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Regulating the Digital Television Infrastructure in the EU. Room for Citizenship Interests?

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Abstract

This article argues that the regulation of the DTV infrastructure cannot be limited to economic concerns and that it must also address citizenship values. The analysis focuses on the regulatory framework for electronic communications (eCommunications) in the European Union, with a particular emphasis on the control of bottleneck facilities. The argument for bringing public policy considerations under the European framework on eCommunications faces major difficulties. This could be achieved only in the long term and is dependent on the shaping of the European democratic dimension and on a greater supranational competence in matters such as pluralism and diversity in the communications sector. Under the current framework, public policy concerns in the communications sector are gradually forgotten, while the regulators are giving in to commercial pressures. The maintenance of the status quo commits the protection of citizenship values to an uncertain future and, unless we are prepared to look beyond economic interests in eCommunications, the commodification of the public will become an irreversible aspect of a market-dominated reality.

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1. Introduction

Every revolution has its victims and the digital revolution makes no exception. Technological advances have produced significant transformations in the communications market and the process of convergence allowed commercial players to expand across the previously divided sectors of telecommunications, broadcasting and information technology. As a reaction to this competitive environment, policy-makers have adopted deregulatory measures designed to allow their “national champions” to expand internationally¹ and have approached the regulation of the digital television (DTV) infrastructure in an economic light. In this changing regulatory environment, citizenship interests were generally forgotten from the regulatory discourse.

This article argues that the regulation of the DTV infrastructure cannot be limited to economic concerns and that it must also address citizenship values. The analysis focuses on the regulatory framework for electronic communications (eCommunications) in the European Union, with a particular emphasis on the control of bottleneck facilities, which are “points of strategic control” in the DTV supply chain.² Part One argues that the notions of “citizens” and “consumers” cannot be considered to be synonymous. Consumer interests are addressed in an economic light and are associated with access to services, high quality products, increased choice and lower prices. Citizenship concerns are more complex, calling for pluralism and diversity in the communications sector and an effective participation in society. Part Two examines consumer and citizenship interests associated with the regulation of bottleneck facilities, seeking to emphasize that an effective regulation of the DTV infrastructure must respond not only to technical and competition concerns, but also to a range of non-economic factors. Part Three emphasizes that the European regulatory framework on eCommunications is limited to economic considerations. Rather than fighting for the protection of public policy concerns, the regulators were captured by the market players, reacting favourably to their pressures. Finally, Part Four indicates that an effective control of the digital television sector can be achieved only if the regulators are prepared to stand up to the commercial giants and rely on a complementary application of economic and social regulation for the DTV infrastructure. The study also calls for an increased level of competence at the European Union level to address the social aspects of the bottlenecks challenge, and argues that citizenship interests in eCommunications must be prioritised over commercial interests. Maintenance of the *status quo* is not an answer and the “increased commodification” of the public indicates that solutions need to be found soon.³ A failure to react would mean that the digital revolution came at too high a price.

¹ M Feintuck and M Varney, *Media Regulation, Public Interest and the Law* (2006) 2nd edn.

² D Nolan, “Bottlenecks in pay television. Impact on market developments in Europe” (1997) 21 *Telecommunications Policy* 597, at 603.

³ A E Varona, “Changing channels and bridging divides: the failure and redemption of American broadcast television regulation” (2004) 6 *Minnesota Journal of Law, Science and Technology* 1.

2. Citizens or Consumers? In search of our Identity in the Digital Age

In the communications sector, the public must be protected as both consumers and citizens. The concept of citizenship comprises wider democratic values such as equality between the members of society. When acting as citizens, people tend to take into account the interest of others, rather than being confined to the pursuit of self-interests.⁴ They act not only as economic actors, but also as participants within the wider social and political sphere. On the other hand, the notion of consumers reflects a narrow perception of the public. Viewers act in the pursuit of individual goals, and interactions in the communications environment are driven by market forces. The active involvement of consumers in the communications sector, enhanced by technologies such as interactive television, is limited mainly to having a say in the range of available alternatives.⁵

In the current communications environment, a significant degree of power is concentrated in the hands of the market players that control access to bottlenecks such as Conditional Access Systems. Rifkin has noted that “a world structured around access relations is likely to produce a very different kind of human being”.⁶ Unfortunately, as a result of commercial pressures over policy making, the interest of the public as both citizens and consumers has been replaced by a commodified perception of the viewer.⁷ Driven by financial considerations and with no regard to public policy concerns, the big market players are undermining the force of the member states to provide a sufficient safeguard to the democratic expectations of the citizens.

The growth of commercial players in the communications sector constitutes a reaction to technological advances. Bustamante Ramirez refers to this as “defensive movements in the face of uncertainty and convulsion” as a result of digitalisation.⁸ These corporations establish strong alliances with the national regulators, placing a significant degree of influence over policy-making at the detriment of citizenship-oriented concerns.⁹ In fact, there is a major discrepancy between the degree of influence exercised over the regulatory realm by the commercial players on one hand, and the public on the other. In the absence of social regulation designed to safeguard citizenship interests and prioritise such concerns over commercial-oriented considerations, the battle for protecting citizenship interests is lost.

This article relies on a wide definition of citizenship, based on the values associated with this concept and including all residents within a community.¹⁰ In Marshall’s view the concept of citizenship is based on three universal elements: civil, political

⁴ C R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990), at 58.

⁵ C Crouch, “Citizenship and Markets in Recent British Education Policy”, in C Crouch, K Eder and D Tambini (eds) *Citizenship, Markets and the State* (2001), 111.

⁶ J Rifkin, *The Age of Access* (2000) at 7.

⁷ Varona, above, note 1.

⁸ E Bustamante Ramirez, “Cultural Industries in the Digital Age: Some Provisional Conclusions” (2004) 26 *Media, Culture and Society* 803, at 813.

⁹ Varona, above, note 1.

¹⁰ European Network against Racism (ENAR) “For a Real European Citizenship” (<http://www.enar-eu.org/en/publication/citizenshipE.pdf>).

and social.¹¹ The civil element comprises individual liberties, including the freedom of expression, the right to property and the right of access to justice. The political aspect refers to the right of citizens to be involved in the political life, standing in elections and exercising their right to vote. Finally, the social element comprises, *inter alia*, “the right to share to the full in the social heritage and to live the life of a civilized being”.¹² Examples include the right of access to services. The article perceives the notion of “consumer” as comprised within the civil element of citizenship. This is based on the individualistic emphasis of civil rights and the function of economic freedoms highlighted by Marshall as being “indispensable to a competitive market economy”.¹³

Transformations in society posed significant challenges to Marshall’s vision of citizenship. Crouch *et. al.* draw attention to the “marketisation of citizenship”, calling for solutions that “relocate participation in the market” or that encourage, *inter alia*, deliberative forms of democracy.¹⁴ In the present context for regulating the communications sector, the civil element of citizenship has been expanded, while the political and social aspects have been diminished.¹⁵ The current measures designed to protect the interest of the public in eCommunications are generally concerned with consumer-related interests. This is reflected in the language adopted in the regulatory instruments for this sector, which refer to the public as consumers, customers or end users. As consumers in the digital age, we seem better off: the choice of channels has never been as extensive, while image and sound are provided at an unprecedented level of quality. Nevertheless, commercial players are not concerned with ensuring that we are well-informed citizens capable of participating in society.¹⁶ As Herman and McChesney indicate, media corporations are market-driven, looking at “what sells best” and this ultimately reduces the potential for the communications sector to serve democracy.¹⁷

A well-informed public is more likely to take part in society as active citizens rather than passive consumers. Habermas put forward the idea of a “public sphere” free from the control of governmental or market forces, in which citizens can engage freely in public debate.¹⁸ This refers to “a zone of discourse in which ideas are expressed and a public view is crystallised” and where “debate has consequences”.¹⁹ This concept has relevance in the current communications context confronted with challenges in regulating bottlenecks in DTV. Price notes that:

¹¹ T H Marshall, *Citizenship and Social Class, and Other Essays* (1950).

¹² *Ibid* 10-11.

¹³ *Ibid* 33.

¹⁴ C Crouch, K Eder and D Tambini (eds) *Citizenship, Markets and the State* (2001) at 6.

¹⁵ M Feintuck, *The Public Interest’ in Regulation* (2004), at 59.

¹⁶ J Harrison and L. Woods, “European citizenship: can audio-visual policy make a difference?” (2000) 38 *Journal of Common Market Studies* 471, at 483.

¹⁷ E S Herman and R W McChesney, *The Global Media: the New Missionaries of Corporate Capitalism* (1997), at 189.

¹⁸ J Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (1992).

¹⁹ M Price, “Free Expression and Digital Dreams: The Open and Closed Terrain of Speech” (1995) *Critical Inquiry* 64, at 69.

*Each new communications technology ... presents the possibility of altering the infrastructure of discourse. As it is absorbed, implemented and developed, each technology plays out and reshapes the idea of community.*²⁰

A communications sector dominated by bottleneck controllers (in which access to information is encrypted and made available only to those who can pay) is increasingly moving towards the closing up of the “public sphere”.²¹ In this context, the adoption of social regulation for the DTV infrastructure, seeking to ensure that citizens have access to information, could remedy some of these difficulties. Unfortunately, the development of a genuine public sphere was compromised by the adoption of a market-oriented framework for regulating the communications sector. Drawing on the view that an active involvement of citizens in society is reliant on “a media that plays a public service function”, McChesney sees the adoption of measures favourable to market interests as “a disaster” for democratic values.²² The current deregulatory trends are major contributions to the “commercialisation of the public discourse” and the commodification of the public.²³ In this “pseudo public sphere”,²⁴ the political element of citizenship diminished and we are merely passive consumers. This is similar to the situation observed by Varona in the United States, when arguing that “inertia, not democratic participation, is what modern commercial television seems to promote”.²⁵ The transformation from active citizens into passive consumers is also manifested through a certain degree of isolation of the public. As a result of technological advances, we prefer to be confined into virtual and isolated spheres.²⁶ This re-confirms the concerns expressed by Crouch *et. al.* when pointing out towards “the triumph of the market over citizenship”.²⁷ A citizen whose social and political interests have been neglected by the regulatory framework and whose main entitlements are economic, has stopped being a citizen. A more accurate description reflecting his/her status is that of a consumer.

3. Beyond Economic Concerns in the Regulation of Bottlenecks

The regulation of bottlenecks in the DTV infrastructure is an essential step towards the broader objective of ensuring pluralism and diversity in the communications sector and facilitating the access of the public to information. In this sense, the public must be protected as both citizens and consumers. The economic challenges posed by the regulation of the DTV infrastructure have been discussed extensively by academic

²⁰ Ibid 64.

²¹ Ibid 67.

²² R W McChesney, “Making Media Democratic” (1998) *Boston Review* @: <http://www.bostonreview.net/BR23.3/mcchesney.html>.

²³ Id.

²⁴ Habermas, above, note 18.

²⁵ Varona, above, note 1, at 65.

²⁶ Harrison and Woods, above, note 16, at 483.

²⁷ Crouch *et. al.*, above, note 14, at 11.

commentators²⁸ and will be addressed here only briefly. Instead, this section aims to concentrate mainly on the non-economic concerns associated with this sector.

3.1 Bottlenecks – Brief Background

Bottlenecks/gateways²⁹ represent “points of strategic control” in the DTV infrastructure³⁰ and access to these facilities is crucial for any competitors who wish to provide services to the public.³¹ Rifkin makes an analogy between gatekeepers in the DTV supply chain, and collectors on toll roads.³² Facilities can be transformed into bottlenecks by various factors, including the proliferation of proprietary technology and the strengthening of a position of dominance by an undertaking in the relevant market.³³ While bottlenecks or gateways were also present in the analogue sector, technological advances such as convergence and digitalisation brought a new level of complexity and enhanced the scale of the regulatory challenges.³⁴

Bottlenecks are present at various stages in the DTV supply chain, including content, packaging, bundling, delivery, conditional access, reception and revenue collection.³⁵ This study concentrates on conditional access and reception bottlenecks, particularly Conditional Access Systems (CASs), Electronic Programme Guides (EPGs) and Application Programme Interfaces (APIs). Conditional Access technology allows market players to deliver information only to those viewers that have paid for the services.³⁶ Programmes are encrypted and reception is possible only for those consumers that have acquired the decoding “key”.³⁷ Helberger refers to conditional access as a “driving factor” for development in the communications sector, allowing market players to charge the public directly for the provision of services.³⁸

An important role in the digital television supply chain is also played by the reception technology. The set-top box (STB), known also as the Integrated Receiver Decoder (IRD), also comprises key components such as the verification software, the API and the EPG.³⁹ The mechanisms adopted for operating receivers are very similar to

²⁸ M. Cave and C. Cowie “Not only Conditional Access. Towards a Better Regulatory Approach to Digital TV” (1998) Euro-CPR, 16-17 Mach, Venice; C. Cowie and C T Marsden, “Convergence, Competition and Regulation” (1998) 1 *International Journal of Communications, Law and Policy* @ http://www.digital-law.net/IJCLP/1_1998/rtf/ijclp_webdoc_6_1_1998.rtf; N. Helberger, “Access to Technical Bottleneck Facilities; the New European Approach” (2002) 46 *Communication and Strategies*.

²⁹ This study uses the terms “bottlenecks” and “gateways” interchangeably.

³⁰ Nolan, above, note 2, at 603.

³¹ Cowie and Marsden, above, note 28, at 2.

³² Rifkin, above, note 6, at 177-178.

³³ Helberger, above, note 28, at 27-28

³⁴ Cowie and Marsden, above, note 28, at 1-2.

³⁵ Cave and Cowie, above, note 28.

³⁶ *Ibid* 6.

³⁷ D A Levy, *Europe’s Digital Revolution, Broadcasting Regulation, the EU and the Nation State* (2001), at 63.

³⁸ Helberger, above, note 28, at 2.

³⁹ *Id.*

operating systems in information technology (IT).⁴⁰ The EPGs allow the viewers to navigate between different programmes, providing information on the services available.⁴¹ Nolan refers to these services as “the digital video cousins of the web browsers such as Netscape and Explorer”.⁴² These technologies allow the public to select between the hundreds of available channels. Comparisons with the IT environment have relevance also when referring to the API. This facility is considered as “the digital TV analogy to Windows”⁴³ and it “interprets a set of commands telling it, for instance, where to display a graphic or other object on the screen”.⁴⁴ The API has a significant role in ensuring access of the public to a number of services, including interactive programming, navigation software and teletext.⁴⁵ In this context, the API acts as the “operating language” for managing the STB⁴⁶ and provides the necessary link between the hardware and the software in the system.⁴⁷ Nevertheless, as it will be seen below, the challenges associated with the control of bottlenecks are not limited to technical complexities. Bottlenecks constitute an interaction between “technological, contractual or economic factors”,⁴⁸ and the control of these facilities often places the gatekeepers in a powerful position in the eCommunications sector.

3.2. Some Competition Concerns posed by Bottlenecks in Digital Television

The arrival of digital technology led to an increased complexity in the challenges faced by regulators in the communications market. Ensuring access to these facilities in the DTV supply chain and interoperability between services are likely to be vital in the battle for survival in this sector. In this context, the control of a bottleneck is often equated with a position of dominance.⁴⁹ While dominance as such is not problematic, competition authorities condemn the abuse of a dominant position.⁵⁰

In the DTV sector, the control over the technical specifications of a bottleneck facility can place commercial players in a strategic position.⁵¹ Bottleneck controllers that developed a proprietary facility benefit from first mover advantages, due to their “prior knowledge” of the design and interfaces of these technical components. This

⁴⁰ Cowie and Marsden, above, note 28, at 7.

⁴¹ Oftel, “Digital Television and Interactive Services: Ensuring Access on Fair, Reasonable and Non-discriminatory Terms”, March 1998 (http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/broadcasting/dig398.htm).

⁴² Nolan, above, note 2, at 603.

⁴³ Ibid 604.

⁴⁴ Oftel, above, note 41.

⁴⁵ C T Marsden, “Pluralism in the Multi-media Channel Market - Suggestions from Regulatory Scrutiny” (1999/2000) 4 *International Journal of Communications, Law and Policy* @: http://www.ijclp.org/4_2000/pdf/ijclp_webdoc_5_4_2000.pdf.

⁴⁶ Cowie and Marsden, above, note 28.

⁴⁷ M. Rosenthal, “Open Access from the EU Perspective” (2002/2003) 7 *International Journal of Communications, Law and Policy* @: http://www.ijclp.org/7_2003/pdf/rosenthal-artikel-ijclp.pdf.

⁴⁸ Nolan, above, note 2, at 597.

⁴⁹ Cave and Cowie, above, note 28.

⁵⁰ Case 322/81 *Michelin v Commission* [1983] ECR 3461.

⁵¹ Helberger, above, note 28, at 3.

allows them to have a “consistent market hold over all broadcasters using its platforms”.⁵² Ultimately, this can lead to practices that harm competition in the market, such as denial of access or refusal to provide details of the technical specifications necessary for ensuring interoperability between services.⁵³ A further factor that can potentially strengthen a position of dominance rests with the proliferation of popular technology, at the detriment of less widespread alternatives.⁵⁴ Network effects are present when “consumption benefits depend positively on the total number of customers who purchase compatible products”.⁵⁵ These can have a negative effect on new market players wishing to enter into the market.

Levy indicates that dominant market players operating in network industries have strong financial incentives to abuse their position of dominance.⁵⁶ Anti-competitive practices are manifested across the entire DTV network, comprising, *inter alia*, the provision of access under unfavourable conditions or the refusal to allow the access of competitors to key facilities. Abusive practices common to gatekeepers throughout the DTV supply chain also include the signing of contracts subject to additional obligations such as the “bundling” of proprietary and non-proprietary technology and the imposition of exploitative prices on competitors across various services.⁵⁷ The control over key facilities in DTV can also give rise to concerns specific to each bottleneck. For example, market players controlling EPGs possess a strong position in the market due to the “daily opportunity to influence viewing shares”.⁵⁸ In fact, as Cowie and Marsden point out, this position of influence is strengthened by the fact that EPGs are the first points of reference for the consumers accessing digital television services.⁵⁹ Given viewers’ increased dependence on these facilities to access hundreds of available channels, it is essential for service providers to have their channels listed on the EPG.⁶⁰ The chances of competitors to succeed in the market are seriously undermined if EPG controllers deny them access to this facility or grant them access under unfavourable conditions.⁶¹

Barriers to entry posed by proprietary technology and limited interoperability solutions, as well as the strategic position enjoyed by the first mover into the market, led to an environment in which newcomers face major difficulties to succeed.⁶² By denying the access of competitors into the market, gatekeepers limit the choices

⁵² D A Levy, “BBC Response to EU Convergence Working Document (Sec (98) 1284)” November 1998 (<http://europa.eu.int/ISPO/convergencegp/workdoc/bbc.html>).

⁵³ Helberger, above, note 28, at 3.

⁵⁴ Cowie and Marsden, above, note 28, at 11.

⁵⁵ N. Gandal, “Compatibility, Standardisation and Network Effects: Some Policy Implications” (2002) 18 *Oxford Review of Economic Policy* 80.

⁵⁶ Levy, above, note 17, 63.

⁵⁷ Cowie and Marsden, above, note 28, at 3.

⁵⁸ *Ibid* 9.

⁵⁹ *Id.*

⁶⁰ BBC “Consultation on the Regulation of Electronic Programme Guides. The BBC Response” (2004) (<http://www.ofcom.org.uk/consult/condocs/epg/responses/bbc.pdf>).

⁶¹ Levy, above, note 17, at 66

⁶² Helberger, above, note 28, at 6.

available to the public.⁶³ The body of decisions adopted by the European courts and Commission under Article 82 EC can prove pertinent for dealing with anti-competitive practices.⁶⁴ This provision aims to condemn “exploitative” and “exclusionary” practices and can prove relevant to situations in which dominant operators grant access to their facilities under discriminatory conditions, or when they refuse to deal with competitors.⁶⁵ Furthermore, the essential facilities doctrine can play an important role in addressing the issue of access to bottlenecks. As clarified in *Bronner*,⁶⁶ this doctrine requires dominant undertakings to provide the access of competitors to key facilities, if there are no objective reasons that would justify the refusal to provide access, the access to the facility is “indispensable” and a refusal to provide access is likely to hinder “all competition” from the competitor.

The measures designed to control bottlenecks in the DTV supply chain are generally oriented towards economic concerns, relying on the view that competitive markets will ultimately benefit the public.⁶⁷ Digital technology has indeed brought major transformations to the way we experience broadcasting as consumers. Yet, to argue that these technological and market transformations improved our experience as citizens, would be far from true. A competitive market does not necessarily protect us from the growth of consumerism and does not automatically ensure plurality of ideas in the communications environment.⁶⁸ The challenges posed by bottlenecks in digital television are not limited to mere economic concerns. Matters such as the proliferation of proprietary technology and the limitation of access by competitors to key facilities have wide-ranging implications that affect the public not only as consumers but also as citizens.

3.3. Public Policy Concerns posed by Bottlenecks in Digital Television

The current regulatory perception of digital bottlenecks responds mainly to economic considerations concentrated on technical and competition aspects. These concerns are addressed by sector specific regulation and general competition law, with the ultimate economic objective of remedying market failure (e.g. absence of competition).⁶⁹ Yet, an approach based almost entirely on an economic perspective leaves unresolved the public policy implications associated with the regulation of the DTV infrastructure. The public is perceived in an economic light, while citizenship interests are left vulnerable. In Nikolinakos’ terms:

Issues associated with access to digital gateways are considered to be of a major importance, not only because of their potential anti-competitive effects, but also because of the existence of certain public policy objectives – such as the preservation of pluralism and

⁶³ Levy, above, note 52, at 7.

⁶⁴ See P. Nihoul and P. Rodford, *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (2004).

⁶⁵ *Ibid* 349.

⁶⁶ Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791 (henceforth *Bronner*).

⁶⁷ C. Murroni and N. Irvine, *Access Matters* (1998), at 18.

⁶⁸ Feintuck and Varney, above, note 1.

⁶⁹ A. Ogus *Regulation, Legal Form and Economic Theory*, (2004), at 29.

*consumer choice, which cannot be safeguarded solely by the application of competition law.*⁷⁰

In addressing the bottlenecks challenge, social regulation must be applied alongside economic concerns in order to protect the public not only as consumers but also as citizens. If service providers are denied access to key bottlenecks, this will affect not only competition in the relevant market but also the public generally, and can potentially have an impact on pluralism and diversity in the communications sector.⁷¹ In light of these concerns, the ability of market players to access networks, services and facilities is seen as instrumental in facilitating the access of the public to information.⁷² As Helm contends, network industries reflect “interdependencies” between various key points in the chain and “change[s] in any part of a network can potentially affect all the other components”.⁷³ Therefore, in regulating access and interoperability in the DTV supply chain, the interest of the public must be reflected throughout all the supply chain rather than being limited to the bottom of the vertical market, where viewers access broadcasters’ channels.

There is a connection between the control of interoperability and access to bottlenecks and the need to ensure pluralism and diversity in the communications sector. Van Loon highlights the connection existent between control of bottlenecks and the need to safeguard citizenship interests, arguing for the need to shift the emphasis from “how to safeguard and promote pluralism in traditional media” to “how to prevent gateway monopolies”.⁷⁴ Furthermore, Marsden highlights three mechanisms deemed necessary for safeguarding pluralism and diversity in the communications sector: (i) ownership rules to secure a diversity of market players; (ii) Public service broadcasting and “must carry” obligations to facilitate the access of all citizens to information; and (iii) the control of access by competitors to bottlenecks in digital television.⁷⁵ This article relies on this approach, in order to illustrate that the citizenship expectations for pluralism and diversity are connected not only the access of the public to information, but also to the issue of market players’ access to bottlenecks. In this context, these democratic expectations (for access to information and participation in society) can be ensured only if pluralism and diversity concerns are reflected throughout the entire DTV chain.

The eCommunications sector presents a tendency towards ownership concentration.⁷⁶ This is manifested across various sectors of the industry, as a result of technological convergence.⁷⁷ McChesney sees the concentration of media ownership as “a poison

⁷⁰ N. Nikolinakos, “The new legal framework for digital gateways – the complementary nature of competition law and sector specific regulation” (2000) 21 *European Competition Law Review* 408, at 409.

⁷¹ Marsden, above, note 45, at 9.

⁷² Murrioni and Irvine, above, note 67.

⁷³ D. Helm, “The Assessment: European networks: competition, interconnection and regulation” (2001) 17 *Oxford Review of Economic Policy* 297, at 303.

⁷⁴ A. Van Loon, “Freedom versus Access Rights in a European Context” in C T Marsden (ed) *Regulating the Information Society* (2000) 285, at 300.

⁷⁵ Marsden, above, note 45.

⁷⁶ Varona, above, note 1.

⁷⁷ M Feintuck, *Media Regulation, Public Interest and the Law* (1999) 1st edn, p. 106.

pill for democracy”, pointing towards the paradox that a “rich media” is likely to lead to a “poor democracy”.⁷⁸ An adequate control of ownership in the communications sector is essential for ensuring pluralism and diversity and for preventing the establishment of “gateway monopolies”.⁷⁹ This calls for the application of social forms of control for the DTV infrastructure, applied alongside economic regulation. As Feintuck points out, economic regulation can lead to a plurality of market players but this does not automatically lead to a diversity of ideas in the communications market.⁸⁰

The control of ownership in the communications sector is “central to the realisation of the pluralistic vision”.⁸¹ Nevertheless, this mechanism is not sufficient for ensuring pluralism and diversity in this sector. This must be complemented by additional measures such as the maintenance of public service broadcasting.⁸² Based on “principles of citizenship, universality and quality”,⁸³ public service broadcasting facilitates an active involvement of the public in society by keeping the viewers informed and by providing access to diverse and impartial information.⁸⁴ Harrison and Woods suggest that following the arrival of digital technology and the proliferation of “payment barriers” on the access of the public to information, public service broadcasters (PSBs) have gained a new mission in “mitigating the disintegrating effect” of conditional access technology.⁸⁵

Social objectives in the eCommunications environment are often associated with the idea of “connectivity”, referring to the need to guarantee citizens a minimum level of access to information.⁸⁶ Nevertheless, digital technology brings an increased level of complexity in securing the availability of public service broadcasting,⁸⁷ as PSBs have to “negotiate carriage over a wider range of delivery networks”.⁸⁸ One means to facilitate the access of PSBs to these networks is through the imposition of “must carry” obligations on network operators, a mechanism rooted in the United States

⁷⁸ R W McChesney *Rich Media, Poor Democracy: Communications Politics in Dubious Times*, (2000) at 2-3.

⁷⁹ Van Loon, above, note 74, at 292.

⁸⁰ Feintuck, above, note 77, at 191.

⁸¹ G. Kelly and A. Gamble, “Owners and Citizens” (1998) 69 *Political Quarterly* 344.

⁸² Marsden, above, note 45.

⁸³ G. Born and T. Prosser “Culture and consumerism: citizenship, Public Service Broadcasting and BBC’s fair trading obligations” (2001) 64 *Modern Law Review* 657, at 658.

⁸⁴ J Harrison and L M Woods “Defining European Public Service Broadcasting” (2001) 16 *European Journal of Communication* 477.

⁸⁵ *Ibid* 482.

⁸⁶ R Collins, “Realising Social Goals in Connectivity and Content” in C T Marsden (ed) *Regulating the Information Society* (2000) 108.

⁸⁷ Born and Prosser, above, note 83, p. 678.

⁸⁸ M Varney, “European controls on member states’ promotion and regulation of Public Service Broadcasting and broadcasting standards” (2004) 10 *European Public Law*, 503, at 506.

jurisdiction.⁸⁹ As Varney comments,⁹⁰ this could contribute towards ensuring pluralism and diversity in eCommunications:

*‘Must carry’ seems to serve the important purpose of ensuring that certain channels are available to end users choosing to access broadcasting networks, regardless of the technology chosen. As such, the ‘must carry’ obligations could have the potential to lead to a diverse range of material being available to viewers on all broadcasting networks.*⁹¹

Furthermore, “must carry” obligations are a much needed response to the limited availability of programming caused by the proliferation of pay TV, and contributes to what Marsden calls the “reinvention” of public service broadcasting.⁹² There is a strong correlation between the access of the public to information and the existence of effective mechanisms facilitating the access of service providers to networks and facilities in DTV.⁹³ Nevertheless, Varney notes that although “must carry” obligations facilitate the transmission of public service channels through digital networks, these measures do not automatically guarantee the access of service providers through the bottlenecks.⁹⁴ It is therefore important that the social objectives that motivated the imposition of “must carry” obligations are reflected also when regulating the access of service providers to bottlenecks. Public policy concerns such as the need to ensure pluralism and diversity must be given sufficient weight when controlling gateway facilities. As Feintuck indicates, unless these citizenship interests are taken into account and “gateways are kept open”, there is a serious risk that an excessive level of power is transferred into the hands of these major commercial operators.⁹⁵

Bottleneck controllers possess a significant degree of power in the communications sector, which raises both competition and public policy concerns. According to Hirst, the power enjoyed by these market players has three crucial implications for democracy.⁹⁶ Firstly, the focus is on the impact of corporate power in “setting the wider political agenda”.⁹⁷ This raises concerns of regulatory capture by commercial interests, at the expense of democratic values. As McCahery *et. al.* indicate, capture can be manifested through regulatory frameworks designed to serve the regulated players, or through the exercise of “excess influence” over the regulators, at the

⁸⁹ In the United States, the imposition of these obligations is justified on the basis of the First Amendment. This was confirmed in *Turner Broadcasting System Inc. et al. v Federal Communications Commission et al.*, 117 s. Ct. 1174 (31 March 1997).

⁹⁰ M Varney, “Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity” (2004/2005) 14 *Utilities Law Review* 112.

⁹¹ *Id.*

⁹² Marsden, above, note 45, at 27.

⁹³ *Ibid* 15.

⁹⁴ Varney, above, note 90.

⁹⁵ Feintuck, above, note 77, at 200.

⁹⁶ P Hirst “Ownership and Democracy” (1998) *Political Quarterly* 344.

⁹⁷ *Id.*

detriment of “public interest” goals.⁹⁸ Regulators should, therefore, prioritise the interest of the public over commercial interests in the communications sector. On the other hand, a regulatory approach for the communications sector channelled towards safeguarding commercial interests fails to respond to the democratic mission of the media to ensure an informed citizenry.⁹⁹

Secondly, concerns are posed by the lack of accountability of these market players. Hirst calls for the “checking [of] the unhealthy concentration of corporate power over both economic choices and the political agenda”.¹⁰⁰ The main problem is believed to derive from the “weak legitimacy” and the minimum “internal accountability” of commercial players, if compared to political structures.¹⁰¹ Keane refers to this unaccountable power as comprising “the seeds of despotism”.¹⁰² In the eCommunications sector, bottleneck operators enjoy a considerable degree of private power. The exercise of this power, which is not presently constrained by adequate mechanisms of accountability, affects the public as both consumers and citizens. Consequently, commentators call for an increased degree of responsibility by these commercial players to the public. In light of the power enjoyed by the market players in the communications sector, Feintuck contends that “it is reasonable to expect that they too should be accountable”.¹⁰³

The third implication advanced by Hirst relates to the influence exercised by these commercial operators on “the attitudes and political resources of those who work for them”.¹⁰⁴ A primary concern is whether these market players “help to promote the habits and beliefs necessary for democratic citizenship”.¹⁰⁵ Herman and McChesney focus on the potential of the communications environment to “provide a public sphere for democracy”.¹⁰⁶ Unfortunately, the record of these commercial players in the pursuit of citizenship expectations is disappointing.¹⁰⁷ In this commercially driven environment, the perspectives for safeguarding democratic interests seem grim.¹⁰⁸

The private and unaccountable power possessed by bottleneck controllers in digital television has the potential to harm citizenship expectations for an effective access to information.¹⁰⁹ We are confronted with a gradual diminution of the public sphere¹¹⁰

⁹⁸ J McCahery *et. al.* (eds) *International Regulatory Competition and Coordination: Perspectives on Economic Regulation* (1996), at 13.

⁹⁹ Feintuck, above, note 77, at 39-49.

¹⁰⁰ Hirst, above, note 96, at 358.

¹⁰¹ *Id.*

¹⁰² J Keane, *The Media and Democracy* (1991), at 95.

¹⁰³ Feintuck, above, note 77, at 5.

¹⁰⁴ Hirst, above, note 96, at 354.

¹⁰⁵ *Id.*

¹⁰⁶ Herman and McChesney, above, note 17, at 10.

¹⁰⁷ Hirst, above, note 96, at 354.

¹⁰⁸ M. Feintuck “Walking the High-Wire: the UK’s Draft Communications Bill” (2003) 9 *European Public Law* 105.

¹⁰⁹ Feintuck, above, note 77, at 192.

¹¹⁰ Habermas, above, note 18.

and an increased degree of pressure exercised by commercial players over the regulatory realm. One possible way to address these concerns is to ensure that the key points in the DTV supply chain are regulated in the pursuit of citizenship values.

4. Regulation of Bottlenecks under the European Framework on eCommunications – An Effective protection of Citizenship Interests?

The approach of the European Union in regulating digital television has been the subject of significant transformations following the adoption in 2002 of the New Regulatory Framework (NRF) for eCommunications,¹¹¹ which has now been transposed in all of the 25 EU member states.¹¹² Changes include the adoption of a technology-neutral framework regulating the communications sector, the replacement of some individual licences with general authorisations, and the abandonment of the 25 % threshold for the assessment of significant market power, in favour of a dominance test aligned to competition law. Yet, the protection of citizenship interests in the eCommunications sector rests on shaky ground. The NRF is concerned mainly with the economic aspects of the bottlenecks challenge, failing to provide an adequate response to the public policy concerns associated with the regulation of the infrastructure. Furthermore, this framework failed to address the “huge mismatch” between the level of protection given to economic and social concerns in the European framework for the information society.¹¹³

The Directives aim towards a move from sector specific regulation towards general competition law.¹¹⁴ The new framework adopts a “light touch” regulatory approach in which *ex ante* intervention is gradually rolled back, depending on market progress. The NRF promotes the view that the interest of the public is “best served by competitive markets”¹¹⁵ and an increased reliance on competition law will bring the ultimate benefit to the public.¹¹⁶ Nevertheless, this approach concentrates on the benefits brought to consumer interests, failing to respond to the broader citizenship dimension. As Prosser indicates:

[T]here are certain values in the form of social and economic rights that will trump competition law and so require limitations to be placed on its application to public services. These arise from

¹¹¹ Directive 2002/21/EC (*Framework Directive*); Directive 2002/19/EC (*Access Directive*); Directive 2002/20/EC (*Authorisation Directive*); Directive 2002/22/EC (*Universal Service Directive*); Directive 2002/58/EC (*Data Protection Directive*).

¹¹² European Commission Press Release MEMO/06/84, 20 Feb 2006

(<http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/06/84&format=HTML&aged=0&language=EN&guiLanguage=en>).

¹¹³ D A Levy, “The regulation of digital Conditional Access Systems: a case study in European policy-making” (1997) 21 *Telecommunications Policy* 661, at 675.

¹¹⁴ Recital 27, *Framework Directive*.

¹¹⁵ A. de Streeel, “The integration of Competition Law Principles in the New European Regulatory Framework for Electronic Communications” (2003) 26 *World Competition* 489.

¹¹⁶ S. Taylor, “The EU Electronic Communications Package: Competition-Based Regulation for the Digital Age” (2001/2002) 12 *Utilities Law Review* 83.

*inequalities in distribution, which make equal treatment of citizens unachievable simply through the use of competitive markets.*¹¹⁷

While an analysis of services of general interests is outside the scope of this article, it is important to mention the “change in emphasis”¹¹⁸ in the approach adopted by the EU for this issue.¹¹⁹ As Prosser notes, the European framework manifested a gradual move in the perception of non-economic values associated with these services, from “an unwelcome hindrance to the completion of the internal market” to “an essential element of European citizenship”.¹²⁰ Rather than concentrating merely on economic concerns, the EU adopted an approach for these issues that took full account of citizenship values, particularly the need to ensure a universal access to services.¹²¹

In regulating bottlenecks in digital television, public policy considerations are not given a similar degree of emphasis. Under the NRF, the protection of public policy concerns in the DTV infrastructure is confined to the imposition of “must carry” obligations.¹²² These obligations are necessary to ensure that all the citizens have a basic access to eCommunications services and to avoid the situation in which market players would provide services only for the “profitable segments” of the communications market.¹²³ Subject to a proportionality requirement, these obligations are imposed under Article 31 of the *Universal Service Directive* only if “a significant number of end users of such [eCommunications] networks use them as their principal means to receive radio and television broadcasts”. National Regulatory Authorities (NRAs) can impose these obligations only with regard to “specified services”. This is necessary to ensure that these measures do not lead to an excessive interference with the freedom of the market players in the communications market.¹²⁴ In addition, “must carry” obligations cannot be invoked in relation to associated facilities. As stated by the European Commission:

*Access to such facilities is already covered by Articles 5 and 6 of the Access Directive, which grants any broadcast content provider access to CAS under fair, reasonable and non-discriminatory conditions. Taken together, these provisions preclude the imposition of must carry obligations on CASs or other associated facilities such as APIs and EPGs.*¹²⁵

¹¹⁷ T. Prosser, *The Limits of Competition Law – Markets and Public Services* (2005), at 34.

¹¹⁸ *Ibid* 172.

¹¹⁹ Commission Communication (EC) 96/C281/03 [1996] OJ C281/3; Commission Communications (EC) 2001/C17/04 [2001] OJ C17/4.

¹²⁰ Prosser, above, note 117, at 173-174.

¹²¹ *Id.*

¹²² Article 31, *Universal Service Directive*.

¹²³ D. Geradin, “Institutional Aspects of EU Regulatory Reforms in the Telecommunications Sector: An Analysis of the Role of National Regulatory Authorities” (2000) 1 *Journal of Network Industries* 5, at 6-8.

¹²⁴ Nihoul and Rodford, above, note 64, at 760.

¹²⁵ European Commission “Must-Carry Obligations under the 2003 Regulatory Framework for Electronic Communications Networks and Services” (2002).

The imposition of “must carry” obligations constitutes a minimal reflection of the public policy aspects of regulating the DTV infrastructure. The remainder of the NRF, in almost its entirety, concentrate only on the economic aspects of bottlenecks control. Nevertheless, relying only on these quantifiable aspects of the infrastructure is not sufficient in providing an adequate response to the bottleneck regulatory challenge, as it fails to perceive the public as both citizens and consumers.

It was previously emphasised that pluralism and diversity concerns must be addressed throughout all the stages of the DTV supply chain, particularly in relation to bottlenecks control. Unfortunately, within the current framework, pluralism and diversity concerns are concentrated on the regulation of content.¹²⁶ Although the NRF does not cover content regulation, recital 5 of the *Framework Directive* states that this is without prejudice to the “existent links” between content and transmission regulation, especially in relation to pluralism and diversity in the communications market. Nevertheless, the Directives are vague as to what particular actions will be taken in order to ensure an effective protection of these issues.¹²⁷

Competence-related concerns have often stood as a barrier for an effective protection of pluralism and diversity at the supranational level. Previous attempts to adopt a Directive on pluralism and media concentration resulted in failure,¹²⁸ as member states and commercial influences have succeeded in arguing that the Commission does not possess the competence to address these matters.¹²⁹ As a result, the EU had to resort to indirect methods of protection such as competition law.¹³⁰ Yet, if the citizenship interests associated with the regulation of the infrastructure are to be protected effectively, they must be acknowledged expressly within the EU regulatory framework. This is important, given the ineffectiveness of the current approach which leaves these matters to be address at the national level. Although the Directives are “without prejudice to the possibility of each member state to take the necessary measures (...) to safeguard public policy”,¹³¹ the situation reflected at the member state level is disappointing. The national measures implementing the NRF failed to provide any protection for pluralism and diversity concerns in relation to the DTV infrastructure. On the contrary, these measures replicate the approach reflected in the Directives, in which the public is perceived mainly as economic actors.

Within the NRF, references to citizenship interests are limited to the preamble, while the provisions regarding the regulation of the infrastructure reflect a perception of the public as customers, consumers and end users.¹³² This is illustrative of a wider problem associated with the deregulation of the communications industry, which has

¹²⁶ Recital 5, *Framework Directive*.

¹²⁷ Feintuck, above, note 108, at 109.

¹²⁸ Commission’s Green Paper on Pluralism and Media Concentration in the Internal Market – an Assessment of the Need for Community Action, COM (92) 480.

¹²⁹ D. Westphal, “Media Pluralism and European Regulation” (2002) 13 *European Business Law Review* 459.

¹³⁰ M. Ariño, “Pluralism in Digital Broadcasting: Myths, Realities and the Boundaries of European Intervention” ITS Conference, Berlin, 4-7 September 2004.

¹³¹ Recital 7, *Framework Directive*.

¹³² Feintuck, above, note 108, at 111.

led to the creation of a “pseudo public sphere”¹³³ in which informed political discussion has given way to popular programming.¹³⁴ According to Harrison and Woods, the solution rests with “re-focusing” the regulation of the eCommunications sector from market-oriented rationales towards citizenship concerns.¹³⁵ Nevertheless, this approach is subject to a significant set of challenges, including competence and subsidiarity implications and the member states’ reluctance to transfer power over this crucial sector. The pressures exercised by market players over the policy-making process pose further difficulties. Varona refers to the communications sector as “the most obvious textbook example” of an industry captured by market interests.¹³⁶ The common threat posed by commercial pressures to democratic concerns across the member states should trigger citizenship reactions, leading to an active involvement of the public in policy-making and the development of a “common European discourse”.¹³⁷ Unfortunately, under the current system, the public lacks the power to set the agenda and we are constantly being exposed to a market and technology-driven agenda, presented in the absence of any other alternatives.

The current situation reflects the general problem of a lack of synchronisation in the development of supranational powers and the European democratic dimension, which causes each to inhibit the further development of the other. Scharpf refers to this in terms of a “constitutional asymmetry” between the measures pursuing market-oriented aims on one hand and democratic objectives on the other.¹³⁸ Even if the European Constitution¹³⁹ is eventually adopted,¹⁴⁰ it is unlikely to have an immediate effect in remedying this imbalance in the eCommunications sector. Although the Charter of Fundamental Rights¹⁴¹ (incorporated in Part II of the proposed Constitution) makes specific reference to the importance of “the freedom and pluralism of the media”,¹⁴² this instrument states clearly that it “does not extend the field of application of Union law”.¹⁴³

An extension of the EU competence to address the public policy concerns associated with the regulation of the infrastructure, although desirable, could take place only in the long term. This is dependent on the development of a European democratic dimension, and the increased legitimacy of the European Union in dealing with citizenship-related aspects of regulating the communications sector. Until then, calls for reconsidering the EU competence in the communications sector will continue to

¹³³ Habermas, above, note 18.

¹³⁴ Harrison and Woods, above, note 16, at 483.

¹³⁵ *Ibid* 490.

¹³⁶ Varona, above, note 1.

¹³⁷ U K Preuss, “The Constitution of a European Democracy and the Role of the Nation State” (1999) 12 *Ratio Juris* 417.

¹³⁸ F W Scharpf, “The European Social Model: Coping with the Challenges of Diversity” (2002) 40 *Journal of Common Market Studies* 645.

¹³⁹ *Treaty establishing a Constitution for Europe* [2004] OJ C 310/1.

¹⁴⁰ After the negative vote given to the Constitution in France and the Netherlands in 2005, the ultimate fate of the Constitution is unclear. However, it is evident that the process of ratification is currently stranded.

¹⁴¹ *Charter of Fundamental Rights of the European Union*, OJ C 364, 18 December 2000.

¹⁴² Article 11(2) Charter; Article II-70(2) proposed Constitution.

¹⁴³ Article 51(2) Charter; Article II – 111(2) proposed Constitution.

emphasise on the vulnerability of citizenship-interests to commercial pressures.¹⁴⁴ In assessing the risks associated with the current framework that focuses on “competition law methodologies”, De Streel notes that the future protection of citizenship interests is in the balance:

*[This] is a big challenge for the regulators of the member states and indeed for the whole electronic communications sector. If it fails, the national authorities and operators will entangle in multiple legal challenges, to the detriment of the whole industry. If it succeeds, the authorities' decisions will be focused and efficient, to the benefits of the European citizens.*¹⁴⁵

The current system for regulating eCommunications is affected by the strong influence exercised by commercial forces over the regulatory realm and by the absence of an established framework of principles designed to protect citizenship values.¹⁴⁶ In the absence of measures expressly acknowledging and prioritising the public policy dimension of regulating the DTV infrastructure, it is very likely that the balance will weigh in favour of the market players. Given the negative implications that this will have over the citizenship interests, it is legitimate to question whether we can really afford to take this risk.

5. Social Regulation for Addressing the Citizenship Concerns posed by Bottlenecks

A regulatory approach for bottlenecks in DTV confined to economic regulation confers only a limited level of protection to the public: it safeguards consumer interests and overlooks citizenship-related concerns. Nevertheless, the regulation of the communications sector must reflect the significant role of the media in ensuring an informed citizenry and, therefore, a higher degree of protection is necessary in order to address these democratic expectations. Social regulation must be applied alongside economic regulation in order to address the public policy dimension of the bottlenecks challenge. While economic regulation responds to consumer interests, social regulation protects citizenship interests by ensuring the access of the public to information and by safeguarding pluralism and diversity in the communications sector.¹⁴⁷

The current communications sector has witnessed an increased tendency towards deregulation.¹⁴⁸ The reliance on “less interventionist methods of control” such as competition law are justified from a political and an economic perspective.¹⁴⁹ Political rationales indicate that a deregulatory approach “decentralises and disperses

¹⁴⁴ Ariño, above, note 130.

¹⁴⁵ De Streel, above., note 115, at 514.

¹⁴⁶ Feintuck, above, note 108, at 121.

¹⁴⁷ Feintuck, above, note 77.

¹⁴⁸ J M Glachant, “Why Deregulate Deregulated Network Industries?” (2002) 3 *Journal of Network Industries* 297.

¹⁴⁹ Ogus, above, note 69, at 10.

power”.¹⁵⁰ On the other hand, the economic rationales point towards the “allocative efficiency” that characterises a competitive market, as “resources cannot be reallocated to produce a different bundle of goods which will then allow someone to be better off, while no one is made worse off”.¹⁵¹ In the eCommunications sector, commercial operators generally oppose an active regulatory intervention, relying on the view that regulation should be employed only as a response to market failures such as the absence of competition.¹⁵² Market players argue that regulation places “unreasonable burdens” on them and that this has a detrimental effect on the “economic growth”. This is a reflection of the view that “the market can do it all”.¹⁵³ In reality, however, the market can only deal with quantifiable issues and perceives the public exclusively as consumers. As Prosser suggests, the market constitutes a “seriously inadequate means of protecting citizenship rights”, given that interactions between individuals and service providers vary in accordance with the financial means of the public and no weight is given to substantive concerns of equality.¹⁵⁴ In this context, democratic concerns such as citizenship-interests are left in a vulnerable position.

The public policy dimension of the bottlenecks challenge can be addressed effectively only through social regulation in the pursuit of citizenship values. The concept of citizenship employed in this study is closely linked with a “value-laden” interpretation of the “public interest”, differentiated from private interests and oriented towards democratic values such as equality of citizenship.¹⁵⁵ In view of countervailing the significant degree of power exercised by commercial players in the communications sector, Feintuck notes that regulatory objectives should concentrate on “the extent to which the industry can be subverted or converted to the public interest goal of citizenship”.¹⁵⁶ The rights enjoyed by market players in the communications sector are not absolute¹⁵⁷ and regulatory intervention channelled towards social objectives is necessary in order to ensure that citizenship expectations are protected effectively.¹⁵⁸

In the context of privatised utilities, Graham argues that the relation between the public and the suppliers should be perceived in “an alternative way”.¹⁵⁹ Rather than focusing on this relation from an economic perspective, we need to acknowledge that the public possesses “certain rights” concerning the supply of services, and these can be referred to as citizenship rights.¹⁶⁰ In this context, a regulatory framework that pursues social objectives should be seen as “a legitimate part of the discourse of

¹⁵⁰ Ibid 22.

¹⁵¹ R G Lispey and K A Chrystal, *Principles of Economics* (1999) 9th edn, at 611.

¹⁵² Herman and McChesney, above, note 17, at 109.

¹⁵³ Ibid 35.

¹⁵⁴ Prosser, above, note 117, at 29.

¹⁵⁵ Feintuck, above, note 15.

¹⁵⁶ Feintuck, above, note 77, at 190.

¹⁵⁷ M Hantke-Domas, “The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?” (2003) 15 *European Journal of Law and Economics* 165.

¹⁵⁸ Feintuck, above, note 77.

¹⁵⁹ C Graham, *Regulating Public Utilities: A Constitutional Approach* (2000), at 129.

¹⁶⁰ Id.

utility regulation, rather than some subjective interloper or embarrassing add on”.¹⁶¹ Similar arguments can be raised in relation to the DTV infrastructure. The challenges posed by bottleneck controllers affect the public not only as consumers but also as citizens. The pressures for acknowledging these citizenship interests are far greater, given the role of the communications sector in ensuring an informed citizenry.¹⁶²

Regulation in the pursuit of public policy objectives would be needed even in an idealistic context of perfect competition. Collins notes that even a competitive market could “produce outcomes which are so unequal, as to be socially unacceptable”.¹⁶³ In the DTV market, we are confronted with a dysfunctional public sphere.¹⁶⁴ Commercial interests dominate the communications sector and the current reliance on advertising-driven programming fails to ensure an informed public. These concerns press the call for regulatory intervention to safeguard citizenship values and these democratic objectives must be reflected throughout the entire supply chain in the DTV infrastructure.

This study calls for an extension of the EU competence to include the public policy dimension of bottlenecks. This refers to a coordination of the pluralism and diversity objectives at the supranational level, while leaving the details of the implementation at the member state level. The public policy concerns associated with the bottlenecks challenge need to be acknowledged at the European Union level and this must be accompanied by prioritising the interest of the public over commercial interests. This approach comes as a response to the threats posed by commercial players to citizenship interests, emphasising on the perception of the public as economic actors.¹⁶⁵ As these commercial pressures are not confined within domestic structures, member states cannot deal effectively with these challenges. We are faced with the choice of either allowing unaccountable market players to make the rules of the game, or opting for a coordinated response at the supranational level to deal with these challenges.¹⁶⁶ While the former option would pose significant threats to the interest of citizens, the latter approach provides a democratic framework in which the public is perceived as both consumers and citizens.

6. Conclusion

The present study addressed the issue of access from two perspectives: access of the public to information and access of the market players to bottlenecks, perceiving the latter as instrumental in ensuring the access of citizens to information. Both aspects must be regulated effectively and must be based on clear objectives that incorporate democratic values.¹⁶⁷ According to Marsden, the citizenship concerns for regulating the communications sector must be “defended and renewed” in the DTV

¹⁶¹ Ibid 44.

¹⁶² Feintuck, above, note 77, at 192.

¹⁶³ Collins, above, note 86, at 110.

¹⁶⁴ Price, above, note 19, at 88.

¹⁶⁵ McChesney, above, note 22.

¹⁶⁶ J K Chalaby and G Segell “The Broadcasting Media in the Age of Risk – The Advent of Digital Television” (1999) 1 *New Media and Society* 351.

¹⁶⁷ Feintuck, above, note 77, at 49.

environment.¹⁶⁸ In fact, the access of the public to an “encrypted” sphere of communications strengthens the rationales for intervention.¹⁶⁹ Feintuck points out that unfortunately, instead of focusing on the pursuit of citizenship values, the communications sector has been developed “within the logic of the market paradigm”.¹⁷⁰ In the eCommunications environment, regulators need to return to democratic rationales for intervention and give them sufficient weight when controlling bottlenecks in digital television.

The application of social regulation to the DTV infrastructure provides an effective way to address the public policy concerns associated with the bottlenecks challenge. It also ensures that the public is perceived as more than just economic actors, acknowledging the need to “reappraise our conception of the individual in society”.¹⁷¹ The regulatory discourse should therefore depart from “consumerism” and concentrate on citizenship expectations. Furthermore, these democratic values should be prioritised over commercial interests, in order to ensure that the public is not defenceless in the face of the commercial pressures exercised over the regulatory realm.¹⁷²

Making the case for EU level coordination in relation to the public policy dimension of the bottlenecks challenge may prove difficult. The arguments are faced with competence and subsidiarity-related challenges, alongside scepticism concerning the idea of a European democratic dimension. Nevertheless, supranational coordination is necessary in order to safeguard the interest of citizens with regards to commercial pressures. There is still a long way to go until the European Union can address the public policy dimension of bottlenecks regulation, involving institutional and regulatory reform. As identified by Seurin, there is need for “political solutions, affirming that ... the most important value is respect for democratic principles and that their practice can, from now on, take place at a level beyond the national”.¹⁷³ A preservation of the *status quo* would leave citizenship values vulnerable to commercial interests.

The pursuit of social regulation for the eCommunications infrastructure should not be discouraged by the current conditions in this sector.¹⁷⁴ In fact, the measures designed to respond to public policy concerns in digital television can be seen as “preliminary building blocks” in developing a “reconstructed public sphere”.¹⁷⁵ Regulation designed to safeguard citizenship interests in the eCommunications sector must respond to all elements of citizenship: civil, political and social.¹⁷⁶ So far,

¹⁶⁸ Marsden, above, note 45, at 5.

¹⁶⁹ *Id.*

¹⁷⁰ Feintuck, above, note 77, at 192.

¹⁷¹ L Whitehouse, “The Home-owner: Citizen or Consumer?” in S Bright and J Dewar (eds) *Land Law: Themes and Perspectives* (1998) 183, at 184.

¹⁷² Feintuck, above, note 77, at 195.

¹⁷³ J L Seurin “Towards a European Constitution? Problems of Political Integration” (1994) *Public Law* 625, at 635.

¹⁷⁴ Herman and McChesney, above, note 17, at 190.

¹⁷⁵ Price, above, note 19, at 88.

¹⁷⁶ Marshall, above, note 11.

deregulatory trends have led to a preference for “individualism” associated with the civil element of citizenship.¹⁷⁷ Nevertheless, the access of the public to information, in view of responding to the political and social elements of citizenship, can be ensured only through active regulatory intervention.

The regulation of bottlenecks in the DTV infrastructure is concerned with both economic and public policy concerns. Similar to the views expressed by Graham in relation to private utilities, we can argue in the eCommunications context that the public enjoys rights for the supply of these services as both consumers and citizens.¹⁷⁸ The perception of individuals merely as consumers could have devastating effects for citizens as this approach may fail to protect people from social exclusion.¹⁷⁹ As Dahrendorf points out, citizenship entitlements cannot be made reliant on “the readiness of people to pay a price in the private domain”, given that “citizenship cannot be marketed”.¹⁸⁰ In order to make sure that the interests of the public are not left at the mercy of the gatekeepers, regulators need to ensure that the control of bottlenecks in digital television responds to public policy objectives.¹⁸¹ This crucial step ensures that, apart from technological advances and developments in the market, the regulation of the digital television infrastructure takes full account of the democratic implications of these transformations.

¹⁷⁷ Whitehouse, above, note 171, at 186.

¹⁷⁸ Graham, above, note 159, at 130.

¹⁷⁹ Whitehouse, above, note 171, at 200.

¹⁸⁰ R Dahrendorf, “Citizenship and Social Class” in M Bulmer and A Rees, (eds) *Citizenship Today: the Contemporary Relevance of T. H. Marshall* (1996), at 32.

¹⁸¹ Nikolinakos, above, note 70.