responsible for ensuring the respect of basic rights and freedoms and for pluralism in societies and in cultural expressions in the media". This statement is actually a slightly expanded version of a key principle first articulated by the European Court of Human Rights in the *Lentia* case, *viz.* that

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[129] Article 1(1), EPRA Statutes (as amended), available at www.epra.org.
[130] Article 1(2), *ibid*.

the State is the "ultimate guarantor" of the principle of pluralism, "especially […] in relation to audio-visual media, whose programmes are often broadcast very widely".[131]

The inclusion of the statement in the Declaration of Barcelona is significant in that it provides a firm, rights-based context for the reiteration of participating regulatory authorities' commitment to the objective of promoting cultural diversity in broadcasting. However, this statement of commitment did not translate into provisions for concrete action other than an undertaking to "prepare a work plan every year from 2006, which shall be submitted to members of the BRCD".

The Declaration also led to the establishment of a "permanent" network of broadcasting regulatory authorities for exchanging information and experiences about their activities relating to cultural diversity. The network is called Broadcasting Regulation and Cultural Diversity (BRCD). Although the Declaration of Barcelona describes the network as "permanent", it would appear that after initial enthusiasm for the initiative, the wind has since gone out of its sails. The BRCD's official website (www.brcd.net) has fallen into abeyance and whereas its Secretariat was to have been housed at the CAC, the relevant part of the CAC's website does not detail any current or projected activities.[132]

In light of the foregoing observations, it is somewhat unclear whether the BRCD is likely to continue to be an influential force in the promotion of cultural diversity in audiovisual regulation throughout Europe.

Stock-taking of studies and compendia of best relevant practices at European level

Media4Diversity: Taking the Pulse of Diversity in the Media (2009) is one of the most recent European studies on relevant themes. It is described in its second sub-title as "A Study on Media and Diversity in EU Member States and 3 EEA countries". The

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[131] *Informationsverein Lentia & Others v. Austria*, Series A, no. 276, 24 November 1993, para. 38.
[132] Both websites last accessed on 21 September 2009.

study was conducted by a consortium comprising Internews Europe, [133] the International Federation of Journalists[134] and the Media Diversity Institute,[135] with the publication being supported under the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). The study set out to map media and diversity initiatives across 30 European countries. It ultimately selected and commented on 30 examples of best practice. The selected initiatives were chosen in accordance with the following criteria: significance and inovativeness; replication potential; quality (incl. clear goal-setting and monitoring procedures); potential impact, and balance of regional clusters and type of media.[136]

The study further notes in respect of the selected initiatives that:

1. They demonstrate a high degree of insight into the broader driving forces affecting the media and diversity domain
2. They adopt holistic design approaches and inclusive partnership strategies
3. They deploy effective knowledge management and monitoring procedures
4. They highlight the successful impact on audiences
5. They demonstrate the value of longer term programmes and campaigns
6. They show the impact – and the necessity – of proactive leadership
7. They demonstrate the power of incentives
8. A few of them prove that media diversity initiatives can bring financial benefits to their businesses[137]

The selected initiatives span a number of focus areas:

- Journalism (News production and editorial processes);
- Production (Integration of diversity into the creative process and programme production);
- Employment (Recruitment processes that tap into the richness of diversity);
- Training (Use and implementation of resources, tools and courses);

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[133] Website: http://www.internews.eu.
[134] Website: http://www.ifj.org.
[135] Website: http://www.media-diversity.org.
[136] *Ibid.*, p. 22.
[137] *Ibid.*, pp. 22-23.

- Partnerships (Cooperation and joint conduct of initiatives);
- Organisation (Integration of diversity throughout the organisation's structure and overall strategy).[138]

The above list of focus areas allows for the useful categorisation of the initiatives. However, the typology of diversity used[139] does not include "cultural diversity": age (old); age (young); disability; ethnic; gender dimension; religion or belief; Roma; sexual orientation, and "all".[140] As such, its relevance for the present study is mainly indirect and analogous. This is also true of the list of handbooks and guides provided by the study.[141]

A very important and instructive section of the study is entitled 'Identifying Gaps in the Media and Diversity Arena' (see Appendix).[142] This section is diagnostic in character: it identifies 13 key points which require further attention and action. Put summarily, the following concerns are flagged: informal resistance to the diversity agenda within the media sector; the relative inability of the diversity agenda to inform political and media priorities; a perceived lack of cooperative initiatives between PSBs at the European and international levels; the lack of initiatives in the private media sector; the absence of a virtual centre/clearing-house for media and diversity (activities); the need for *ex-ante* planning, ongoing evaluation and follow-up/monitoring/impact-assessment exercises to be integrated into policy-making and projects; the need for rural, regional and community media to address diversity issues; educational and training issues in respect of diversity; a general lack of multi-stakeholder initiatives.

Of the handbooks and guidebooks presented in the study, two publications, in particular, are worthy of mention. The *Reporting Diversity Manual*[143] contains sections on ethnicity; religion; gender; physical and mental disabilities; socially disadvantaged groups; elderly and pensioner; refugees and internally displaced

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[138] *Ibid.*, p. 27.
[139] This typology has essentially been derived from Article 13 of the Treaty on European Union (as amended).
[140] *Ibid.*, p. 26.
[141] *Ibid.*, pp. 60 *et seq.*
[142] *Ibid.*, pp. 72-73.
[143] David Tuller, *Reporting Diversity Manual* (London, Media Diversity Institute, 2004).

persons; sexual orientation; political opposition and dissidents. *A Diversity Toolkit for factual programmes in public service television* was developed under the auspices of the European Broadcasting Union's Intercultural and Diversity Group in conjunction with/facilitated by the European Union Agency for Fundamental Rights. It includes a Diversity Checklist and shares reflections and best practices about various aspects of reporting diversity. As its title suggests, its focus is primarily on PSB news and current affairs programming and its exploration of the same is comprehensive.

Another relevant compilation of best practices, again primarily concerning PSB, has been developed under the auspices of UNESCO: *Public Service Broadcasting: A best practices sourcebook.* [144] Although this compilation does not contain a formal/extensive focus on cultural diversity, it does consider questions such as the importance of diversity in defining the PSB mandate and the changes and challenges inherent in the process of digitization. [145] The publication takes a disaggregated approach to diversity, emphasizing that the "services offered by public broadcasting should be diversified in at least three ways: the genres of programmes offered, the audiences targeted, and the subjects discussed". [146] Examples of best practices have been cherry-picked from around the world.

Initiatives at national level

In a number of countries, there are promising examples of initiatives aimed at promoting cultural diversity from within the broadcasting sector itself. Such initiatives can vary in character, eg. self- or co-regulatory or purely voluntary. A noteworthy example of the latter is the Cultural Diversity Network (CDN), which was set up in 2000 in the United Kingdom. [147] The CDN's membership comprises broadcasters and other organisations in the sector. It prioritises sharing "expertise, resources and models of good practice", including through activities such as:

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[144] Indrajit Banerjee & Kalinga Seneviratne, Eds., *Public Service Broadcasting: A best practices sourcebook* (UNESCO, 2005).
[145] *Ibid.*, Chapters 1 and 8, respectively.
[146] *Ibid.*, p. 15.
[147] See: http://www.culturaldiversitynetwork.co.uk/.

1. Modernising the casting and portrayal of ethnic minorities in mainstream programming.
2. Sharing non-commercially sensitive research on cultural diversity.
3. Obtaining a comprehensive picture of ethnic minority employment in UK broadcasting.
4. Establishing industry standards for the collection of ethnic monitoring data.

A key strategy of the CDN is the promotion of its Diversity Pledge (see Appendix), which it describes as "a public commitment by independent production companies and in-house producers to take measurable steps to improve diversity". The Pledge is divided into four sections:

1. Recruit fairly and from as wide a base as possible and encourage industry entrants and production staff from diverse backgrounds.
2. Encourage Diversity in Output.
3. Encourage diversity at senior decision-making level.
4. Take part in or run events that promote diversity.

Each section corresponds to a different aspect of diversity and is supplemented by a non-exhaustive list of practical examples of how the stated goal can be achieved.[148] Companies signing up to the Pledge must – as a minimum - commit themselves to two sections and one course of action per section. Signatory companies which have submitted their information to the CDN are entitled to display the CDN Diversity Pledge Logo.

This initiative is noteworthy for several reasons. First, it usefully distinguishes between different dimensions of diversity, thereby facilitating a tailored and effective approach to each. Second, it deliberately targets senior decision-making level (and in practice organises annual briefings of its Members' CEOs), thereby seeking impact in the higher echelons of management and editorial control. Third, more influential signatories of the Pledge can, in practice, expect that all of their partners also become

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[148] Further practical examples are provided by the Pact Diversity Toolkit. Pact is "the trade association representing the commercial interests of independent film, television, animation and new media production and distribution companies" and a member of the CDN.

signatories, or conceivably even exert pressure over them to do so. Fourth, the promotional kudos arising from being allowed to display the Logo are important for the business profile of broadcasters.

CDN members devise and adopt individual Diversity Action Plans (DAPs), which include actions centring on, for example, "senior management, production staffing, on-screen portrayal, recruitment and training". Individual DAPs are intended to be public, transparent and a basis for continuous discussion/performative evaluation.

Specific national institutional-based approaches

The task of upholding and promoting media diversity is sometimes assigned to a purpose-created institution or a specially-constituted committee within an existing institution with a broader remit. An example of the former – of several years' standing - is the South African Media Development and Diversity Agency.[149] The Act pursuant to which the Agency was established defines diversity (in respect of the media) as "access to the widest range of sources of information and opinion, as well as equitable representation within the media in general".[150] The Agency is an independent body and in turn, it must respect the (editorial) independence of the media.[151] A number of observations can usefully be made about the institutional design of the Agency.

First, its objectives, composition, independence and provision for its financing are statute-based. This put it on a firm footing from its very inception, not least in terms of its mandate, operational latitude and financial security. A statutory basis can prove helpful in insulating a public body from political and/or budgetary pressures and vagaries. Second, by assigning the Agency a specific, coherent mandate and accompanying funding for the discharge of that mandate, the risk of competing in-house thematic and financial priorities is reduced considerably. Third, by instating the Agency as a separate, purpose-conceived institution, the risk of conflicts between its various objectives and functions is reduced. By way of illustration: the safeguarding

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[149] The Agency was established by the South African Media Development and Diversity Agency Act, No. 14 of 2002.
[150] Article 1(vi).
[151] Article 2.

of media diversity is sometimes entrusted to media regulatory bodies. General monitoring or enforcement duties of regulatory bodies do not always sit comfortably with their facilitative or promotional objectives and responsibilities. Fourth, the assignment of the goal of promoting media diversity to a single, dedicated body, could help to pre-empt an unnecessarily piecemeal approach by a range of bodies with differing interests in the broader objective. Furthermore, the dedicated body could enhance coordination of initiatives taken by other bodies independently of one another, thereby avoiding unnecessary duplication of efforts and investments.

The Act lists a number of specific ways in which the Agency's more general aims – the promotion of development and diversity in the South African media – are to be achieved:

(i)   encourage ownership and control of, and access to, media by historically disadvantaged communities as well as by historically diminished indigenous language and cultural groups;

(ii)   encourage the development of human resources and training, and capacity building, within the media industry, especially among historically disadvantaged groups;

(iii)   encourage the channelling of resources to the community media and small commercial media sectors;

(iv)   raise public awareness with regard to media development and diversity issues;

(v)   support initiatives which promote literacy and a culture of reading;

(vi)   encourage research regarding media development and diversity; and

(vii)   liaise with other statutory bodies such as the Independent Communications Authority of South Africa and the Universal Service Agency.[152]

Beyond the elements of the above objectives that reflect some pressing policy concerns in South Africa (eg. references to historically disadvantaged communities and diminished indigenous groups, as well as the promotion of literacy), these objectives could be of wider relevance. Focuses on ownership, control and access are

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[152] Article 3.

as complementary as they are crucial. The emphasis on research, training and development and general capacity-building are all components of longer-term strategies for diversity. Public awareness-raising and support for miscellaneous pro-diversity initiatives also fall into the same pattern of priorities.

Finally, in this subsection, attention will turn to an initiative to improve transparency of information concerning media pluralism generally – but with potential knock-on value/interest for cultural diversity in the (broadcast) media. The *Conseil supérieur de l'audiovisuel* (CSA) of the Belgian Francophone Community recently launched a new website devoted to the scope and pluralism of the media within the French Community. [153] The site has been developed in the context of the CSA's responsibilities to safeguard media pluralism and to monitor the economic structures of media enterprises on an ongoing basis. The site details the panoply of media and media services available in the French Community and their ownership structures. As such, the site, which includes search functions, aims to serve as a clearing-house for all relevant information. The four main axes of the site are: (i) the range of media and media services available; (ii) media groups active in the French Community; (iii) audience data concerning each of the three main branches of the media sector (i.e., television, radio and press), eg. audience share, time-use data, turnover and levels of concentration of ownership, and (iv) media content (incl. a breakdown per programme category). The media content section of the site is not yet operational. The information provided on the site is gleaned from the annual reports filed with the Belgian CSA by all broadcasters subject to its jurisdiction.

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[153] See: http://www.csa.be/pluralisme/.

III. ANALYSIS OF IRISH LEGISLATIVE FRAMEWORK

The objective of promoting cultural diversity also features in Irish broadcasting regulation, both directly and indirectly. The most relevant provisions of the Broadcasting Act 2009 will now be identified and commented upon, referring – where appropriate - to discussions in other sections of this report.

First, under s. 25(1), the Broadcasting Authority of Ireland (BAI) (and its statutory committees) "shall endeavour to ensure":

(a) that the number and categories of broadcasting services made available in the State by virtue of this Act best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity,

(b) that the democratic values enshrined in the Constitution, especially those relating to the rightful liberty of expression are upheld, and

(c) the provision of open and pluralistic broadcasting services.

Regard to the cultural diversity of the people of the island of Ireland in overseeing the provision of broadcasting services is thus explicitly included among the BAI's general objectives. The other two objectives cited in s. 25(1) are closely related to the first objective insofar as the upholding of democratic values, especially the right to freedom of expression, and the provision of open and pluralistic broadcasting services, both facilitate the promotion of cultural diversity.

Cultural diversity is (indirectly) implicated in other general objectives of the BAI, as specified in s. 25(2), i.e., to:

- stimulate the provision of high quality, diverse and innovative programming by commercial, community and public service broadcasters and independent producers,
- facilitate public service broadcasters in the fulfilment of their public service objects […]
- promote diversity in control of the more influential commercial and community broadcasting services
- provide a regulatory environment that will facilitate the development of a broadcasting sector in Ireland that is responsive to audience needs […]

These objectives focus on, respectively: diversity of output; the centrality of cultural diversity to the public service mission; diversity of outlet or in the context of different media types; the need to cater for the needs of a culturally diverse audience. The multidimensional character of cultural diversity and its relationship with media diversity generally – both recurrent themes in this report - shed light on its relevance to these objectives.

Next to the general objectives of the BAI, the statutory description of some of its specific functions, eg. licensing, also leaves room for the promotion of cultural diversity. S. 64, concerning community sound broadcasting contracts, for instance, offers additional scope for fostering cultural diversity. Significantly, such sound broadcasting contracts are designed not only for *local* communities but also for communities *of interest*. Either type of community could conceivably include culturally diverse components. "Community of interest" is defined as "a group of persons with a shared interest, association or bond" in s. 2 of the Act. The resultant expansive interpretation of community broadcasting would render certain thematic services eligible to apply for such sound broadcasting contracts. This means that specific interest groups – including those with cultural objectives – could be awarded sound broadcasting contracts without having to satisfy the (potentially) restrictive criterion that they are also part of a geographically-confined community.

A recurrent concern in the Broadcasting Act is the need to allow for the establishment of "a diversity of services in an area catering for a wide range of tastes including those of minority interests" (ss. 65, 66(2)(f)). This is a clear commitment to diversity in broad terms and as already outlined, *supra*, cultural diversity is an important constituent part of overall diversity in the media. This concern for ensuring diversity at the outlet-level is supplemented by comparable concern for ensuring diversity at the ownership-level (see, for eg., ss. 66(2)(g)-(i)). Service to "recognisably local communities" (and support by "the various interests in the community") or to "communities of interest" is another criterion to be relied on by the BAI in its consideration of applications for sound broadcasting or television programme contracts (s. 66(2)(j)(i) and (ii)).

Another of the BAI's specific functions where the upholding of cultural diversity is relevant, is its responsibility to ensure that television programming provided by television programme service contractors:

(a) be responsive to the interests and concerns of the whole community, be mindful of the need for understanding and peace within the whole island of Ireland, ensure that the programmes reflect the varied elements which make up the culture of the people of the whole island of Ireland, and have special regard for the elements which distinguish that culture and in particular the Irish language,

(b) uphold the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression,

(c) have regard to the need for the formation of public awareness and understanding of the values and traditions of other countries than the State, including in particular those of other Member States, and

(d) include a reasonable proportion of news and current affairs programmes.

The foregoing applies specifically to programming provided by a television programme service contractor (s. 70). Programming provided by Radio Teilifís Éireann (RTÉ) must meet the same criteria, but its obligations as regards news and current affairs programmes are more detailed/demanding (s. 114(2)). The programming obligations of TG4 are expressed in almost identical wording to that setting out RTÉ's obligations, except that the emphasis on "the Irish language" at the end of s. 114(2)(a) is replaced by emphasis on "the Gaeltachtaí" in s. 118(2)(a).

Ss. 114(2)(a) and 118(2)(a) rest on an expansive and inclusive notion of the people of Ireland. It embraces the cultural diversity of contemporary Irish society, as evidenced by its explicit reference to the "varied elements" that make up the culture of contemporary Ireland. Paragraph (c) of both sections reinforces this approach by referring to "the need for the formation of public awareness and understanding of the values and traditions" of other countries (and by implication, of persons from other countries residing in Ireland). The societal argument for the promotion of cultural diversity is implicated here, but so too are the intrinsic and identity arguments (see further, Section I, *supra*).

As already explained, the objective of promoting cultural diversity is quintessentially a task for public service broadcasting. One of the objects of both public service

broadcasters, Radio Teilifís Éireann and TG4, as set out in the Broadcasting Act, is: "to establish, maintain and operate a national television and sound broadcasting service which shall have the character of a public service, be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland" (ss. 114(1)(a) and 118(1)(a), respectively). Both broadcasting corporations are also required to "facilitate or assist contemporary cultural expression and encourage or promote innovation and experimentation in broadcasting" (ss. 114(3)(c)/114(4)(m) and ss. 118(3)(c)/118(4)(m), respectively). The reference to "public service" coupled with the reference to "the whole community" suggest an underlying concern for cultural diversity.

This suggestion is rendered explicit in neighbouring provisions of the Act. Firstly, RTÉ is required under s. 114(3)(a) of the Act to ensure that the programme schedules of its broadcasting services:

> provide a comprehensive range of programmes in the Irish and English languages that reflect the cultural diversity of the whole island of Ireland and include programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests and which, in every case, respect human dignity […].

Secondly and very similarly, TG4 is required under s. 118(3)(a) to ensure that the programme schedules of its broadcasting services:

> provide a comprehensive range of programmes, primarily in the Irish language, that reflect the cultural diversity of the whole island of Ireland and include, programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater for the expectations of those of all age groups in the community whose preferred spoken language is Irish or who otherwise have an interest in Irish […].

The Broadcasting Fund, set out in ss. 153 *et seq.* of the Act, also represents an opportunity for promoting cultural diversity – to the extent that programmes on relevant topics could match the priority subject areas targeted by the Fund. Additional conditions applicable under the scheme, such as how and when programming must be

broadcast increase the likelihood of ensuring wide(r) exposure for the programming.[154]

This section scans the text of the Broadcasting Act 2009 and inventorises the provisions that (explicitly or implicitly) deal with (the promotion of) cultural diversity in the broadcasting sector. Numerous references to cultural diversity as a reality, a value or an objective, illustrate that the topic certainly informs regulatory thinking. However, none of the highlighted provisions offer any interpretive guidance as to what the topic actually entails. Nor is there any call to measure the extent to which the objective is actively pursued or to engage in other impact-assessment exercises. As such, there remains a significant challenge to operationalise the concept in practice.

The following sections will propose several approaches based on academic research and ultimately devise a set of appropriate indicators for application in the Irish context. These indicators will be derived from international standards, examples of best practices gleaned from comparative country analysis and relevant academic literature.

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[154] For details of comparable schemes in selected other countries, see Section II, *supra*.

IV. OPERATIONALISATION OF CONCEPTS AND ADAPTATION OF STRATEGIES TO THE IRISH BROADCASTING SECTOR

Section I of this study outlined the definitional difficulties bedevilling culture and cultural diversity *from the perspective of international and European law*. It will come as little surprise that theoretical approaches to cultural diversity are even more varied, open-ended and contested. A selection of definitional approaches will now be dwelt on briefly, in order to demonstrate how academic theory impacts on law- and policy-making. Arguments for diversity can sometimes sound like unobjectionable pleas for virtue[155] or "pious aspirations"[156] which are the subject of widespread "cheerleading".[157] This is because it is readily associated with freedom and other democratic values.[158] To guard against "the fetishization of diversity as a policy principle",[159] it is therefore important to "deconstruct" the principle, for instance, as Philip Napoli has done in a seminal article, by "highlighting its various components, means of assessment, and the hypothesized relations requiring empirical attention".[160]

A couple of important preliminary observations are in order, however. First, of the many differing understandings of cultural diversity, two tend to predominate:

- **traditional cultural heterogeneity**, i.e., regional/local cultural differences or distinct groups or communities, eg. the Travelling Community, and other ethnic, religious, linguistic or other groups with their own sets of distinctive cultural traditions;

- **new/recent cultural heterogeneity**, i.e., resulting from increased immigration into Ireland, in particular since the 1990s.

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[155] Denis McQuail, "Revisiting Diversity as a Media Policy Goal", in Werner A. Meier & Josef Trappel, Eds., *Power, Performance & Politics: Media Policy in Europe* (Baden-Baden, Nomos, 2007), pp. 41-57, at 43.

[156] Farrel Corcoran, "Cultural Rights and Media Performance", in Eoin Cassidy & Andrew G. McGrady, Eds., *Media and the Marketplace: Ethical Perspectives* (Dublin, Institute of Public Administration, 2001), pp. 15-32, at 16.

[157] Trevor Phillips, *Superdiversity: Television's Newest Reality* (Equate Organisation, 2008), p. 46.

[158] Denis McQuail, "Revisiting Diversity as a Media Policy Goal", *op. cit.*, at 42.

[159] Sandra Braman, "The Limits of Diversity", in Philip M. Napoli, Ed., *Media Diversity and Localism: Meaning and Metrics* (Mahwah, New Jersey & London, Lawrence Erlbaum, 2007), pp. 139-150, at 139. For a similar line of argument, see: Des Freedman, "Promoting Diversity and Pluralism in Contemporary Communication Policies in the United States and the United Kingdom", 7 *International Journal on Media Management* (No. 1, 2005), pp. 16-23, at 22.

[160] Philip M. Napoli, "Deconstructing the Diversity Principle", *Journal of Communication* (Autumn 1999), pp. 7-33, at 8.

The aforementioned distinction between two predominant understandings of cultural diversity is presented here as an empirical assertion and it does not claim to be scientifically or academically proven. Nevertheless, it is submitted that it is important to recognise the distinction and then engage with *both* types of cultural heterogeneity because *together* they constitute the comprehensive reality of contemporary cultural heterogeneity in Ireland.

The second important preliminary observation is that there is a voluminous and steadily growing corpus of academic literature dealing with pluralism and diversity in the media. Pluralism is generally taken to refer to issues of media ownership; of choices available to the public between providers of services. Diversity, for its part, is most often taken to refer to the range of programmes and services available to the public. The legal and semantic overlap between pluralism and diversity is unclear, and the terms are frequently used interchangeably across legal and other official texts, as well as academic writings.

Opinions are divided on how external pluralism (i.e., pluralism across the entire media sector),[161] can best be achieved. Some scholars hold out that the objective is best-served by (State-induced) encouragement of "a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a far preferable course of action".[162] The latter model is that of internal pluralism, which is usually reserved for public service broadcasters. This proposition is, however, sometimes regarded as inadequate, as "the mere increase in the number of channels which will be brought about by digital television is not sufficient in itself to guarantee media pluralism".[163] Other additional criteria, such as the determination of relevant markets and shares of relevant markets, remain important for assessing whether sufficient pluralism can be achieved.

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[161] See further, Eric Barendt, *Broadcasting Law: A Comparative Study* (Oxford, Clarendon Press, 1993), pp. 96-97.

[162] Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970), p. 671.

[163] European Commission for Democracy through Law (Venice Commission), Opinion on the compatibility of the Laws "Gasparri" and "Frattini" of Italy in the field of freedom of expression and pluralism of the media, June 2005, Opinion No. 309/2004, para. 264. The Venice Commission is the Council of Europe's advisory body on constitutional matters.

As already intimated in Section I, the promotion of diversity in broad or general terms would necessarily include cultural diversity. Figuratively, this could be described as various discrete types of diversity dovetailing into an amalgamated whole. One leading commentator has aptly referred to "the diversity of diversity".[164] To isolate cultural diversity from other types of diversity is to facilitate direct and targeted critical engagement with relevant, specific issues. This approach does not aim to hierarchise different types of diversity in any way; rather, it aims to ring-fence a specific area for detailed scrutiny. In this connection, the rationales for seeking to promote cultural diversity in the first place (see Section I) assume considerable importance. The specificity of cultural diversity should be borne in mind while examining more general approaches to diversity, as below. The emphasis in law, policy, practice and academic writing has traditionally tended to remain at the more general level, with only incidental probings of cultural diversity, *per se*.

Thomas Gibbons has usefully distinguished between three distinct levels of media-related pluralism (an expansive term used here to signify both pluralistic and diversity aspects of media law, policy and practice): content, source and outlet.[165] Of these three levels, content is the most substantive in character and therefore the ultimate end-goal. It is concerned with variety in political and cultural media output, both as regards information and opinion. Source and outlet, by contrast, are instrumental. They are useful means by which the ultimate end-goal may be achieved. However, they are not entirely dispositive as they cannot, of themselves, guarantee the achievement of the ultimate end-goal.

The entire case for plurality of sources and ownership rests on the premise that there is an assumptive – or perhaps even probabilistic – relationship between source/ownership and content. Many scholars have cautioned against equating plurality of source/ownership or indeed outlets with diversity of media content. The

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[164] Denis McQuail, "Revisiting Diversity as a Media Policy Goal", *op. cit.*, at 47.

[165] Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry", in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157. This distinction is replicated in the Joint Declaration on Diversity in Broadcasting, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFOM, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 12 December 2007.

former is primarily quantitative, whereas the latter, which is best gauged by media performance, is primarily qualitative. As Jan van Cuilenburg has put it: "highly competitive media markets may still result in excessive sameness of media contents, whereas one should at least theoretically not exclude the possibility of media oligopolies or even monopolies to produce a highly diverse supply of media content".[166] Indeed, such caution is not just theoretical: some recent empircial data suggests that there is not always a "a strong link between concentration of markets and the diversity of content" and that even "[M]arkets that are strongly concentrated can demonstrate similar levels of content diversity as markets that are less concentrated".[167]

The existence of a range of media outlets is similarly an important, but of itself, insufficient safeguard for the preservation of media-related pluralism. More specifically, it plays an assumptively instrumental role in ensuring diversity of media output. Having said that, the primary freedom of expression interest in maintaining a plurality of media outlets in society is that such plurality implies at least the potential for more extensive access to expressive and informational opportunities. In a roundabout way, extensive access for diverse groups in society should enhance the availability of diverse media output.

In the context of increasingly converged and multifunctional media, access to a wide range of media platforms is an essential (but not necessarily sufficient) requirement for access to truly diverse content and services. It is therefore important that different types of content-providers, especially (different types of) broadcasters have equitable access, to and are able to operate on, different distribution platforms.[168] In this connection, it has been urged that the digital dividend (i.e., the "radio spectrum freed

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[166] Jan van Cuilenburg, "Diversity Revisited: Towards a Critical Rational Model of Media Diversity", in Kees Brants, Joke Hermes & Liesbet van Zoonen, Eds., *The Media in Question: Popular Cultures and Public Interests* (Sage Publications Ltd., London, 1998), pp. 38-49, at 41.

[167] David Ward, Final report on the study on "the assessment of content diversity in newspapers and television in the context of increasing trends towards concentration of media markets", Group of Specialists on Media Diversity (MC-S-MD), Media Division, Directorate General of Human Rights, Council of Europe, 27 February 2006, Doc. No. MC-S-MD (2006) 001, p. 2.

[168] This point is made, *inter alia*, in the Joint Declaration on Diversity in Broadcasting, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFOM, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 12 December 2007.

as a result of the switchover from analogue to digital broadcasting"[169]) be used for the advancement of diversity in broadcasting.[170]

A crucial consideration, applicable primarily at the "outlet" level, but also at "source" level, concerns the composition of the workforce. This off-screen diversity can be determinant in the ways in which material is collected, organised and presented. Again, the relationship between production techniques is probabilistic, and the existence of a culturally diverse workforce will not, of itself, guarantee culturally diverse output. It merely gives rise to a wider cultural and experiential base to draw on in peri-production processes and as such, increases the credibility of the broadcasting organisation in the eyes of a culturally diverse public. To emphasise the importance of a culturally diverse workforce is not, however, to argue for the introduction of staff quotas, which often leads to crude quantitative approaches in practice (as opposed to positive, progressive and flexible recruitment policies).

At the content-level, further disaggregation can be useful, for instance, in terms of programme genre. Certain types of programming are often prioritised on account of their perceived contribution to the promotion of cultural diversity, eg. educational programmes, children's programmes, news and current affairs. These types of programming often correspond to the informational and viewing/listening preferences and interests of different sections of the public.

In the foregoing paragraphs, different levels of conceptual disaggregation have been proposed in the interests of analytical clarity. A final example of disaggregation concerns types of broadcasters. The promotion of cultural diversity is not necessarily a shared aim of all broadcasters. The extent to which it informs the objectives of a broadcaster can be determined, *inter alia*, by the nature of the broadcaster. In this sense, general distinctions are apparent between:

- public service broadcasting
- community broadcasting

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[169] Declaration of the Committee of Ministers on the allocation and management of the digital dividend and the public interest, 20 February 2008.
[170] *Ibid*.; Joint Declaration on Diversity in Broadcasting, *op. cit*.

- commercial broadcasting
- transnational broadcasting

These general distinctions are also reflected – to a significant extent – in relevant European and international legal standards (as already outlined in Section I).

Whereas the promotion of cultural diversity is perhaps intuitively associated with public service broadcasting (PSB) and community broadcasting, its potential relevance to other types of broadcasting should not be overlooked or downplayed. Irrespective of the precise obligations arising from their licensing agreements, individual broadcasters can, depending on their particular mission statement and the niche of the market they wish to fill, be very effective in harnessing this potential.

Concern for cultural diversity is widely regarded as one of the defining characteristics of **PSB**. Eric Barendt, for instance, lists among his six basic features of PSB "concern for national identity and culture" and a "range and variety of programmes".[171] As has already been argued any national identity and culture are necessarily forged from a diversity of component identities and cultures. Other commentators, like Georgina Born and Tony Prosser, foreground cultural diversity in the PSB paradigm, by emphasising, *inter alia*, the following features/objectives of PSB: [...] mixed programming or universality of genres; programming to support social integration and national identity; diverse programming catering to minorities and special interest groups, to foster belonging and counteract segregation and discrimination; programming reflecting regional identities; commitment to national and regional production [...].[172] These features/objectives match a number of the rationales for promoting cultural diversity put forward in Section I. They also address the two predominant understandings of cultural diversity set out earlier in this Section.

Community broadcasting is often considered to have clear kinship with PSB. The objectives of community broadcasting are public service, but in respect of a target group defined by geographical concentration or interest. This is also, to an extent, the

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[171] Eric Barendt, *Broadcasting Law*, *op. cit*., p. 52.
[172] Georgina Born & Tony Prosser, "Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations", 64 *The Modern Law Review* (Issue No. 5, September 2001), pp. 657-687, at p. 671.

rationale behind regional and local PSB. Community broadcasting typically involves active production and participatory paradigms, but such approaches also evident in PSB exploitation of new technological opportunities.

Whereas broadcasters with primarily **commercial** goals are not usually vaunted for their contribution to the advancement of cultural diversity, that does not mean that they are without importance for the realisation of that goal. First, commercial broadcasters can be subject to certain public service commitments. This can result from general obligations governing the activities (esp. programming) of all broadcasters or from the outsourcing of specific public service commitments to commercial broadcasters. Second, successful business strategies and practices can coincide with the advancement of cultural diversity, without that goal being formalised as an objective of a commercial broadcaster (eg. by serving niche cultural markets or by developing a culturally diverse workforce). This type of contribution to diversity has been described as "*pragmatic* diversity",[173] "which seeks to satisfy the demands of various audience segments".[174] The term is used in contradistinction to "*principled* diversity",[175] which refers to the kind of "explicit performance goals" to which public service broadcasters are subject, *viz*., "a balanced mix of basic programme categories".[176]

Transnational broadcasters, for their part, are also seldom cited in terms of their potential contribution to assuring cultural diversity in a given media sector. Nevertheless, their contribution can be very meaningful, particularly in respect of immigrant groups from outside of Europe, who may rely heavily on transnational broadcasts for content in their own languages and pertaining to their own cultures. As such, transnational broadcasters can (potentially) serve the new/recent cultural heterogeneity (mentioned at the beginning of this section) in good stead.

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[173] Emphasis per original – Heikki Hellmann, citing Jay G. Blumler, "Vulnerable Values at Stake", in Jay G. Blumler, Ed., *Television and the Public Interest: Vulnerable Values in West European Broadcasting* (London, Sage Publishing Ltd., 1992), pp. 22-42, at 32.
[174] Heikki Hellmann, "Diversity – An End in Itself?: Developing a Multi-Measure Methodology of Television Programme Variety Studies", 16 *European Journal of Communication* (No. 2, 2001), pp. 181-208, at 187.
[175] Emphasis per original. Hellmann, citing Blumler, *op. cit*., at 32.
[176] Heikki Hellmann, "Diversity – An End in Itself?: Developing a Multi-Measure Methodology of Television Programme Variety Studies", *op. cit*., at 187.

Impressionistic assessment of past and ongoing practices geared towards furthering cultural diversity[177]

It is the opinion of this author that in the Irish broadcasting sector, there is generally a large measure of goodwill towards the policy goal of promoting cultural diversity. Some skepticism can also be detected in some quarters. Notwithstanding the existence of general goodwill, though, there would appear to be a lack of expertise (of successful strategies) and capacity (in terms of both human and financial resources). There would also appear to be a lack of experience of action plans specifically geared towards cultural diversity, based on preliminary scoping research, the establishment of clear policies, their implementation through targeted activities and evaluation by means of monitoring processes and impact assessment exercises.

The above paragraph is, as already noted, impressionistic and personal. For in-depth theoretical and very recent empirical research pertaining to the treatment of relevant issues in the Irish broadcasting sector, the reader is referred to *Broadcasting in the New Ireland: Mapping and Envisioning Cultural Diversity*, an extensive study conducted by Gavan Titley, Aphra Kerr and Rebecca King O'Riain and funded by the Broadcasting Authority of Ireland.[178]

Consideration of potential obstacles to active and effective pursuit of strategies to promote cultural diversity in broadcasting

The limitations of experience and expertise mentioned in the previous subsection point up the need for an appropriate forum in which the experience and expertise

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[177] The "impressionistic" character of this sub-section is based on a number of semi-structured interviews conducted by telephone. The interviews are described as "semi-structured" because their point of departure was a general list of questions (see Appendix), but the directions they took were then largely determined by the interviewees' presentation of their organisations' objectives and practices in relation to cultural diversity. It was not the intention that the interviews would go beyond conveying general impressions of past and present efforts within the Irish broadcasting sector to promote cultural diversity. The author is very grateful to BCI staff for their assistance in identifying potential interviewees and to the interviewees themselves for their willingness to discuss relevant matters.

[178] Gavan Titley, Aphra Kerr and Rebecca King O'Riain, *Broadcasting in the New Ireland: Mapping and Envisioning Cultural Diversity* (Maynooth, National University of Ireland, Maynooth, April 2010).

which have been developed by individual broadcasting organizations could be pooled and explored further. Such a forum could go beyond sharing and discussing best practices: if suitably constituted, it could also provide an important framework for the coordination, development and ongoing review of relevant strategies within the Irish broadcasting sector. A self-regulatory model along the lines of the British Cultural Diversity Network, described in Section II, would seem a viable option; the details – in terms of objectives, design features, *modi operandi*, etc. – of such an initiative in the Irish context, will be tentatively set out in the Conclusions to this study.

How to devise optimal institutional strategies for the advancement of cultural diversity in the media generally and broadcasting in particular, is certainly an acute question in light of the cutback culture currently prevailing across the Irish public sector. In recent years, the former National Consultative Committee on Racism and Interculturalism (NCCRI) had been to the fore in facilitating and promoting initiatives (including projects relating to the media) to enhance cultural diversity.[179] The NCCRI ceased operations at the end of December 2008 due to government cutbacks. Similarly, budgetary cutbacks have significantly curtailed the capacity of the Equality Authority[180] and the Human Rights Commission[181] to assume meaningful roles in the same direction.

The foregoing observations provide important contextualisation for any proposed new initiatives to promote cultural diversity in the Irish broadcasting sector. In order to function optimally, it would be useful for new initiatives to be able to draw on the more generalised expertise and networks of bodies such as the former NCCRI. Even for initiatives originating in the media sector itself, it would be important to be able to graft on to broader institutional structures and networks.

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[179] For more information about the establishment and objectives of the NCCRI, see: http://www.nccri.ie/nccri-about.html.
[180] See further: http://www.equality.ie.
[181] See further: http://ihrc.ie.

V. DEVELOPMENT OF APPROPRIATE INDICATORS FOR CULTURAL DIVERSITY IN THE IRISH BROADCASTING SECTOR

The definitional malleability of "cultural diversity", both in terms of legal standards and theoretical approaches, does not lend itself to straightforward measurement. The promotion of cultural diversity in the broadcasting sector is a goal of conduct more than of result. It is an objective that is not fully attainable and therefore better qualified as progressive. The challenge of operationalisation is therefore to render a complex, composite and somewhat open-ended notion meaningful and effective in practice. There has been a notable trend, in economic, media and human rights circles to rely on so-called indicators in order to clarify the content of relevant obligations and to measure progress towards their attainment. Given the horizon-line character of cultural diversity in the broadcast media, it will be proposed in this section that indicators can be a useful – but not a definitive – tool for assessing progress towards a goal that is ultimately beyond full realisation.

This section will commence with a short theoretical introduction to the application of indicators in different sectors. It will then survey existing, recent examples of reliance on indicators by selected international organizations. Afterwards, it will analyse the quality control criteria which indicators ought to fulfil in order to be suitable for application to cultural diversity in the Irish broadcasting sector. The conclusion to this study will draw directly on this Section and recommend that a tailored set of indicators should inform, but not determine, strategic future approaches to the operationalisation of cultural diversity in the Irish broadcasting sector.

Reliance on indicators

In economic circles, reliance on indicators is a well-established practice. It is also comparatively straightforward. Economic progress and performance are readily measurable in terms of figures and statistical data. In international human rights law and media policy, the task of devising suitable indicators is more complicated. The object of the indicators in the latter contexts is usually less tangible and highly contextualized.

It is beyond dispute that a lack of means can never be accepted as justification for failing to strive to implement human rights obligations at the domestic level.[182] As pointed out by the UN Human Rights Committee in the context of the ICCPR, "failure to comply with [the obligation under Article 2(2) to give effect to the Covenant rights] cannot be justified by reference to political, social, cultural or economic considerations within the State". [183] This is a well-established principle of international human rights law and in practice, treaty-monitoring bodies, as well as independent human rights organisations, are increasingly relying on human rights indicators and various bench-marks to monitor governmental performance as regards the (progressive) implementation of (economic, social and cultural) rights. This approach involves measuring the willingness of a government to implement human rights against its capacity to do so; the dissociation of a lack of moral or political commitment from financial or technical incapacity reveals any real progress or regression.[184]

Although, as argued in Section I, cultural diversity is not a (human) right as such, it can be regarded as an important element of public policy, or, to use Bhikhu Parekh's term, an "operative public value". This gives rise to legitimate expectations that public funds will be used in order to give certain priority to the operationalisation of that public value.

A trend of increasing reliance on indicators for media pluralism is clearly in the ascendant, as will be borne out by the following selected examples. The approach taken rests on overtly economic thinking and strategies. It has been noted, for example,

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[182] See, for example, CESCR General Comment No. 3 The nature of States parties obligations (Art.2, para. 1 of the Covenant), adopted on 14 December 1990, para. 11 of which reads: "[…] even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints […]". See also, paras. 1, 10, *ibid*.
[183] Para. 14, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 26 May 2004.
[184] See further, Katarina Tomasevski, "Indicators", in Asbjorn Eide, Catarina Krause & Allan Rosas, Eds., *Economic, Social and Cultural Rights: A Textbook (Second Revised Edition)* (Kluwer Law International, the Netherlands, 2001), pp. 531-543; Asbjorn Eide, "The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights", in *ibid*., pp. 545-551.

that "the objectives of media diversity and media pluralism are converging around the rhetoric of competition and choice". [185] Furthermore, it has been contended that "Essentially, we have reached a point where diversity as a policy goal has become increasingly identified with choice for consumers of products and services, with freedom to supply media services and with unceasing competition amongst providers of content or services and makers of equipment". [186]

The conceptual difficulties involved in reducing an essentially unattainable goal such as the promotion of cultural diversity in the broadcasting sector are implicitly downplayed. The assumption appears to be that even complex, multi-faceted objectives can be reduced to concrete measurement. Whereas this study recognises the usefulness of indicators in measuring progress, it argues against total reliance on a system of indicators, due to the resistance of the topic to neat classification.

UNESCO

UNESCO has devised a set of media development indicators in order to provide a framework within which media development can be assessed. [187] The indicators have been developed under five main categories:

- A system of regulation conducive to freedom of expression, pluralism and diversity of the media
- Pluralism and diversity of the media, a level economic playing field and transparency of ownership
- Media as a platform for democratic discourse
- Professional capacity building and supporting institutions that underpins freedom of expression, pluralism and diversity
- Infrastructural capacity is sufficient to support independent and pluralistic media

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[185] Des Freedman, "Promoting Diversity and Pluralism in Contemporary Communication Policies in the United States and the United Kingdom", 7 *International Journal on Media Management* (No. 1, 2005), pp. 16-23, at 19.
[186] Denis McQuail, "Revisiting Diversity as a Media Policy Goal", *op. cit.*, at 47.
[187] *Media Development Indicators: A framework for assessing media development* (Paris, UNESCO, 2008).

As the titles of the five categories would suggest, some of the indicators could be of relevance for the present study. However, the overarching theme of the UNESCO report is media development and not cultural diversity. As such, the possible suitability of some indicators is not a foregone conclusion and can be explained by coincidental thematic overlap. Moreover, UNESCO's indicators were devised for global application, not application in a specific country. As such, they are intended to be sufficiently flexible so as to be suitable for application across a very wide range of States and contexts. They therefore lack the contextual specificity required for effective application in Ireland. These points converge because concerns about media development in Ireland are not widespread at the present time.

Council of Europe

In 2008, the Parliamentary Assembly of the Council of Europe devoted a significant amount of attention to "Indicators for media in a democracy". This was the title of a Resolution and Recommendation adopted by the PACE, as well as the report on which both texts were based.[188]

The Resolution emphasises the importance of freedom of expression, information and the media in democratic society and it puts forward a list of 27 "basic principles" which it regards as a suitable basis for analyses of the media situations in Council of Europe Member States. This (check-)list comprises a wide range of media and journalistic freedoms guaranteed or promoted by other Council of Europe standard-setting texts.

Many of the basic principles concern safeguards for the effective exercise of journalism, including rights and protections for journalists: protection against physical threats or attacks; no undue registration or other such State-imposed requirements as

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[188] *Indicators for media in a democracy*, Resolution 1636 (2008), Parliamentary Assembly of the Council of Europe, 3 October 2008; *Indicators for media in a democracy*, Recommendation 1848 (2008), Parliamentary Assembly of the Council of Europe, 3 October 2008; *Indicators for media in a democracy*, Report, Parliamentary Assembly of the Council of Europe, Committee on Culture, Science and Education (Rapporteur: Mr Wolfgang Wodarg), Doc. 11683, 7 July 2008.

preconditions for working in journalistic capacities (including refusals of entry or work visas for foreign journalists); respect for confidentiality of journalistic sources; freedom to disseminate content in the language of their choice; freedom of association (including trade union activities and the possibility of collective bargaining); adequate working conditions (including social security). Relatedly, other "basic principles" focus on the accessibility and availability of information, in particular the need to prevent undue restrictions on information due to privacy and state secrecy laws or exclusive reporting rights.

The importance of access to the media is also stressed, e.g. for political parties. Likewise, the need for the media themselves to enjoy "fair and equal access to distribution channels" is underscored. So, too, is the importance of transparency in media ownership structures and sources of funding; in regulatory and licensing processes and in journalistic activities. The need to prevent political or financial interference with editorial content (especially in respect of public service broadcasters) is also a recurrent concern in the Resolution. Self-regulatory mechanisms and journalistic codes of conduct are encouraged in the media sector.

The Recommendation, for its part, is more concise and calls on the Committee of Ministers to: endorse the basic principles set out in the Resolution; take them into account when assessing "the media situation in member states", and "establish indicators for a functioning media environment in a democracy which is based on this list, and draw up periodical reports with country profiles of all member states concerning their media situations".

The aforementioned PACE texts are unlikely to have much direct bearing on the promotion of cultural diversity in Ireland. First, the enumerated basic principles would appear to be largely of indirect relevance to cultural diversity (apart from references to general freedom of expression concerns, dissemination of content in different languages, ownership issues). Second, the texts lack binding effect and the action which they call for on the part of the Committee of Ministers is unlikely to be prioritised by the latter, given that various standard-setting and monitoring mechanisms are already in place and partly cover the would-be focus of the proposed examinations and periodical reporting.

European Union

Indicators have also featured in media law and policy at EU-level. For instance, in a 2005 European Parliament report concerned with enhancing the implementation of Articles 4 and 5 of the Television without Frontiers Directive, indicators were mooted as a possible solution for the vagueness of the provisions and their implementation. The report stated that in the absence of "public, precise and transparent indicators", it can be a problematic exercise to determine the exact extent to which States actually discharge their relevant obligations.[189] Neither the report nor its Explanatory Statement provided any further guidance as to the development of such indicators or their likely focus or content.

The most extensive study to date (to the knowledge of this author) on indicators in the media sector was published at the beginning of October 2009.[190] The study – the objectives of which have been welcomed, *inter alia*, by the European Parliament[191] – is the second step in a three-step plan devised by the European Commission in order to engage more effectively with media pluralism issues. The first step was the preparation of a Staff Working Document on the topic, providing an initial sense of the terrain. The second was to commission an independent study based on a risk-analysis approach. The third step will be the (likely) preparation of a Communication by the Commission on the topic in 2010.

The approach taken in the study pivots on a risk-analysis theory of media pluralism, as well as a mapping of relevant laws and practice across the Member States of the European Union. Significant sections and emphases in the study are of relevance for the question of cultural diversity in the broadcasting sector. The study's approach

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[189] *Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the "TV without Frontiers" Directive), as amended by Directive 97/36/EC, for the period 2001-2002 (2004/2236(INI))*, European Parliament Committee on Culture and Education, Rapporteur: H. Weber, Doc. No. A6-0202/2005, 21 June 2005, para. 7.
[190] ICRI *et al.*, *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*, July 2009 (rendered public in October 2009).
[191] See, for example, its Resolution on Concentration and pluralism in the media in the European Union, *op. cit*.

comprises legal, socio-demographic and economic components and the "risk domains" it identifies are:

- Pluralism of media ownership and control
- Media types and genres
- Political pluralism in the media
- Cultural pluralism in the media
- Geographical pluralism in the media

As such, the domains surveyed are largely congruent with the examples of analytical disaggregation suggested in Section IV of the present study.

Quality control of indicators

In order to ensure that indicators are an effective tool for assessing progress towards the realisation of a stated policy goal, a measure of caution is required. Indicators should be, at a minimum:

- Contextually embedded
- Specifically targeted
- Realistic and credible
- Transparent and verifiable
- Dynamic

Contextually embedded

The replication of approaches or standards developed in other jurisdictions or thematic contexts always run the risk of being compromised if they are not adequately contextually embedded. This study leans towards a recommendation that a self-regulatory model for the promotion of cultural diversity, originally conceived in Britain, should be adopted for the Irish broadcasting sector.

However, British experience of cultural diversity is substantively different to the Irish experience – in respect of both predominant understandings of cultural diversity (i.e., "traditional" and "new", see further, Section IV of this study). First, in terms of traditional cultural diversity: cultural differences between various regions in the United Kingdom are – by and large – more pronounced than in Ireland. This can be explained by historical, political, geographical and demographic factors. Second, in terms of new or recent cultural diversity, the United Kingdom has a longer and wider experience of immigration, shaped in no small measure by its history of colonial imperialism and subsequent post-colonial heritage. Societal experience of the cultural diversity brought by immigration has accumulated over generations. The focus of Trevor Phillips' report is (how the media can engage with the reality of) "superdiversity" or "hyperdiversity",[192] - both references to the *volume* and *diversity* of immigration into Britain.[193] Ireland, on the other hand, has only experienced significant patterns of immigration since the 1990s. As such, cultural diversity (as influenced by immigration trends) is a much more recent societal phenomenon. Whether cultural diversity is understood as indigenous or non-indigenous or both, size and scale are important variables when comparing and contrasting relevant British and Irish experiences.

Specifically targeted

In light of the foregoing discussion about the level of generality at which debates about diversity in the media are conducted, any set of indicators pertaining to cultural diversity in the Irish broadcasting sector would need to move beyond generalities and engage with the specificities at hand. Specificity of focus and application are therefore crucial for rendering an indicator-based approach meaningful in practice.

Realistic and credible

Initiatives and practices nurtured from within the media sector are often those which enjoy the greatest chance of uptake and effective implementation. In such instances, standards can reflect valuable sector-specific expertise and a sense of (part) authorship

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[192] Trevor Phillips, *Superdiversity: Television's Newest Reality* (Equate Organisation, 2008), p. 26.
[193] *Ibid.*, p. 27.

can bring a feeling of ownership too, thus strengthening commitment to the standards and their application.

Transparent and verifiable

By definition, indicators must be clearly identified/described, accessible with foreseeable consequences and verifiable (for monitoring or other assessment purposes). Their verifiability need not necessarily be formulated in quantitative terms. These criteria are important checks against vagueness and ineffective implementation.

Dynamic

It is a key concern that indicators would be able to keep apace of future technological and regulatory developments; that they would be chosen/developed with the need for organic growth in mind. This is particularly true in light of the imminence of digital switch-over. The "digital dividend" – the radio spectrum freed as a result of switch-over from analogue to digital television - holds considerable potential for the promotion of various public interests and values (eg. innovation, pluralism, cultural and linguistic diversity, education, knowledge, the prevention of digital exclusion, etc.).[194] As noted by Denis McQuail, "the rapid expansion and change of media systems tends to make diversity policies obsolescent before they are effective and the increasing scale of the task of implementing and monitoring any content specific diversity measures outpaces the means available in practice".[195]

Aside from the aforementioned specific qualitative criteria that indicators should meet, any strategy making use of indicators for monitoring purposes should additionally be wary of (at least) two general concerns: (i) the indeterminate nature of cultural diversity and (ii) the ever-changing nature of the (broadcast) media. Both of these concerns have already been mentioned, but nevertheless merit revisiting here.

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[194] See, for example, the Council of Europe Committee of Ministers' Declaration on the allocation and management of the digital dividend and the public interest, 20 February 2008.
[195] Denis McQuail, "Revisiting Diversity as a Media Policy Goal", *op. cit.*, at 50-51.

(i) The usefulness of indicators should not be overestimated. They are not definitive evaluation criteria. They are – as their name suggests – criteria which can be used to indicate progress towards an objective whose scope and meaning require clarification. When policy goals are couched in vague, aspirational terms, interpretive guidance is needed to render them useful in practice. Otherwise, it is easy to be sceptical about the practical worth of well-meaning, but ultimately ineffective terms. As noted by one commentator in a different context, "Terms such as "reasonable" or "substantial" amounts of informational programming are mushy [... and quoting a former Chairman of the US Federal Communications Commission], 'These are, in the vernacular, 'marshmallow' phrases – they mean almost nothing in and of themselves or, conversely, almost anything that one wants them to mean.'".[196]

(ii) The nature of the media is rapidly changing: they are generally becoming increasingly immediate, international and interactive.[197] As a result of these changes – the drivers of which are technological, social and cultural in nature[198] – the current media offer is more plentiful, quantitatively and qualitatively, than at any point in history. There is a greater range of media at our disposal, offering wider and more diversified functionalities/capabilities and greater differentiation in types of access, participation and output. A failure to engage with the constantly increasing functional differences of the media will inevitably result in blunt analysis of questions of cultural diversity and the media. A first step towards a proper appreciation of the divergent functionalities on offer involves prising open the notion of "new media", for instance along the lines of Karol Jakubowicz's comprehensive study, *A new notion of media?* He distinguishes three new notions of media: (i) all media are new-media-to-be;[199] (ii) forms of media created by new actors, and (iii) media or media-like activities

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[196] Henry Geller, "Mass communications policy: where we are and where we should be going", in Judith Lichtenberg, Ed., *Democracy and the mass media*, *op. cit.*, pp. 290-330, at p. 306.

[197] See generally, Karol Jakubowicz, *A new notion of media?: Media and media-like content and activities on new communications services* (Strasbourg, Council of Europe, April 2009).

[198] *Ibid.*, pp. 3; 5-7, and Karol Jakubowicz, "A New Notion of Media", Keynote speech at the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, Reykjavik, 28-29 May 2009.

[199] Whereas the other two new notions of media are self-explanatory, this one may require additional explanation. As Jakubowicz himself writes: "With the digitisation of all media, they may all be transformed into convergent media distributed on broadband networks. Older media will not be substituted for and disappear, but may re-emerge in changed form, as another source of content available on broadband Internet and other broadband networks", *op. cit.*, p. 19.

performed by non-media actors.[200] In consequence, just as the traditional media are adapting to their new and evolving technological environment, so too will traditional indicators and other monitoring and benchmarking mechanisms have to adapt.

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[200] *Op. cit.*, pp. 19 *et seq.*

CONCLUSIONS & RECOMMENDATIONS

Summary & conclusions

A central theme in this study has been the need to clarify the meaning and scope of cultural diversity before it can be meaningfully applied in the (Irish) broadcasting sector. The concept, as used in international law- and policy-making circles, is complex and vague. Its relationship with other contiguous concepts, eg. linguistic diversity and media pluralism, is at once overlapping and divergent. This study has sought to clarify the content of the concept by first setting out the rationales for the promotion of cultural diversity. The rationales, grouped as intrinsic, identity, non-discrimination/equality, democratic, societal and economic, were intended to structure the subsequent analysis. When cultural diversity or other "operative public values" are justified in terms of multiple rationales, it is important not to lose sight of each of those rationales when devising – and later – evaluating strategies designed to give expression and effect to the values in question.

Another definitional difficulty that had to be navigated by this study is the meaning and scope of the broadcast media. The "media" can be described as a convenient, amalgamated term that comprises content, outlets, structures and processes alike. Moreover, different types of media have different objectives, capacities, functionalities, reach, impact and working methods. The term "broadcast media" denotes the same complex of dimensions, but the range of outlets or forms of distribution involved is more limited. Nevertheless, changing technological paradigms and patterns in public and social communication mean that more traditional conceptions of "broadcast media" are being stretched to include new forms of broadcasting which are becoming increasingly prevalent in the digital environment. Given the depth of differentiation within the broadcast media sector, and its rapid and ongoing evolution, suitable strategies for the promotion of cultural diversity within the sector must engage adequately with the key themes of differentiation and evolution.

The study then proceeded to explore a wide selection of international legal and policy instruments that are either centrally or tangentially relevant to both cultural diversity

and its promotion in the media. This exploration was informed by both the rationales for promoting cultural diversity and the specific features of the pursuit of that goal in the media/broadcasting sector. The profound ongoing technological, social and economic changes within the sector and their relevance for the promotion of cultural diversity were centrally implicated.

This study is primarily (and deliberately) international in scope. Drawing on its international and comparative national focuses, it considers whether various legal and non-legal measures designed to operationalise cultural diversity would be suitable for replication in an Irish context. The study's brief analysis of the main provisions in Irish legislation dealing with the promotion of cultural diversity in the broadcast media provides important contextualization for this enquiry. The study then outlines the usefulness, but also the inherent limitations, of an approach based on indicators of progress towards the operationalisation of cultural diversity in the broadcasting sector. Indicators are increasingly being relied on in international circles in order to measure (different aspects of) media diversity. Despite the appeal of their potential to clarify complex and vague policy objectives, existing indicator-based systems should not be adopted in Ireland without due prior evaluation and reflection. In order for any set of indicators to be viable, it would have to be convincingly established that they are: contextually embedded, specifically targeted, realistic and credible, transparent and verifiable, and dynamic.

Finally, this study will now proffer some tentative recommendations, which are intended merely as a basis for further discussion and exploration, first and foremost by the widest possible range of actors from the Irish (broadcast) media sector. That is the limit of its ambition. It is in no sense intended to be prescriptive or presumptive. The most suitable approaches for the Irish context can only emerge from commitment and a sense of collective initiative from within the media sector. The predominantly legal, international and comparative insights offered by this study will, it is hoped, make a meaningful contribution to ongoing and further discussion and debate on relevant issues. However, they would be very usefully complemented by in-depth theoretical and empirical research pertaining to the contemporary broadcasting landscape of Ireland, such as the recent extensive study conducted by Gavan Titley,

Aphra Kerr and Rebecca King O'Riain, *Broadcasting in the New Ireland: Mapping and Envisioning Cultural Diversity.*[201]

Recommendations

The central recommendation of this study is that a forum should be created for high-level, inclusive and engaged discussion of the policy goal of promoting cultural diversity within the Irish (broadcast) media sector. The individual recommendations listed below seek to flesh out specific focuses and details of this central recommendation with a view to ensuring that it would be suitably tailored to, and of practical relevance for, the Irish broadcasting sector.

As is clear from this study, international and European standards offer an important legal framework in which debates about policy and the development of practical measures must be conducted. This is true notwithstanding: (i) the vagueness with which international and European normative standards deal with cultural diversity and the media; (ii) the fact that those standards have a limited (direct) applicability to Ireland, and (iii) the fact that those standards oscillate between legal and political texts. The essential point is that the international and European framework *is* relevant to the Irish situation to the extent that it is legally applicable, politically persuasive and referentially important. It sets out the primary parameters within which international and European policy-making is pursued.

Partly in response to the definitional and conceptual vagueness affecting the use of key terms and notions in international and European law- and policy-making, there has been increased reliance in recent years on both approaches which are not legally binding on States and on approaches which employ indicators and other techniques which seek to clarify the content of relevant international provisions. Both approaches seek to pierce the vagueness of formal international and European law and to prise open relevant provisions and explore their scope and meaning in practical terms. This is potentially a useful *démarche*, but it must be accompanied by a healthy measure of considered caution. Contextual variables inevitably apply at the national level,

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[201] *Op. cit.*

including Ireland. Thus, European-level initiatives or initiatives in other countries cannot simply be appropriated and used, lock, stock and barrel, in Ireland.

The following recommendations therefore recognise the *certain but limited* potential of international and European legal standards and policy developments for effective engagement with the goal of promoting cultural diversity in the Irish (broadcast) media sector. They accord as much space as possible for a representative range of actors in the Irish broadcasting sector to reflect on, tailor, develop and refine the legal and policy standards and initiatives discussed throughout this report, for further application in the Irish context. In order to provide practical impetus to the envisaged forum for promoting cultural diversity in the Irish broadcasting sector, a concrete model is proposed below. It is based on the Cultural Diversity Network (CDN) in the United Kingdom (discussed in Section II of this study), but subject to the firm proviso that the model should be seen as a point of departure, which would require contextual and other adjustments (see further, below). It is crucial that such an exercise be conducted by the widest possible range of relevant actors – including not only the media themselves, but also regulatory authorities and policy-makers – in order to ensure comprehensive and multilateral input.

Another discernible trend in (the interpretation and implementation of) international and European legal standards and in policy-making is the breaking down of a generalised goal of promoting cultural diversity into its different component elements and appropriate strategies for its achievement. Such elements and strategies include, as this study has shown, the potential contribution of particular types of media (eg. public service and community media) and the potential contribution of new media platforms and services. This disaggregated approach also argues strongly for representatives of a broad range of media and other actors to be involved in the shaping of future approaches to the promotion of cultural diversity in the Irish broadcasting sector.

The specific recommendations flowing from, and developing specific aspects of, the more general recommendation set out at the beginning of this section are as follows:

- An exploratory meeting should be organised of wide-ranging actors in the Irish broadcast media sector (representing national (public service and commercial), local and community broadcasters, audience representatives, civil society organisations, minority groups, journalistic organisations, production companies, governmental departments and agencies, the advertising industry, etc.) in order to ascertain the levels of enthusiasm and capacity for the promotion of cultural diversity across the Irish broadcasting sector. The meeting should also inventorise and discuss past, existing and projected programmes and practices aimed at promoting cultural diversity in the broadcasting sector. The meeting should involve senior managerial staff and staff with specific responsibilities for cultural diversity from participating organisations. The agenda for the meeting should provide for concrete follow-up (see, for example, the next recommendation). The Broadcasting Authority of Ireland could be invited to consider facilitating the convening of such an initial meeting, subject to the availability of funding.

- A key and explicit aim of the aforementioned meeting should be to explore the desirability and feasibility of launching a self-regulatory initiative modelled on the Cultural Diversity Network (CDN) in the United Kingdom (discussed in Section II of this study). Like the CDN, the proposed Irish initiative could be built around a general Diversity Pledge and transparent individual Diversity Action Plans.

- The structure of the proposed Diversity Pledge and Diversity Action Plans should disaggregate and engage with the different dimensions of (cultural) diversity, the different (and changing) dimensions of the broadcast media and the crucial interface between cultural diversity and the broadcast media.

- The presentation of Cultural Diversity Commitments in the Diversity Pledge should be along axes of principles and practice; the principles should correspond to key rationales for, and dimensions of, diversity (as determined by participating parties), whereas the possible action lines should correspond to a wide range of suitable indicators (again, developed by participating parties,

but informed by the discussion in Section V of this study and a non-exhaustive list of examples of suitable indicators distilled from existing studies at international level and in other jurisdictions). Relevant principles or rationales for the promotion of cultural diversity via broadcasting – as prioritised by participating parties – could be set out in a detailed preamble to the Diversity Pledge. Such a preamble could also sketch the relevant parameters of international law- and policy-making, in order to give a sense of the international legal and political obligations and expectations that percolate down to the national level.

- The CDN's Diversity Pledge comprises four sections focusing on the promotion of diversity in the areas of recruitment, output, senior decision-making level and participation in/organisation of promotional activities. These sections represent useful disaggregation for practical purposes. The disaggregation also corresponds roughly to the distinctions between source, outlet and content, referred to repeatedly throughout this study. Another section could be added to address specificities associated with the outlet or type of broadcaster involved. Relevant specificities have also been discussed throughout this study and include the broadcaster's objectives, mode(s) of transmission, reach, audience/market share, etc.

- The CDN model could prove a useful source of inspiration, but it need not necessarily serve as a blueprint for a comparable Irish initiative. A number of the CDN's design and procedural features could be examined and adjusted with a view to enhancing the effectiveness of the proposed Irish initiative. For instance, under the CDN's Diversity Pledge, participating organisations must commit to two sections and one action per section (chosen from the list of suggestions provided by the CDN or proposed by the participating organization itself). This *à la carte* arrangement could be replaced with a *table d'hôte* menu, which requires that something be chosen from each course/section.[202] Another plausible adjustment might include increasing the

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[202] Such a set-up is not without precedent at the international level – it is the formula used in the European Charter for Regional or Minority languages, discussed in Section I of this study. The concept is explained in: Dónall Ó Riagáin, "The Charter: An Overview", in François Grin, *Language policy*

commitment to two or more actions per section. A *non-recul* or non-slip-back clause could perhaps be included to help to prevent any regression in the commitments undertaken by broadcasters on a multi-annual basis. The foregoing are mere suggestions: appropriate design features would advisedly be left for determination by participating parties. The CDN prefers a constructive, dialogical, solution-oriented approach to one based on sanctions for failure to honour commitments. Given that the proposal being tentatively advanced here for the Irish broadcasting sector is a voluntary initiative, it is likely that the collegial approach of the CDN would also prove more successful in practice than any alternative built around punitive measures.

- The proposed initiative could usefully include a formal research component in order to further understanding of the complex dynamics at play in the Irish broadcasting sector. It would be particularly important to be able to follow, analyse and evaluate patterns and practices relating to the promotion of cultural diversity in the sector. Examples would typically include the extent of participation by culturally diverse groups in media activities; questions of portrayal and representation; the availability and accessibility of programming that corresponds to the real informational and entertainment needs and preferences of culturally diverse groups.

- The proposed initiative could also usefully seek to develop formal and innovative information and publicity strategies. Such strategies should be directed at actors within the sector and the public at large. The initiative should aspire to become the primary national forum for the discussion and exchange of policies and practices for fostering diversity in the broadcast media. A compendium of successful practices could be developed, shared and promoted. Awareness-raising measures should be pro-actively pursued with a view to drawing attention to the social relevance of the objective and to raising the profile of the initiative, its aims, achievements and membership.

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evaluation and the European Charter for Regional or Minority Languages (New York, Palgrave Macmillan, 2003) pp. 55-68, at p. 64.

- The advantages of statute-based or other structured provisions for public subsidies for initiatives such as the one currently being proposed are obvious. In the absence of the same, funding provisions to ensure the viability of the initiative could be built into its design features. This could, for example, include the initial hosting and coordination of the initiative by a particular broadcaster, with appropriate *pro rata* financial contributions from other participating parties. The hosting and coordination of the initiative could evolve into a rotation system as soon as the initiative was established on a firmer footing.

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2. International instruments

2.1 United Nations instruments - selected

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Mavlonov & Sa'di v. Uzbekistan, Communication No. 1334/2004, Views adopted on 19 March 2009, para. 8.7.

2.1.2 UNESCO instruments - selected

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2.2 Council of Europe Treaties - selected

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2.2.1 European Court of Human Rights – selected case-law

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Gorzelik & Others v. Poland, Judgment of the European Court of Human Rights (Grand Chamber) of 17 February 2004.

Informationsverein Lentia & Others v. Austria, Judgment of the European Court of Human Rights of 24 November 1993, Series A No. 276.

Jersild v. Denmark, Judgment of the European Court of Human Rights of 23 September 1994, Series A no. 298.

Khurshid Mustafa & Tarzibachi v. Sweden, Judgment of the European Court of Human Rights (Third Section) of 16 December 2008.

Oberschlick v. Austria, Judgment of the European Court of Human Rights of 23 May 1991, Series A no. 204.

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2.2.2 Council of Europe – selected Recommendations and Declarations of the Committee of Ministers

Text	Title	Date
Declaration (2009)	On the role of community media in promoting social cohesion and intercultural dialogue	11/02/2009
Declaration (2008)	On the allocation and management of the digital dividend and the public interest	20/02/2008
Rec (2007) 16	On measures to promote the public service value of the Internet	07/11/2007
Rec (2007) 3	On the remit of public service media in the information society	31/01/2007
Rec (2007) 2	On media pluralism and diversity of media content	31/01/2007
Declaration (2007)	On protecting the role of the media in democracy in the context of media concentration	31/01/2007
Rec (2006) 3	On the UNESCO Convention on the protection and promotion of the diversity of cultural expressions	01/02/2006
Declaration (2006)	On the guarantee of the independence of PSB in the member states	27/09/2006
Declaration (2005)	On human rights and the rule of law in the Information Society	13/05/2005
Rec. No. R (2003) 9	On measures to promote the democratic and social contribution of digital broadcasting	28/05/2003
Declaration (2000)	Cultural diversity	07/12/2000
Declaration (1999)	A European policy for new information technologies	07/05/1999
Rec. No. R (99) 1	On measures to promote media pluralism	19/01/1999
Rec. No. R (99) 14	On the universal community service concerning new communication and information services	09/09/1999
Rec. No. R (96) 10	On the guarantee of the independence of public service broadcasting	11/09/1996

Declaration (1982)	On the freedom of expression and information	29/04/1982

2.3 European Union regulatory texts - selected

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European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union (2007/2253(INI)).

2.3.1 Court of Justice of the European Communities – selected case-law

Case C-250/06, *United Pan-Europe Communications Belgium SA v. Belgium*, Judgment of the Court of Justice of the European Communities (Third Chamber) of 13 December 2007.

Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, Judgment of the Court of Justice of the European Communities (Third Chamber) of 2 June 2005, ECR I-4891.

Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Judgment of the Court of Justice of the European Communities of 24 July 2003, Rec.2003, p. I-7747.

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