

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT **C**

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



# A comparative analysis of media freedom and pluralism in the EU Member States

STUDY FOR THE LIBE COMMITTEE





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

# **A comparative analysis of media freedom and pluralism in the EU Member States**

**STUDY**

## **Abstract**

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. The authors argue that democratic processes in several EU countries are suffering from systemic failure, with the result that the basic conditions of media pluralism are not present, and, at the same time, that the distortion in media pluralism is hampering the proper functioning of democracy. The study offers a new approach to strengthening media freedom and pluralism, bearing in mind the different political and social systems of the Member States. The authors propose concrete, enforceable and systematic actions to correct the deficiencies found.

## **ABOUT THE PUBLICATION**

This research paper was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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## **LINGUISTIC VERSIONS**

Original: EN

Manuscript completed in September 2016.

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## LIST OF ABBREVIATIONS

- AVMSD** Audiovisual Media Services Directive
- CJ** Court of Justice
- CJEU** Court of Justice of the European Union
- CMPF** Centre for Media Pluralism and Media Freedom
- CMP** Media Pluralism Monitor
- ECHR** European Convention on Human Rights or Convention for the Protection of Human Rights and Fundamental Freedoms
- ECD** Directive on Electronic Commerce
- ECtHR** European Court of Human Rights
- ECI** European Citizens Initiative
- ECJ** European Court of Justice
- ECPMF** European Centre for Press and Media Freedom
- EPRA** European Platform of Regulatory Authorities
- EU** European Union
- FRA** Fundamental Rights Agency
- ISP** Internet Service Provider
- MEP** Member of the European Parliament
- MP** Member of Parliament
- MPM** Media Pluralism Monitor
- MS** Member State
- NRA** National Regulatory Authority
- TEU** Treaty on the European Union
- TFEU** Treaty on the Functioning of the European Union
- UGC** User-Generated Content

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## EXECUTIVE SUMMARY

Policy-makers have expressed concern for several decades now over the progressive curtailment of media freedom and pluralism in several Member States (MSs) of the European Union, but they have not been able to reach a consensus on precisely what actions to take. Recent political events – namely the systematic deterioration of the level of democracy in some Member States<sup>1</sup> and the rise of political extremism, nationalism and populism throughout the EU – have prompted fears that these processes will spread virally and have sent a strong signal that supranational action is needed in order to improve the state of freedom and pluralism of the media.

The Charter on Fundamental Rights of the EU explicitly calls for respect of media freedom and pluralism, among other fundamental rights. The Charter is directly applicable in cases where the Member State acts in the scope of EU law.<sup>2</sup> MSs' obligation to ensure pluralism includes 1) refraining from interference that would distort the market and 2) ensuring that a plurality of opinions is present in the media market by enacting the necessary legislation.

Research on media freedom and pluralism has traditionally focused on the growing power of transnational media companies, which tend to dominate public discourse, and has been critical of the liberal media system, which is predisposed towards increased market concentration. Recent studies have warned that freedom and pluralism of the media – and even democracy itself – are threatened by these powerful private enterprises.<sup>3</sup>

This study conducted comparative research on seven Member States of the European Union: Bulgaria, France, Greece, Hungary, Italy, Poland and Romania. The MSs were specifically selected on the basis of previous research results that showed political pluralism at high risk, accompanied by heavy state interference in the media, or close economic ties between the political sector and private media owners. The team of local experts ensured that accurate and up-to-date qualitative information was collected on informal structural features of the media markets under scrutiny. The research was carried out between 2 May 2016 and 22 July 2016.

The authors found in their research that the examined media systems suffer from a web of **non-transparent relationships** established in an interconnecting **network of political and economic power**, which in some countries<sup>4</sup> is provoking **systemic failure** of the media market and is linked to the **dysfunction of democracy**. They therefore conclude that this poses a greater threat to media freedom and pluralism at this stage than the concentration of private media ownership and calls for urgent action.<sup>5</sup> The study also paid attention to the

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<sup>1</sup> Rule of law in Poland: Commission starts dialogue, 13 January 2016, [http://ec.europa.eu/news/2016/01/20160113\\_en.htm](http://ec.europa.eu/news/2016/01/20160113_en.htm) (last retrieved on 15 June 2016); Uitz, Renata. 2015. 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary'. *International Journal of Constitutional Law*. Vol. 13. No. 1. 279–300.

<sup>2</sup> CJ, Case C-617/10, Åklagaren v Hans Åkerberg Fransson, 26 February 2013.

<sup>3</sup> Curran, James. 2012. *Media and Power*. Routledge; Bagdikian, Ben H. 2014. *The New Media Monopoly*. Boston: Beacon Press; Keane, John. 1991. *The Media and Democracy*. Polity Press; McChesney, Robert W. 2015. *Rich media, poor democracy: Communication politics in dubious times*. The New Press; McQuail, Denis. 2000. *Mass Communication Theory* (4th edition). London: SAGE; Van Cuilenburg, Jan. 'Media Diversity, Competition and Concentration: Concepts and Theories' in: Els de Bens. 2007. *Media between Culture and Commerce*. Intellect Books.

<sup>4</sup> The scope of the countries correlates closely with the theory of Professor Mancini published in Hallin, Daniel C. and Paolo Mancini. 2004. *Comparing Media Systems: Three Models of Media and Politics*. Cambridge University Press.

<sup>5</sup> Karppinen, Kari. 2007. 'Making a difference to media pluralism: A critique of the pluralistic consensus in European media policy'. in Bart Cammaerts and Nico Carpentier (eds). *Reclaiming the media: Communication rights and*

weakening media sector following the financial crisis, the digital transformation and its effect on media financing and user behaviour, and the worrying political processes that can be observed internationally.

The study identifies existing EU competences that can be used to make legislative changes to protect and maintain media freedom and pluralism within EU MSs. While no explicit competences to regulate media pluralism are conferred on the EU, there is some room for manoeuvre for the EU to act. Under its negative competences, the EU can attach consequences to not respecting the EU values enshrined in Article 2 TEU, and the Charter of Fundamental Rights of the EU. There are also some positive competences enabling the EU to adopt measures on fundamental rights, state aid and the internal market.

When making their recommendations, the authors were mindful of the many obstacles to policy-making, such as the **constraints of EU competencies** and the difficulty of reaching consensus among MSs on detailed regulation (which would be required by a harmonisation of ownership concentration rules). Their main goal was to propose measures that would ensure a sustainable system for long-term improvement in the status of media freedom and pluralism in the EU, while also proposing prompt measures to prevent aggravation of the situation.

Therefore, this study strongly advises that any attempt to address the adequacy of media freedom and pluralism on a European level should be intrinsically **connected to the issues of democracy, rule of law and fundamental rights** and should become part of a regular process of democratic scrutiny. To this end, the authors put forward the following six policy recommendations.

1) A regular, **biennial assessment** of potential risks to media pluralism should be carried out in each Member State by an independent committee of experts, appointed by the European Commission. As media pluralism and freedom are fundamental rights rooted in freedom of expression, monitoring can be performed under the framework of the Fundamental Rights Agency (FRA) or a Rule of Law framework. If a specific MS's media system is evaluated as posing a "medium risk" to media pluralism, the members of the expert committee would take up temporary residence in the MS and collaborate with the government on **improving pluralism over a five-year period**, via various actions and follow-up measures. In the event that an evaluation reveals a "high-risk" threat to media pluralism, or if the previous five-year effort at improvement proved **unsuccessful**, the Commission should initiate an **enforcement procedure**, according to either Article 258 TFEU, Article 7 TEU or the newly designed pre-Article 7 procedure.

2) A **specific Directive on state aid to the media sector** should be adopted that would set out the principles of providing state aid to both commercial media outlets and to public-service media.<sup>6</sup>

3) The Audiovisual Media Services Directive (AVMSD) should be amended to include an **obligation on MSs to achieve and maintain pluralism** using their own instruments, and a clear definition of the elements of pluralism.

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democratic media roles. University of Chicago Press. 9–30. at 13. Karppinen refers to Meier and Trappel, 1998; Doyle, 2002; van der Wurff, 2004; Aslama et al., 2004. See also Commission Staff Working Document on Media Pluralism in the Member States of the European Union. {SEC(2007) 32} at pages 5,8,10,11. [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/media\\_pluralism\\_swp\\_en.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf) (last retrieved on 15 June 2016).

<sup>6</sup> Based on the rules of the Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance) OJ C 257, 27.10.2009

4) Each MS should create and maintain a **transparent database** containing all **direct and indirect owners** of media companies up to the natural persons, with links to **cross-ownership** in the media sector and in the sector that is affected by public funds. The database should be easily accessible to the public and **searchable** through various filtering and ordering algorithms. The ultimate benefit of this database is to foster development of a long-term project to create a free and diverse EU media system.

5) **The E-commerce Directive** should be updated in order to relieve platform providers of any liability for third-party content and to harmonise the divergent MS jurisdictions in this regard. It is also recommended that the planned Articles 28a and 28b [and by all means Article 28a (5)] relating to video-sharing-platform-providers should be omitted from the **AVMSD**, because of their chilling effect on sharing user-generated content (UGC). The liability for content should be assigned to actors who actually contribute the content: the content providers themselves, even if they are private individuals.

6) **Educational projects** should be undertaken as **preventative policy instruments** to support the long-term goal of building a free, pluralistic and democratic media system. Such projects should be designed, organised and supervised by the European institutions in order to achieve desired results in three targeted areas: i) democracy and fundamental rights, ii) media and digital literacy and iii) journalistic ethics.

7) Follow-up and additional research should be carried out, focusing in particular on two topics: i) individual factors influencing pluralism, separating out the effects of other factors; and ii) new forms of online mass communication content and the possibilities of user empowerment in 'outsourcing regulation'. The Media Pluralism Monitor project should be continued, possibly in cooperation with the official monitoring procedure described in Recommendation #1.

# 1. INTRODUCTION

## 1.1. Background

There is a growing concern in the European Union regarding media freedom and pluralism. The background situation has dramatically changed since the first Green Paper on Media Pluralism was published in 1992. In all EU Member States (MSs), to a greater or lesser extent, **business powers** have allied with **political powers** to **exert pressure** on the media, which are experiencing financial and cultural difficulties to fulfil their watchdog function. Digitalisation poses an extra concern to the media industry today.

Media pluralism is an essential element of democracy, and an important part of freedom of expression. Without freedom and pluralism of the media, citizens are unable to scrutinise the government or obtain the necessary information to exercise their right to vote. A **democratic deficit in one country affects the whole of the EU**, through the representative mechanisms built into the EU's governing structure. Member States' citizens directly elect members of the European Parliament, who in turn elect the President of the Commission. Member States' governments form one of the most powerful EU institutions, the Council. Therefore, if Member States' citizens are unable to make an informed decision about when they elect their MPs and MEPs, then all EU decision-making bodies, and as a consequence all EU instruments, are affected. **Through the decisions taken at the EU level, all Union citizens are affected by the democratic deficit of one Member State.**

In addition, the EU's external relations may suffer if a deficit in media pluralism is tolerated. The EU's reputation as **a free and democratic region** is in danger of being tarnished if democracy and fundamental rights are **systematically violated** in several of its constituent member countries. These conditions can also undermine **the EU's favourable investment environment** not only for the media market, but also for the national markets of the affected MSs. Distortions of the investment climate limit the right to free movement of persons, services and establishment, and they also affect the EU's competitiveness.

Both the EU and MSs should respect democracy, the rule of law and other fundamental rights, including media freedom and pluralism, which are expressly incorporated into the European Charter on Fundamental Rights. The Charter is directly applicable in cases when the Member State acts in the scope of EU law.<sup>7</sup>

The obligation to ensure pluralism stems from the **objective side of the right to freedom of expression**. In its decision in the *Centro v. Italy* case, the ECtHR established a violation of Article 10 (Freedom of expression) of the European Convention on Human Rights because the state's legislative measures did not satisfy the state's obligation to guarantee effective pluralism.<sup>8</sup> The state obligation to ensure pluralism includes 1) refraining from interference that would distort the market and 2) ensuring that a plurality of opinions are present on the media market by enacting the necessary legislation.

## 1.2. Methodology

We conducted comparative research on seven Member States of the European Union, including some identified in previous research as high-risk countries: Bulgaria, France, Greece, Hungary, Italy, Poland and Romania. The purpose of the comparative country

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<sup>7</sup> CJ, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013.

<sup>8</sup> In ECtHR, *Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy*, Application no. 38433/09, 7 June 2012, the Court declared that "there can be no democracy without pluralism" (p. 129.), and that it was necessary for the state "to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed" (p. 130).

studies, contained in the Annex, was to obtain precise information from local experts on issues that are supposed to influence media pluralism and media freedom in a number of Member States. We built on studies previously conducted, especially at the preparation phase of the research and when selecting countries, with the intention of creating a fresh perspective.

To formulate the research question, we broke down the multi-dimensional concept of pluralism into smaller constituent parts: diversified ownership, independence from economic and political pressure, observation of journalistic ethics and professional quality, financial stability, cultural and political diversity of content, geographical diversity and independence of regulatory authorities. None of the Member States is capable of ensuring all these conditions. The **concentration of ownership**, which is the traditional focal point of the media pluralism discourse, **depends on a number of variables**: population, geographical size of a country, GDP, regulatory environment, educational level of the citizens and median per-capita income and expenditure.<sup>9</sup> It should also be noted that a significant part of the literature contests the direct correlation between diverse ownership and a plural media market. Plurality of opinions could be present in a highly concentrated market, while even a diverse market could provide unsatisfactory diversity in terms of genre, political opinion or minority representation.<sup>10</sup> This is especially true in the underfinanced markets of Central and Eastern Europe, where resource-rich international owners are able to resist political pressures and to provide diverse and high-quality content compared to smaller domestic competitors. The financially weak media companies sometimes divide the market between them, or seek support either from the political establishment or from industry.

We examined the **role played by MSs in the media market** and the **transparency** of their activities. For this purpose, we conducted qualitative research in the fields of **cross-sector-ownership, direct and indirect state subsidies, state advertising** and formal or informal relationships between media actors and the political class, including the exertion of political pressure.

Providing **funding from the state budget** to certain media outlets can be beneficial to sustain media products that would not be sustainable in a competitive market, but for which there is a social or cultural need. If under-financing is a key problem in a media market, MSs should be allowed to set up a fair and transparent system of subsidies, but under the scrutiny of the European Commission.

**State aid** is generally prohibited under the TEU, with an exemption as originally laid down in the Ninth Protocol attached to the Amsterdam Treaty,<sup>11</sup> which defines certain conditions for public-service broadcasting.

The research included an **examination of public-service broadcasting** in order to verify whether the principles of state aid declared by the Commission in its Communication on State Aid to Public Service Broadcasting are being respected. While public-service broadcasting is

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<sup>9</sup> See for example: Noam, Eli M. 2016. Who owns the world's media? Media Concentration and Ownership around the World. Oxford University Press at 1249.

<sup>10</sup> Commission Staff Working Document on Media pluralism in the Member States of the European Union. SEC(2007) 32} 5,8,10,11. [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/media\\_pluralism\\_swp\\_en.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf) (last retrieved on 15 June 2016) Karppinen, Kari. 2007. 'Making a difference to media pluralism: a critique of the pluralistic consensus in European media policy'. in: Cammaerts, Bart and Carpentier, Nico (eds). Reclaiming the media: communication rights and democratic media roles. University of Chicago Press. 9–30. at 13.

<sup>11</sup> 11997D/PRO/09 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States Official Journal C 340, 10 November 1997.

viewed in western media theory as a means of ensuring internal pluralism by serving all segments of the public for the public good, in some MSs, public broadcasters are regarded as the domain of the ruling government, both in terms of content and financial matters.<sup>12</sup> We found that the Commission Communication was not respected in several MSs and therefore recommend that it is enforced.

### 1.3. The role of digitalisation in the pluralism problem

It should be noted that the **business model for media financing has changed radically**. Through online advertising, traditional media have suffered a great loss of income. In another blow to the new online media, readership is migrating to social network sites and has access to content through these intermediaries.

Due to the **network effect**,<sup>13</sup> also called the “Hollywood effect” by Karol Jakubowicz,<sup>14</sup> the trusted and large online media content providers constantly grow in popularity. In an age of “**attention scarcity**”, the audience needs to make difficult choices among the abundance of content on offer, and they prefer what they already know that suits their taste. As a result, media consumers are not exposed to views that are much different from their own.<sup>15</sup> The lack of **exposure diversity**<sup>16</sup> is a new, highly important factor in media pluralism, which diminishes access to pluralistic content to an even greater extent than concentrated ownership. This may also lead to a steady reinforcement of consumers’ own views, which may push them towards extremism in a phenomenon also called “**cyberbalkanisation**”.<sup>17</sup> We recommend leaving the constantly changing area of digital content as free from regulation as possible and recommend **user education**.

In some MSs, the interference by the state in advertising, the distribution of frequencies and loans as well as indirect ownership by proxy persons have reached such high levels as to constitute **systemic infringement of media freedom**. While separate incidences of these practices can be found in every MS, the practice of **misusing what are apparently legal tools to create a profoundly unlawful media scene** can be observed mainly in younger democracies, first of all in Hungary, Bulgaria and Romania, but partly also in Italy. Poland used to be an eminent example of media freedom, but it appears that it will follow the example of Hungary. From the point of view of public policy, we recommend that **the problem is regarded in the context of democracy and the rule of law**.

<sup>12</sup> Hallin, Daniel C. and Paolo Mancini. 2004. *Comparing Media Systems: Three Models of Media and Politics*. Cambridge University Press; Gross, Peter and Karol Jakubowicz. 2012. *Media Transformations in the Post-communist World: Eastern Europe's Tortured Path to Change*. Rowman & Littlefield. at 39; Council of Europe: Official report of debates: 2004 ordinary session (first part), 26–30 January 2004 at 113. See also Jakubowicz, Karol and Miklós Sükösd. ‘Twelve Concepts Regarding Media System Evolution and Democratization in Post-Communist Countries’. at 19. in: Jakubowicz, Karol and Miklós Sükösd (eds) 2008. *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective*. Intellect Books.

<sup>13</sup> Barabási, Albert-László. 2002. *Linked: the new science of networks*. Perseus.

<sup>14</sup> Jakubowicz, Karol. ‘New Media Ecology: Reconceptualising Media Pluralism’. in: Valcke, Peggy, Sükösd, Miklós and Robert Picard (eds) 2015. *Media pluralism and diversity: concepts, risks and global trends*. Palgrave Macmillan. at 23–53.

<sup>15</sup> Sunstein, Cass R. 2001. *Republic.com*. Princeton University Press.

<sup>16</sup> Helberger, Natali, Katharina Kleinen-von Königslöw and Rob van der Noll: ‘Regulating the new information intermediaries as gatekeepers of information diversity’. *Info*. Vol. 17 No. 6. at 50–71. <http://dx.doi.org/10.1108/info-05-2015-0034> at 67. (last retrieved on 15 June 2016).

<sup>17</sup> See Sunstein on cyberbalkanisation. Sunstein, Cass R. 2001. *Republic.com*. Princeton University Press.

## 1.4. Competences

We identified existing EU competences available for making legislative changes with a view to protecting and maintaining media freedom and pluralism within EU MSs. While no explicit competences to regulate media pluralism are conferred on the EU, there are relevant competences in the Treaties on **fundamental rights, state aid and the internal market**. As to the competences on enforcing democracy and the rule of law, lessons learned from previous attempts to invoke Article 7 TEU and consideration of the limits of Article 258 TFEU show the practical hindrances to their operability, but even if existing instruments to protect democracy were in use, they were reactive and crisis-driven. Therefore building on the suggestions formulated in previous research, the authors recommend a new approach of a methodologically sound, reliable, permanent and periodic monitoring and evaluation process based on objectivity and equality within the EU on Member States' compliance with Article 2 TEU legal principles.<sup>18</sup>

Our research also confirmed that soft laws (among them the Commission Communication on State Aid to Public Service Broadcasting) have no measurable impact in the field of media pluralism. Therefore, we recommend the establishment of European norms, with **simple content but with compulsory effect and a follow-up mechanism**.

## 1.5. Recommendations

In formulating our recommendations, we kept in mind three overarching ideas: 1) any recommendation we make should be viable in terms of existing competences, 2) the sovereignty of the Member States should be respected and 3) our recommendations should plant seeds to reap results in the long run.

(1) A regular, periodic assessment of potential risks to media pluralism on an equal and objective basis should be carried out every two years in each Member State. This assessment could also feed into the wider monitoring and enforcement of democracy and the rule of law. The important change compared with previous monitoring projects would be that the **results of the monitoring would have legal consequences**. If a specific MS's media system were to be evaluated as having "medium risk" to media pluralism, an expert committee would be formed to visit and stay in the MS to collaborate with the government on improving pluralism. A series of actionable steps to be taken over a one-year period would be formulated, followed-up by a four-year period observation, during which time the MS would be expected to substantially alter the practices that were identified as problematic during the monitoring. If this process fails to produce the desired changes, and in the event that a subsequent evaluation indicates a "high risk" threat to media pluralism, the Commission would launch an enforcement procedure. This could take the form of an infringement procedure according to Article 258 TFEU, an Article 7 TEU process or the newly designed pre-Article 7 procedure.<sup>19</sup> The Commission would be obliged to act in such a case.

(2) A **new Directive on "state aid to the media sector"** should be adopted to set out conditions for providing fair, balanced and transparent funding to the media.

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<sup>18</sup> Bárd, Petra, Sergio Carrera, Elspeth Guild and Dimitry Kochenov. With thematic contribution by Wim Marneffe. An EU mechanism on Democracy, the Rule of Law and Fundamental Rights. European Parliament, European Parliamentary Research Service, 2016 [http://www.europarl.europa.eu/EPRS/EPRS\\_STUD\\_579328\\_AnnexII\\_CEPS\\_EU\\_Scoreboard\\_12April.pdf](http://www.europarl.europa.eu/EPRS/EPRS_STUD_579328_AnnexII_CEPS_EU_Scoreboard_12April.pdf) at 24. (last retrieved on 15 June 2016), also published as CEPS Paper in Liberty and Security, No. 91/April 2016, <https://www.ceps.eu/system/files/LSE%20No%2091%20EU%20Mechanism%20for%20Democracy.pdf> at 81. (last retrieved on 15 June 2016).

<sup>19</sup> European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM (2014) 158, 11.3.2014.

(3) The **AVMSD should be completed to oblige MSs to achieve and maintain pluralism, employing** their own instruments to do so. The key elements of appropriate policy instruments should be defined in the AVMSD (see chapter 6.)

(4) A **searchable and transparent database** should be created containing information on direct and indirect media owners up until the final natural person owner(s).<sup>20</sup> The database would be regularly updated by the MSs. The **Proposal on the AVMSD Article 5a** contains a vague reference to such a database,<sup>21</sup> and we recommend that the provision is **clarified and strengthened**. The database should be **easily searchable with filters** and link information on transnational companies active in various MSs. The indirect effect of such a European database would be to provide a stable informational environment that encourages investment, media literacy, investigative journalism and regulation. The ultimate benefit of this database would be to foster the long-term development of a free and diverse EU media system.

(5) **The E-commerce Directive** should be updated to exempt platform providers from liability for user-generated content (UGC). In this respect, the **proposed AVMSD Articles 28a-28b is seen as causing a chilling effect** in the UGC market and indirectly curtailing users' freedom of expression. We therefore urge **omitting the proposed article from the final amendment**.<sup>22</sup>

(6) Last but not least, we recommend using **preventive policy instruments** in the form of **educational projects** to be carried out by the European Union in MSs to aim at raising democratic awareness, media literacy and journalistic ethics. Education is regarded as a key in preventing future problems in the field of democracy, rule of law and fundamental rights, which include media freedom and pluralism.

This approach is supported by two fundamental observations: i) Thanks to the freedom of choice granted by the digital media, **conscious decisions** concerning content selection need to be made by the users in order **to achieve exposure to plural media content**. ii) The operation of the media system is closely correlated with social and political characteristics of the various MS, which are typically younger democracies, but all EU MSs could benefit from an education in democratic values because signs of extremism are present in all MSs. The EU should take the opportunity to create **a common narrative of the European values** of rule of law, democracy and human rights in the younger generation of European citizens.

It is recommended that the projects are designed, organised and supervised by the EU institutions, with only technical tasks being transferred to local institutions, in order to ensure that the programmes are successful in changing traditional patterns of thinking rather than reinforcing traditional structures and beliefs.

The more the situation of media freedom and pluralism deteriorates, the more difficult it is to open a door for intervention. Therefore, the policy recommendations in this paper target **long-term goals** and recommend taking one step at a time.

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<sup>20</sup> Offshore ownership of media service providers should be prohibited, in order to ensure consequent transparency. This study did not find a legislative opportunity for this at this stage.

<sup>21</sup> Proposed Article 5a of AVMSD.

<sup>22</sup> Proposed Article 28a AVMSD.

7) The steps recommended above should be regarded as first steps in a long process. Follow-up and further research are recommended, particularly in order to analyse other individual factors of pluralism and to work out a new model of online mass communication, with a view to the possibilities of user empowerment. The Media Pluralism Monitoring project should be continued, with its results widely disseminated and utilised for further action. MPM could possibly participate in the official monitoring procedure on pluralism, described in Recommendation #1.

## 2. METHODOLOGY

### KEY FINDINGS

- Previous research results were applied to set up the research hypothesis and to draw up the selection of countries to be examined.
- The problems in media freedom and pluralism were broken down into smaller questions in order to conduct qualitative, in-depth research.
- The role of the state and the transparency of its interference were the key research areas, owing to the gravity and urgency of the specified problem areas in media freedom and pluralism.
- Not all MSs are equally affected by all the problems explored, but all MSs would benefit from transparency of ownership, transparency and regulation of state aid, an updated E-Commerce Directive and AVMSD, and educational programmes.
- It will be easier to establish cooperation among the MSs in the legislative process if the steps to be taken are small and do not touch upon sensitive issues in most MSs (but only in a few of them).
- Among the possible policy tools available, we propose **monitoring and evaluation, information, proposals for an amendment and a new directive, and educational projects.**

This study has built on the state of the art in the area, and adds to existing and publicly available research results. The information was collected by national experts who relied on official documents and publicly available sources, and conducted personal interviews with affected actors. The research was carried out between 2 May 2016 and 22 July 2016. Since main topics of our study were the lack of official information and the existence of informal relationships in the internal market, we had to rely extensively on the insights and expertise of our domestic experts. The literature on legal and media theory was also analysed and summarised relating to the discussion of elements and scholarly approaches to freedom and pluralism in the media.

The innovative element of this research consists of our finding of connections between the various elements in media freedom and pluralism, which have been previously researched by international scholars, including ownership, state aid, state capture, journalism and the rule of law.

### 2.1. Defining the research question

**Ownership concentration** has been a concern ever since the media market grew into a sizeable industry. It is **gaining new importance today in the context of the online environment** with regard to both network operators and content providers. In researching ownership concentration, we found that its ideal level depends on several various factors: population size, geographical size of the country, GDP, regulatory environment, educational level of the citizens, and per-capita income and expenditure on a medium.<sup>23</sup> In addition, concentration can be measured in several ways and no single, generally valid scientific threshold can be defined that would guarantee media pluralism without the risk of over-

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<sup>23</sup> See for example: Noam, Eli M. 2016. Who owns the world's media? Media Concentration and Ownership around the World. Oxford University Press at 1249.

regulating.<sup>24</sup> Furthermore, we found several contradictions in the literature, which showed that no clear correlation could be demonstrated between the level of media market concentration and media pluralism.<sup>25</sup>

Each society has its own characteristics, and their respective media systems reflect these. Hallin and Mancini's description of the media systems grasps important characteristics in which the various systems differ from each other.<sup>26</sup> The younger democracies of post-communist countries with their equally young media markets are very similar to the polarised-pluralist, or Mediterranean model that Hallin and Mancini describe.<sup>27</sup>

These media markets were dynamically transformed during the 1990s and to a lesser extent in the subsequent decades. Some of them are characterised by strong positions of foreign media owners, and relatively low buying force. In several countries, the habit of the political elite to dominate the media has been revived after the first euphoric years of democratisation, or, according to some, it never stopped.<sup>28</sup> Some Central and Eastern European governments have shown clear tendencies of an illiberal governing style, whereas these societies tend to have a weak civil sector unable to counteract these tendencies.<sup>29</sup> Since then, this phenomenon has been extensively researched and documented.<sup>30</sup>

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<sup>24</sup> Iosifidis, Petros. 2010 'Pluralism and concentration of media ownership: Measurement issues'. *Javnost—the public* Vol. 17. No. 3. at 5–21.

<sup>25</sup> Jakubowicz, Karol. 'New Media Ecology: Reconceptualising Media Pluralism'. in: Valcke, Peggy, Sükösd, Miklós and Robert Picard (eds) 2015. *Media pluralism and diversity: concepts, risks and global trends*. Palgrave Macmillan. at 23–53; Bagdikian, Ben H. 2014. *The New Media Monopoly*. Boston: Beacon Press; Karppinen, Kari. 2010. 'Rethinking media pluralism: A critique of theories and policy discourses'. Publications of the Department of Social Research; Valcke, Peggy 2011. 'Looking for the User in Media Pluralism Regulation: The Potential and Limits of Regulating Exposure diversity' *Journal of Information Policy*. 1. at 287–320.

<sup>26</sup> Hallin, Daniel C and Paolo Mancini. 2004. *Comparing Media Systems: Three Models of Media and Politics*. Cambridge University Press.

<sup>27</sup> Hallin, Daniel C and Paolo Mancini. (eds) 2012. *Comparing Media Systems beyond the Western World*. Cambridge University Press. at 26–50.

<sup>28</sup> Hrvatin, Sandra B. and Brankica Petković. 2016. Financial engineering for state and media capture. <http://mediaobservatory.net/radar/state-media-financial-relations-countries-south-east-europe.2016-03-30> (last retrieved on 15 June 2016).

<sup>29</sup> See among others: <https://freedomhouse.org/report/freedom-world/2015/slovenia> (last retrieved on 15 June 2016), Volcic, Zala and Karmen Erjavec. 2012. 'A continuous battle: relationships between journalists and politicians in Slovenia'. *Global Media Journal: Mediterranean Edition*. Vol. 7 No. 2. at 1–9; Bugaric, Bojan and Alenka Kuhelj. 2015. 'Slovenia in crisis: A tale of unfinished democratization in East-Central Europe'. *Communist and Post-Communist Studies*. Vol. 48. No. 4, December at 273–279; Bairrett, Richard L. Jr. 2015. 'Executive Power and Media Freedom in Central and Eastern Europe'. *Comparative Political Studies*. Vol. 48. No. 10. at 1260–1292.

<sup>30</sup> Jakubowicz, Karol. 2001. 'Rude awakening social and media change in Central and Eastern Europe'. *Javnost—The Public*. Vol. 8. No. 4. at 59–80; Klimkiewicz, Beata. 2009 'Is the clash of rationalities leading nowhere? Media pluralism in European regulatory policies'. in: Czepek, Andrea, Melanie Hellwig and Eva Nowak (eds) 2009. *Press freedom and pluralism in Europe: Concepts and conditions*. University of Chicago Press. at 62–64; Bajomi-Lázár, Péter. 2014. *Party Colonisation of the Media in Central and Eastern Europe*. Central European University Press; Bajomi-Lázár, Péter. 2003. *Reinventing media: media policy reform in East-Central Europe*. Central European University Press; Gross, Peter. 2002. *Entangled evolutions: Media and democratization in Eastern Europe*. Washington: Woodrow Wilson Center Press.; Jakubowicz, Karol. 1995. 'Lovebirds? The media, the state and politics in Central and Eastern Europe'. *Javnost—the Public*. Vol. 2. No.1. at 75–93; Splichal, Slavko. 1994. 'Media Beyond Socialism'. *Theory and Practice in East-Central Europe*. Westview Press. at 145; Splichal, Slavko. 1992. 'Media privatization and democratization in Central-Eastern Europe'. *International Communication Gazette*. Vol. 49. No. 1–2. at 3–22; Sükösd, Miklós and Péter Bajomi-Lázár. 'The second wave of media reform in East Central Europe'. in: Sükösd, Miklós and Péter Bajomi-Lázár (eds) 2003. *Reinventing media: Media policy reform in East-Central Europe*. Budapest: CEU Press. at 13–27; Balčytienė, Auksė, et al. 2015. 'Oligarchization, de-Westernization and vulnerability: Media between democracy and authoritarianism in Central and Eastern Europe'. *Tidsskrift for Medier, Erkendelse og Formidling* 3.1.

All media systems have their problems with pluralism, but for different reasons. The Media Pluralism Monitor of 2009<sup>31</sup> created a complex matrix for research purposes and its results show that in western MSs the greatest threat to pluralism is in the market domain, whereas in the Central and Eastern European MSs, political influence poses a higher risk. In Italy and in Greece all factors fall in the high-risk area. Breaking down the complex issue of pluralism into smaller, researchable units was a very useful device, allowing researchers and policy-makers alike to isolate various problem areas. **The various causes should be treated with different policy mechanisms.** All problems deserve attention, but **setting priorities** would be helpful. Rather than dealing with all the different issues at the same time, dividing the problem areas and the tasks into smaller units makes it easier to tackle them. Even cooperation could be easier on smaller questions, especially if some of them are not sensitive to all MSs (but only to a few of them).

When defining which aspect of media pluralism should be the main focus point of this paper, we considered the following issues:

1) *The gravity and urgency of the pluralism problem:* We found that political interference in some MSs reached a level that resulted in systemic misuse of state resources and caused a severe malfunctioning of the media system and thereby threatened the very functioning of democracy. In addition, this pattern seems to emerge from one MS to another. A strong argument seems to be emerging to try to halt this trend and apply preventive measures to stop the viral spreading of this malpractice.

2) *The viability of the policy options to be recommended.* When considering which aspects of pluralism could be most successfully regulated at the European level, we found that the regulation of ownership concentration would require consensus between MSs on a range of technical details: the measurement mechanism, definition of the relevant market (online), defining threshold, etc. Almost all MSs have some sort of concentration regulation that could also be used to achieve the desired goal without legal harmonisation. Acknowledging that a harmonised concentration regulation could be more efficient, the difficulty to achieve this goal does not seem to correlate with the expected gain at this stage.

For these reasons, this study recommends **examining and tackling the pluralism risk domain of political influence separately from market concentration.** Without the intention to diminish the importance of media ownership concentration which is a general problem throughout all MSs of the European Union, we argue that the **network of political and economic ownership distorts the media freedom and media pluralism to such a level that it infringes democratic and fundamental rights of the citizens and requires urgent intervention.** This affects democratic elections both at the national and at the European level. Without a clear action plan, there is an imminent danger that **this phenomenon might spread in other countries** as well, and give the wrong message to accession states and to the wider international community.<sup>32</sup>

**Clarifying the role of the state played in the media system is a basic prerequisite for further discussion about media regulation and media pluralism.** State interference may be necessary in certain areas, but that interference should be based on agreed principles.

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<sup>31</sup> <http://monitor.cmpf.eu/monitor/2009/>; <https://ec.europa.eu/digital-single-market/independent-study-indicators-media-pluralism> (both last retrieved on 15 June 2016).

<sup>32</sup> Brogi, Elda, Alina Dobrova and Pier Luigi Parcu. 2014. European Parliament, Directorate-General for External Policies of the Union Directorate B Policy Department: Freedom of Media in the Western Balkans. Brussels [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534982/EXPO\\_STU\(2014\)534982\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534982/EXPO_STU(2014)534982_EN.pdf) (last retrieved on 15 June 2016).

The measures proposed in this paper are intended **to prepare a foundation also for future legislative actions**. Importantly, it is argued that a **“policy of small steps”** should be applied in this process, in order to **achieve smooth collaboration between the MSs**.

All MSs would benefit from the recommended policy measurements aimed at safeguarding media pluralism. For example, a higher level of **transparency** of ownership information would be favourable for control and ongoing monitoring of media pluralism – and at the same time **it would collect the necessary information to serve as the basis for a future ownership regulation**. State aid is a matter of EU competence, with some harmonisation already achieved.<sup>33</sup> The formulation of additional principles on the required and prohibited methods would not adversely affect any Western European MS, while they could change the rules of the game in the problematic MSs.

## 2.2. Selection of countries

The purpose of this research was to describe and analyse a phenomenon that has reached a level in several MSs that it **threatens freedom and pluralism of the media as well as fundamentals rights and democracy**. The goal was to show the **extent of the problem** and the **pattern of the anomaly** in a series of MSs; therefore we chose MSs that are similar in many characteristics but primarily in the type of their media systems, for which we relied on the categorisation of authors Hallin and Mancini (see below) and on other previous research in the field.<sup>34</sup>

The examined problems do exist in other MSs as well, but certain features (see below in section 4.5.) help to maintain a healthier media system. In the examined MSs these problems are assumed to be structural characteristics of the media and to some extent, of the whole economic sector.

The diversity of the EU makes comparison of all MSs at the same time almost impossible, especially along different criteria, because there are too many variables. Such results can be either misleading, or the comparison can be drawn only at a rough level. Such an approach is more appropriate for a general data mining, as carried out by the European University Institute (EUI) in its Media Pluralism Monitor (MPM) reports. Their unique benefit is their objectivity, being based on quantifiable material, which provides an excellent basis for further research.

Our purpose was to deliver crystal-clear results, so as to prove our hypothesis beyond doubt. The policy advantages of our approach are presented above in section 2.1.

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<sup>33</sup> For a collection of the regulations, see: [http://ec.europa.eu/competition/state\\_aid/legislation/legislation.html](http://ec.europa.eu/competition/state_aid/legislation/legislation.html) (last retrieved on 15 June 2016)

<sup>34</sup> Commission Staff Working Document on Media pluralism in the Member States of the European Union. {SEC(2007) 32} 5,8,10,11; European Commission, Green Paper on Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action, Commission Green Paper, COM (92) 480 final, Brussels, 23 December 1992; Brogi, Elda, Lisa Ginsborg, Alina Ostling, Pier Luigi Parcu and Maja Simunjak. 2016. Monitoring Media Pluralism in Europe – Testing and Implementation of the Media Pluralism Monitor 2015 – Policy Report, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute; and Noam, Eli M. 2016. Who owns the world’s media? Media Concentration and Ownership around the World. Oxford University Press at 1249.

**Table 1: Level of risk to pluralism in the political and the market domain in European MSs**

	<b>Political</b>	<b>Ownership</b>
<b>Bulgaria</b>	high	high
<b>Greece</b>	high	high
<b>Hungary</b>	high	high
<b>Italy</b>	high	high
<b>Finland</b>	low	high
<b>Germany</b>	low	medium
<b>Latvia</b>	low	medium
<b>Luxembourg</b>	low	medium
<b>Netherlands</b>	low	medium
<b>Sweden</b>	low	medium
<b>Portugal</b>	low-medium	medium
<b>Austria</b>	medium	medium
<b>Belgium</b>	medium	medium
<b>Czech R</b>	medium	medium
<b>Cyprus</b>	medium	low
<b>Denmark</b>	medium	high
<b>Estonia</b>	medium	medium
<b>France</b>	medium	high
<b>Lithuania</b>	medium	high
<b>Malta</b>	medium	low
<b>Poland - 2015</b>	medium	high
<b>Slovakia</b>	medium	low
<b>Slovenia</b>	medium	low
<b>Romania</b>	medium-high	high
<b>Ireland</b>	medium-low	medium-high
<b>Spain</b>	medium-low	high
<b>UK</b>	medium-low	medium

**Note:** Countries in red denote those selected as the subject of our case studies.

**Source:** Petra Bárd and Judit Bayer on the basis of results reported in Brogi, Elda, Dobрева, Alina et al. 2015. Monitoring Media Pluralism in Europe – Testing and Implementation of the Media Pluralism Monitor 2014 – Policy Report. Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, January; Brogi, Elda, Ginsborg, Lisa, Ostling, Alina, Parcu, Pier Luigi and Simunjak, Maja, 2016. Monitoring Media Pluralism in Europe – Testing and Implementation of the Media Pluralism Monitor 2015 – Policy Report, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute.

The MPM results provided us with a list of countries where the **political risk is ranked “high”** or “medium” but closer to the former qualification. Not surprisingly, these were the same states that were held to be **“partly free” by the Freedom House Report in 2015**.<sup>35</sup> This is also supported by the **Press Freedom Index** of the Reporters Sans Frontières, where Poland, France and Romania received a slightly better score, but the other examined

<sup>35</sup> With the exception of Poland and France. The Polish results are subject to change due to the events late 2015 and in 2016.

countries are "orange", meaning there is a medium risk to media pluralism.<sup>36</sup> According to Hallin-Mancini's system division, all of these countries would belong under the polarised pluralist model, on the basis of the following characteristics: low circulation of newspapers, high political parallelism, weak professional ethics, media instrumentalisation, strong state intervention, late democratisation and clientelism. France is the farthest from the core of this model, where only strong state intervention can be established with certainty, and some signs of political journalism. However, these phenomena are counterbalanced by fact-based, independent journalism.<sup>37</sup>

Our basic assumption was that the media is pressured from both the political and the economic power bases. Our research hypothesis was that when these two forces ally, the media loses its independence and cannot fulfil its watchdog function but serves particular interests of either the political, or the economic power, or both. We identified issues of media pluralism that relate to problems in **the rule of law and democratic deficit**.

### 2.3. The questionnaire

In order to carry out qualitative research in a narrow field, particular care was taken to formulate very specific questions that **complete, rather than repeat issues covered** by previous research. Therefore, the country reports present very specific data about the countries rather than providing general information. This was made possible by the availability of excellent previous research, among them in particular that of the MPM, which covered several areas of pluralism in all EU MSs.

Because of the large amount of generally available information, the questions aimed specifically to dig deep into certain problematic fields and **show contradictions** between the surface of regulatory level and the real social processes.

The first section of the questionnaire applied to ownership, seeking to paint a broad picture on the status of ownership concentration and its legal regulation. Then the questionnaire attempted to learn the level of transparency of ownership, i.e. whether the ultimate beneficiaries of a media outlet are known to both the authorities and the public. In order for the public to have such information, it should be easily accessible, rather than hidden under several layers buried deep in a website, or in paper-based official archives. The questionnaire enquires whether there are formal or informal links between the media owners and influential owners of other economic sectors, as well as between media owners and members of the political power or political parties. In all cases, we received positive responses. Furthermore, the questionnaire revealed information suggesting that in all countries, the owners of other economic sectors are often beneficiaries of public procurement, and these ties are not widely known by the public.

The next group of questions attempted to reveal the level and the system of using public resources for the funding of media. Having a public media fund would be beneficial for the media market, provided that the funds are distributed on an equitable and impartial basis. This is the case in France, for example, but not in the other examined countries. Most countries under scrutiny do not have a public fund to finance the media, but state advertisements are used to finance government-friendly media. In some cases, these have the power to distort the market (Bulgaria, Greece, Hungary and Poland).

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<sup>36</sup> 2016 World Press Freedom Index. <https://rsf.org/en/ranking#> Poland was in the "free" category until 2015. (last retrieved on 15 June 2016)

<sup>37</sup> Hallin, Daniel C and Paolo Mancini. 2008. Médiarendszerek. Budapest: Gondolat Kiadó. at 117.

Maintaining a deep respect for journalistic ethics is key to ensuring the micro layer of media pluralism and diverse media content. According to previous research, the level of pluralism depends more on the independence of newsrooms and editorial rooms, than on diverse ownership of the media outlets.<sup>38</sup>

The second section of the questionnaire attempted to answer the question: Which type of legislative instruments are influential in MSs' legislation and legal implementation? The hypothesis was that only directives and case law have a substantial impact, whereas the effects of recommendations and resolutions are very limited.

A third section asks questions regarding the concentration and regulation of online service providers and online content providers. The online media's democratic role in exercising freedom of expression and the right to access to information is growing continuously. The freedom and credibility of the online environment are of key importance for the future of media freedom and pluralism. On the internet, the gatekeepers' position has been under discussion in recent years: the rights and obligations of internet access providers, as well as the roles of those internet content providers that convey third-party content, are undergoing extensive transformation.<sup>39</sup>

The fourth section of the questionnaire related to public-service television. In the examined countries, the financing of public-service television companies is not sufficiently transparent, and their financial management is not supervised by an external body, which is contrary to the Commission's Communication on State Aid to Public Service Broadcasting.<sup>40</sup> This topic relates to the issue of state intervention, providing public funds but without the guarantee of transparency or even political impartiality in some cases.

A further aspect that was indirectly examined in the questionnaire was the respondents' attitude towards new technologies: cable and internet penetration versus land-based broadcast, and the importance of access to online information in the formation of opinions among citizens in a democracy.

The results of our survey support the research hypothesis with some interesting deviations (see more in Chapter 5).

## 2.4. Policy recommendations

The objective of the study was to break down the issue of freedom and pluralism in the media into smaller units. The reason for this was to make very **carefully tailored policy recommendations**, the achievement of which would be realistic, and to avoid overregulation.

Since media pluralism is a complex social, economic, demographic and political issue, the policy mechanisms to tackle its problems are also diverse; accordingly, we chose between:

- hard laws
- soft laws
- information tools

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<sup>38</sup> See for example: Dobek-Ostrowska, Bogusława. 'Italianization of the Polish Media System?' in: Hallin, Daniel C and Paolo Mancini. (eds) 2012. *Comparing Media Systems Beyond the Western World* Cambridge University Press. 26–50. at 37.

<sup>39</sup> See for example: Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union and *Delfi v. Estonia*, Application no. 64569/09, 16 June 2015.

<sup>40</sup> Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance) OJ C 257, 27.10.2009

- monitoring
- cooperative projects and
- educational projects

We found in our research that **soft laws** – despite the abundance of such type of instruments in this area – do not make much impact beyond stimulating discussion among liberal intellectuals. Therefore, we dismissed them at one point as an ineffective instrument, and opted instead to recommend using **hard laws** for policy purposes, but using them sparingly and designing them as narrowly tailored to their purpose as possible.

Whenever it was possible, we recommended the amendment of existing hard laws, for example the **AVMSD**, the **E-commerce Directive** and the **transparency Directive**. We also recommended the **drafting of a new directive** on state aid in the media sector.

We found that the **information tool** enhances transparency and the rights of access to public information, and at the same time, is not intrusive to MSs' sovereignty. We recognised that the proposed AVMSD also targets the same tool (of a transparency database), but our proposal is more detailed. We also recommend **completion of the AVMSD proposal**.

**Monitoring** of compliance with the requirement to ensure media freedom and pluralism is a core element of our recommendations. The results of the monitoring will entail legal consequences if they are found to be unsatisfactory.

Because of the social nature of the issue, **projects** were also recommended. These are regarded as necessary because legal rules are not always appropriate to change the ingrained habits of individuals, whether they are regulators, political decision-makers, journalists or members of the listening/viewing audience. We recommended one cooperative project in which a committee, appointed by the European Commission, would collaborate with the MS's designated decision-makers or regulators, with the aim of improving the situation of media freedom and pluralism in a country during a five-year period.

The other project is a **complex educational project** targeted at all ages of society, and partly at journalists or media professionals.

The selection of the policy instruments was greatly influenced by the **availability of European competences**: the EU has negative and positive competences in this field. Under negative competences the EU does not have the powers to legislate, but can attach consequences in the event a country is found to disrespect EU values. The positive competences that are applicable here are those relating to fundamental rights, Article 6 TEU, Article 3 TFEU, Article 60 TFEU, Articles 101–118 TFEU, Article 167(4) TFEU, Article 352 TFEU and the Charter of Fundamental Rights (see also Chapter 4).

## 3. STATE OF THE ART

### KEY FINDINGS

- The EU has made repeated efforts to regulate media pluralism, but with no success until the present time.
- The process of research, monitoring and policy drafts, however, has achieved a certain critical mass. The importance of media freedom and pluralism is accepted by civil society (evidenced by European Citizens' Initiatives or ECIs) and by MSs (evidenced EP resolution 2014/C 32/04).
- The events in Hungary and in Poland signal a frightening tendency, which calls for urgent action.
- Media pluralism is a multidimensional, multi-stakeholder issue, which affects the – often conflicting – interests of all social actors.
- The threat of democracy endangers the EU's stability by destabilising common values; the lack of media freedom and pluralism clearly and further destructs competitiveness of the EU economy.
- EU and other international norms and enforcement mechanisms shall serve as the last resort of militant democracy when the rule of law has been deconstructed in the national setting.

### 3.1. The EU's previous policy actions regarding media pluralism

Media pluralism has been a recurrent concern within the European Union. The European Parliament raised the issue of pluralism several times in the past decades.<sup>41</sup> Reacting to these initiatives, the Commission examined as early as 1992 the possibility of issuing a directive in the field of pluralism and media concentration, but itself appeared very sceptical of the issue. The Green Paper from 1992 was hesitant with regard to a Community action, stating inter alia the following: "Transparency as such is not at present seen as a need which would justify specific action on the part of the Community, as long as there are no obstacles to exchanges of information between national authorities."<sup>42</sup> This 24-year old document – which was produced by a typewriter – held that the growing international dimension in the media market would add to the existing factors, which "sometimes" raise the need for more transparency. Since 1992, huge changes have occurred both in the field of media and information technology and in the political and economic realities of the European Union.<sup>43</sup>

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<sup>41</sup> See for example: European Parliament resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU. (2011/2246(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0117&language=EN#title1>. (last retrieved on 15 June 2016).

<sup>42</sup> Commission of the European Communities. 1992. Pluralism and Media Concentration in the Internal Market. [http://aei.pitt.edu/1156/1/pluralism\\_gp\\_COM\\_92\\_480.pdf](http://aei.pitt.edu/1156/1/pluralism_gp_COM_92_480.pdf) at 81. (last retrieved on 15 June 2016).

<sup>43</sup> Karol Jakubowicz held that the 1992 Green Paper "was clearly guided by liberal pluralism with entrepreneurial freedom seen as paramount, and everything else, including democratic public policy goals, almost a distraction". p. 25.

Concerns over media pluralism originally have focused primarily on the concentration of private media ownership.<sup>44</sup> In 2007, the Commission engaged in a three-step approach to deal with the issue of pluralism, with a new, broader approach. The three steps included another Commission Staff Working Paper; the launching of an independent study on media pluralism to systematically **identify objective indicators and measure media pluralism in the MSs**; and a Commission Communication on the indicators for media pluralism in the EU MSs with a public consultation.

The first two steps were completed: the Working Paper<sup>45</sup> represents a constructive approach towards tackling media pluralism, and a **Media Pluralism Monitoring** tool was designed and its application is in progress.<sup>46</sup> **The third step, however, has not been realised to date.**

One year after the three-step approach was launched, in 2008, the economic crisis hit the world, causing deep restructuring in the media market: thousands of journalists lost their jobs, advertising revenues declined and mergers followed.

Hardly did the economic crisis appear to ease, when another striking event hit media freedom in the EU: in 2010, a significant political, and consequently, a legal and constitutional shift occurred in Hungary. Viktor Orbán, Prime Minister of Hungary used his supermajority in Parliament to launch a new model of illiberal democracy.<sup>47</sup> The Parliament issued without consultation an unprecedentedly restrictive media law, created a powerful, but governmentally dominated media regulatory authority, and subsumed all public-service broadcasting and the national news agency under this regulatory authority.<sup>48</sup> In the following years, the system of checks and balances and the rule of law in Hungary were systematically demolished. State power was centralised and formerly independent institutions' top positions were filled with party-loyal allies.

Orbán also pursued a new media policy, which systematically transformed the weak, but diverse media landscape into one in which most media owners and other economic actors were linked to political power. The EU institutions reacted to this tsunami of events hesitantly and even timidly.<sup>49</sup> The Hungarian case seems to be long overdue for an Article 7 TEU procedure. However, due to political considerations and the practical difficulties of launching a high-threshold Article 7 procedure, no steps in this regard have been taken so far vis-à-vis

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<sup>44</sup> Although the German Constitutional Courts decisions dealt with political pluralism "Vielfältigkeit", when dealing with the issue of external and internal pluralism. BVerfGE 12, 205 (1961); BVerfGE 57, 295 (1981); BVerfGE 73, 118 (1986).

<sup>45</sup> Commission Staff Working Document. Media pluralism in the Member States of the European Union. {SEC(2007) 32}. 16 January 2007. [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/media\\_pluralism\\_swp\\_en.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf) (last retrieved on 15 June 2016).

<sup>46</sup> 'Media Pluralism Monitor' <http://monitor.cmpf.eu.eu/> (last retrieved on 15 June 2016).

<sup>47</sup> Uitz, Renata. 2015. 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary'. *International Journal of Constitutional Law*. Vol. 13. No. 1. 279–300; Vörös, Imre. 2015. 'Hungary's Constitutional Evolution During the Last 25 Years'. *Südosteuropa*. Vol. 63. No. 2. 173–200; Vörös, Imre. 2014. 'The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law' *Acta Juridica Hungarica*. Vol. 55. No. 1. at 1–20; Bárd, Petra. 2013. 'The Hungarian Fundamental law and related constitutional changes 2010–2013'. *Revue des Affaires Européennes: Law and European Affairs*. Vol. 20. No. 3. at 457–472; Tóth, Gábor Attila. (ed) 2012. *Constitution for a disunited nation*. Budapest: CEU Press.

<sup>48</sup> 'Viktor Orbán and the State of Hungarian Democracy' April 10., 2014. <https://freedomhouse.org/blog/viktor-orban-and-state-hungarian-democracy> (last retrieved on 15 June 2016).

<sup>49</sup> European Parliament 2013, Resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI)) 'the Tavares Report' of 3 July 2013; European Parliament 2015, Resolution on the situation of fundamental rights in the European Union (2013–2014), (2014/2254(INI)); 8 September 2015; European Parliament 2015, Plenary debate on the 'Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015', 2 December.

Hungary.

Thereafter, the Commission approached media pluralism with an even more cautious approach, which nevertheless embraced the complexity of the situation. In 2011, a High-Level Group on Media Freedom and Pluralism was asked to prepare a complex report with recommendations for the respect, protection, support and promotion of pluralism and freedom of the media in Europe. The High-Level Group Report recommended an active approach, stating that **the European Union must intervene when there is a restriction of fundamental rights or media pluralism** by one (or more) of the MSs. It acknowledged that harmonisation of the market rules would be “of benefit” to the EU; however, it pointed out that guaranteeing the rights granted by the Treaties justifies the competence of the EU. It emphasised that the justification to enact European legislation for the protection of the right to free movement, and to representative democracy is stronger than for the protection of those that are based on the Charter (only).<sup>50</sup>

Civil society also advocated European common legislation in the field of media pluralism. The **European Citizens Initiative (ECI)** is based on Regulation 211/2011<sup>51</sup> entering into force on 1 April 2012. The signature of 1 million citizens from at least one-quarter of the EU MSs is needed to invite the European Commission to bring forward proposals on a given topic. The organisational team of a citizens’ initiative has to be composed of at least seven EU citizens, who are resident in at least seven different MSs. They have one year in which to collect the necessary statements of support. Support is to be certified by the competent authorities in the MSs. The Commission will then have three months in which to examine the initiative and decide how to act on it. One of the first such initiatives calls for regulating and protecting media pluralism at the EU level, thereby guaranteeing the independence of the media from political and economic pressures in an increasingly hostile climate, especially in the UK, Hungary and Italy. The European Media Initiative demanded effective legislation to prevent ownership concentration, to control advertising, to guarantee independence of regulatory authorities from political power, to prevent media moguls occupying high political office; a clear European monitoring system to regularly check the independence of media systems in the Member States; and new models to support journalists and enhance professional quality. The initiative called for new legislation or amending the Audiovisual Media Services Directive (AVMSD).<sup>52</sup> The ECI collected only 200,000 signatures within the required one-year time limit and therefore failed.<sup>53</sup>

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<sup>50</sup> Vīķe-Freiberga, Vaira, Herta Däubler-Gmelin, Ben Hammersley, Luís Miguel Pórigues Pessoa Maduro. 2013. A free and pluralistic media to sustain European democracy. The Report of the High Level Group on Media Freedom and Pluralism. at 3. [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/hlg/hlg\\_final\\_report.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf) (last retrieved on 15 June 2016).

<sup>51</sup> Regulation (EU) No 211/2011 of 16 February 2011 on the citizens’ initiative.

<sup>52</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

<sup>53</sup> ‘Media Initiative ECI closes with 200,000 signatures’<https://mediainitiative.eu/200-000-times-thank-you-for-your-support/>(last retrieved on 15 June 2016).

Political forces, alliances and scholars propagated the use of Article 7 TEU, and a Citizens' Initiative to launch procedures against Hungary for alleged violations of the EU's fundamental values was also started.<sup>54</sup> The initiative was successfully registered by the Commission.<sup>55</sup>

In 2013, the European Parliament issued a Resolution in which it called upon MSs and the Commission to take appropriate measures **to ensure better monitoring and enforcement of media freedom and pluralism across the EU**, arguing that this right has become legally binding with the enactment of the Charter of Fundamental Rights guaranteeing media freedom and pluralism (Article 11 (2)).<sup>56</sup> It also asked for a review of the AVMSD to establish minimum standards for protecting the fundamental right to freedom of expression and information, media freedom and pluralism, **and to include rules on the transparency of media ownership, media concentration and conflicts of interest**. The Resolution also called for ensuring journalists' independence, protecting them from pressure, intimidation and harassment.

In 2014, the MSs within **the Council managed to agree on some basic tenets regarding media freedom and pluralism in the digital environment**.<sup>57</sup> Although this was a very small step, its meaning should not be under-estimated. The MSs agreed that a high level of media independence and pluralism is essential not only to democracy, but it also contributes to the strengthening of economic growth and its sustainability. They agreed on the importance of transparency of media ownership (including those who benefit from the ownership) and of media literacy. Transparency should mean that the information is easily accessible to citizens (in which aspect there is ample scope for improvement). They further agreed that cooperation of audiovisual regulatory authorities strengthens the single market – which brings this issue closer to the European Union competence. But they were careful to refer to the role of the Council of Europe, and to point out that cooperation among MSs' audiovisual regulatory authorities should be strengthened even without legislative actions. Finally, the Council defined 4-4 actions addressed to the MSs and to the Commission, respectively. It called upon MSs to ensure the independence of their audiovisual regulatory authorities, to achieve genuine transparency of media ownership, to ensure protection of journalistic sources and to protect journalists from undue influence and to take appropriate measures to prevent possible negative effects of excessive concentration of media ownership.<sup>58</sup> The proposals addressed to the Commission are more formal: continue to support projects in this field; to continue to support the independent monitoring tool for assessing risks to media pluralism in the EU (Media Pluralism Monitor) and encourage its further use by MSs and all relevant stakeholders; to strengthen, through non-legislative actions, cooperation between MSs' audiovisual regulatory authorities and promote best practice as regards the transparency of media ownership; and finally, and perhaps most importantly: **to assess the effectiveness of these measures in order to consider any further steps**.

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<sup>54</sup> European Humanist Federation. <http://humanistfederation.eu/our-work.php?page=wake-up-europe-act-4-democracy>, <http://act4democracy.eu/index.html> (last retrieved on 15 June 2016)

<sup>55</sup> 'European Commission Press release, Commission registers European Citizens' Initiative on EU fundamental values in Hungary'. Brussels, 30 November 2015. [http://europa.eu/rapid/press-release\\_IP-15-6189\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6189_en.htm) (last retrieved on 15 June 2016).

<sup>56</sup> EP Resolution on the EU Charter: standard settings for media freedom across the EU (2011/2246(INI))

<sup>57</sup> Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment. 2014/C 32/04.

<sup>58</sup> Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment. 2014/C 32/04. [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014XG0204\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014XG0204(02)) 18–21. (last retrieved on 15 June 2016).

While this memorandum shows the limits of a consensus-based legal harmonisation, it also points out that through small steps, it could be possible to gradually develop common policies and perhaps, legal instruments.

The Media Pluralism Monitoring project was thus given a new impetus, and after simplification of the overwhelmingly rich collection of indicators, a successful pilot test was carried out in 2014, followed by further monitoring projects in 2015 and 2016.<sup>59</sup> In 2014, the Commission set up the European Regulators Group for Audiovisual Media Services (**ERGA**), with the primary task to advise the Commission to ensure a consistent implementation in all MSs, but also with the view to allow exchanges of best practices, and provide opportunity to the less independent national regulatory authorities (NRAs) to further distance themselves from political influences and facilitate their own independence.<sup>60</sup> On 11 January 2016, ERGA **issued a statement on the necessity of independent media, motivated by the events in Poland.**<sup>61</sup>

In June 2015, the Commission subsidised the launch of a new European NGO, a so-called non-profit European Cooperative Society, the **European Centre for Press and Media Freedom (ECPMF)** in Leipzig, which aims to stop the negative trend in press freedom.<sup>62</sup> It has a potential to grow into a vivid place for journalism and media freedom, with a variety of activities and sources.

Most recently, the Polish Law on Radio and Television Broadcasting was amended. The amendment was enacted by the Polish Parliament in December 2015,<sup>63</sup> and the Polish President signed the amendment on 7 January 2016.<sup>64</sup> The amendment entered into force immediately upon its publication.<sup>65</sup> The new law terminated the tenure of management and supervisory board members of the national television broadcasting company, Telewizja Polska S.A. (TVP)<sup>66</sup> and the national radio broadcasting company, Polskie Radio S.A. (PR),<sup>67</sup> with immediate effect. These individuals were assumed to hold their positions until new board members are appointed, but their powers in the transition period were severely restricted (e.g. any action outside the scope of normal management was dependent on ministerial

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<sup>59</sup> The original Media Pluralism Monitoring Tool identified six main risk domains (basic domain, cultural pluralism, political pluralism, geographical pluralism, pluralism of ownership and control, diversity of media types and genres) and three kinds of indicators: legal, economic and socio-political-demographic. Monitoring Media Pluralism in Europe – Testing and Implementation of the Media Pluralism Monitor 2014.

<sup>60</sup> Llorens, Carles and Andreea Madelina. 2014. 'Costache: European Union Media Policy and Independent Regulatory Authorities: A New Tool to Protect European Media Pluralism?' *Journal of Information Policy*. Penn State University Press, Vol. 4.396–420. at 415. <http://www.jstor.org/stable/10.5325/jinfopoli.4.2014.0396> (last retrieved on 15 June 2016).

<sup>61</sup> 'Statement of the European Regulators Group for Audiovisual Media Services (ERGA) on the necessity of independent media'. 11. January 2016. <https://ec.europa.eu/digital-single-market/en/news/statement-european-regulators-group-audiovisual-media-services-erga-necessity-independent-media> (last retrieved on 15 June 2016).

<sup>62</sup> European Centre for Press and Media Freedom founded in Leipzig – #ECPMF, 24 June 2015

<https://ec.europa.eu/digital-single-market/en/news/european-centre-press-and-media-freedom-founded-leipzig-ecpmf> (last retrieved on 15 June 2016).

<sup>63</sup> 'Text of the Act sent to the Senate in accordance with Article 52 of the Sejm Rules of Procedure'. 30. December 2015. [http://www.krrit.gov.pl/Data/Files/public/Portals/0/angielska/Documents/tekst-ze-strony\\_ustawa\\_en.pdf](http://www.krrit.gov.pl/Data/Files/public/Portals/0/angielska/Documents/tekst-ze-strony_ustawa_en.pdf). (last retrieved on 15 June 2016).

<sup>64</sup> 'Polish media laws: Government takes control of state media'. 7. January, 2016. <http://www.bbc.com/news/world-europe-35257105> (last retrieved on 15 June 2016).

<sup>65</sup> Dziennik Ustaw. 2016. 'Ustawa z dnia 30 grudnia 2015 r. o zmianie ustawy o radiofonii i telewizji'. 07. January 2016, <http://dziennikustaw.gov.pl/du/2016/25/1> (last retrieved on 15 June 2016).

<sup>66</sup> TVP. [www.tvp.pl](http://www.tvp.pl). (last retrieved on 15 June 2016).

<sup>67</sup> Polskie Radio. [www.polskieradio.pl](http://www.polskieradio.pl). (last retrieved on 15 June 2016).

consent). According to the new draft law, appointment and dismissal of the board members will be the sole discretionary competence of the Minister of State Treasury. Before the amendment of the law managements and supervisory board members, an (at least formally) independent National Broadcasting Council, established by the Polish Constitution, was elected by KRRiT,<sup>68</sup> on the basis of a competitive consultation process.<sup>69</sup>

According to another bill submitted to the Sejm on 21 April 2016,<sup>70</sup> all public media (operating now as companies of private law) will be transformed into new types of legal entities (so-called "national media institutions"). The act creates two bodies: the National Media Fund and the National Media Board. The first will be responsible for providing financial support for national media institutions – a function similar to the Hungarian Media Support and Property Management Fund.<sup>71</sup> Its activities will be financed from a new tax. The second will supervise the activities of public media. It will also be responsible for the appointment of directors of all public media outlets. The Board will be composed of five persons, two of them nominated by the Sejm, the President and one by the Senat. The draft law envisages automatic termination of all employment contracts for all employees in a management capacity (at various ranks).

The European Commission,<sup>72,73,74</sup> the Council of Europe,<sup>75,76</sup> the European Regulators Group for Audiovisual Media Services (ERGA),<sup>77</sup> the Organization for Security and Co-operation in

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<sup>68</sup> Karajova Rada Radiofonii i Telewizji. <http://www.krrit.gov.pl/en/homepage>. (last retrieved on 15 June 2016).

<sup>69</sup> Karajova Rada Radiofonii i Telewizji. 'KRRiT's statement on the bill amending the Broadcasting Act'. 30 December 2015, <http://www.krrit.gov.pl/en/for-journalists/press-releases/news,2192,krrits-statement-on-the-bill-amending-the-broadcasting-act.html> (last retrieved on 15 June 2016); Statement of the European Regulators Group for Audiovisual Media Services (ERGA) on the necessity of independent media, 11 January 2016, [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=12958](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=12958), (last retrieved on 15 June 2016) <https://ec.europa.eu/digital-single-market/en/news/statement-european-regulators-group-audiovisual-media-services-erga-necessity-independent-media> (last retrieved on 15 June 2016).

<sup>70</sup> 'Text of the draft law is available in Polish'. [https://d-pt.ppstatic.pl/k/r/1/4a/74/5718a13510fde\\_z.pdf?1461231925](https://d-pt.ppstatic.pl/k/r/1/4a/74/5718a13510fde_z.pdf?1461231925) (last retrieved on 15 June 2016).

<sup>71</sup> <http://mtva.hu/en/> (last retrieved on 15 June 2016).

<sup>72</sup> College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers'. 13. January 2016. [http://europa.eu/rapid/press-release MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm) (last retrieved on 15 June 2016).

<sup>73</sup> 'Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016' [http://europa.eu/rapid/press-release SPEECH-16-71\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-16-71_en.htm) (last retrieved on 15 June 2016).

<sup>74</sup> 'Statement by First Vice-President Frans Timmermans and Commissioner Günther Oettinger – EP Plenary Session – Situation in Poland'. [http://europa.eu/rapid/press-release SPEECH-16-114\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-16-114_en.htm) (last retrieved on 15 June 2016).

<sup>75</sup> 'Council of Europe invites Poland to consult its experts on the new media law'. <http://www.coe.int/en/web/media-freedom/-/council-of-europe-invites-poland-to-consult-its-experts-on-the-new-media-law?redirect=http://www.coe.int/en/web/media-freedom/home> (last retrieved on 15 June 2016)

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049a74c> (last retrieved on 15 June 2016).

<sup>76</sup> 'Call on Polish President not to sign new Media Law'. [http://www.coe.int/en/web/commissioner/-/call-on-polish-president-not-to-sign-new-media-law?redirect=http://www.coe.int/en/web/commissioner/home?p\\_p\\_id=101\\_INSTANCE\\_iFWYWFoeghvO&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=4](http://www.coe.int/en/web/commissioner/-/call-on-polish-president-not-to-sign-new-media-law?redirect=http://www.coe.int/en/web/commissioner/home?p_p_id=101_INSTANCE_iFWYWFoeghvO&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=4) (last retrieved on 15 June 2016).

<sup>77</sup> 'Statement of the European Regulators Group for Audiovisual Media Services (ERGA) on the necessity of independent media'. [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=12958](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=12958) (last retrieved on 15 June 2016).

Europe (OSCE),<sup>78</sup> the Polish national broadcasting council (KRRiT)<sup>79</sup> and professional organisations such as the Association of European Journalists (AJE),<sup>80</sup> the European Broadcasting Union (EBU),<sup>81</sup> the European Association of Regional Television (CIRCOM),<sup>82</sup> the European Federation of Journalists (EFJ) and the Committee to Protect Journalists (CPJ)<sup>83</sup> **opposed the planned amendment or criticised it after its enactment.**

### 3.2. The reasons behind the lack of a coordinated EU policy action

Despite repeated efforts at the European level, the idea of a common regulation in media pluralism has not made much progress. Below we attempt to summarise the circumstances that have delayed this process again and again.

#### 3.2.1. Conflicting interests

Any regulatory change in the media market will obviously disadvantage media incumbents and their political allies. Media ownership regulation is highly political, and even scholarship is often highly politicised. A change depends largely on political interests, independently of all rational arguments.<sup>84</sup>

However, defining the interests of the stakeholders is not a straightforward exercise: the **political, economic and public interests** in the field of media freedom and pluralism make a **complicated mix within the EU.**

**A fragile balance** must be found between the interests of **citizens, companies and the states.** MS's populations, market sizes, GDPs and cultural traditions are very divergent, and they have different policies, both in terms of the tolerated levels of concentration and the technical details and thresholds of regulation. At the present time, they are deeply divided over whether they should use the audience share model, the market share model, the licence holder share model, the capital share model or the revenue share model and how they should define the scope of anti-concentration measures, the criteria used to define the thresholds and the enforcement procedures and mechanisms (limiting the number of licences or imposing a ceiling on the total amount of shares that can be controlled by a single person or

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<sup>78</sup> 'OSCE media freedom representative urges Poland's government to withdraw proposed changes to the selection of management in public service broadcasters'. <http://fcold.wafr./www.osce.org/fom/213391> (last retrieved on 15 June 2016).

<sup>79</sup> 'Karajova Rada Radiofonii i Telewizji. KRRiT's statement on the bill amending the Broadcasting Act'. <http://www.krrit.gov.pl/en/for-journalists/press-releases/news,2192,krrits-statement-on-the-bill-amending-the-broadcasting-act.html> (last retrieved on 15 June 2016).

<sup>80</sup> 'Open letter from the Association of European Journalists to Mr. Piotr Gliński, Deputy Premier, Minister of Culture and National Heritage and Mr. Krzysztof Czabański, Deputy Minister of Culture and National Heritage'. [http://www.aej.org/page.asp?p\\_id=517](http://www.aej.org/page.asp?p_id=517) (last retrieved on 15 June 2016).

<sup>81</sup> 'Governance of public service media in Poland'. <http://www.ebu.ch/files/live/sites/ebu/files/News/2015/12/EBU%20Letter%20to%20Polish%20Parliament.pdf> (last retrieved on 15 June 2016).

<sup>82</sup> 'CIRCOM Regional's statement about the current TVP situation in Poland'. <http://www.circom-regional.eu/news1-2/891-circom-regional-s-statement-about-the-current-tvp-situation-in-poland> (last retrieved on 15 June 2016)

<sup>83</sup> 'Press Freedom and Media Organisations issue statement opposing abolition of essential safeguards for public service media pluralism and independence in Poland'. <http://www3.ebu.ch/news/2015/12/press-freedom-and-media-organiza> (last retrieved on 15 June 2016).

<sup>84</sup> Collins, Richard and Martin Cave. 2013. 'Media pluralism and the overlapping instruments needed to achieve it'. *Telecommunications Policy*. Vol. 37. No. 4. 311–320, at 312.

company – or limiting the market share, etc.).<sup>85</sup> They are also divided over the issue of restricting media ownership by political parties and organisations.<sup>86</sup>

A balance is hard to achieve even in one MS and appears to be **overwhelmingly complicated in 27 MSs**. A common regulation should be **more than just the harmonisation** of regulation of the individual MSs. The EU as a whole is another media system and media market – especially as the media is becoming more and more international. The **EU market as a whole** should **remain globally competitive, while satisfying the diverse needs of its audience, in a manner that governments also approve**. The stronger the companies are, the weaker the government influence can be. This creates a highly complicated network of conflicting interests, with **often contradicting expectations**.

### 3.2.2. Divergent Scholarly Opinions

**Basic questions are disputed** not only at the political level, but also **in the scholarship**, as introduced in the previous sections.

Media pluralism lies at the **intersection of economy, law and social science**. In the regulation field, it touches upon competition law, state aid and market regulation (the four freedoms of EU), but also on cultural policy, and last but not least **fundamental rights and democracy**.

The level of concentration can be measured and regulated in several ways. Vertical and horizontal concentration, diagonal or cross-media concentration, and cross-sector ownership – **no generally valid benchmark** for the method and the threshold of ownership ratios is known. The size of the market, the level of GDP and the cultural traditions of the audience all influence the desired level of ownership diversity.

### 3.2.3. A moving target

Economic conditions and social circumstances also change, but it is **digital transformation that constantly changes the market conditions** more than anything else, first of all the **financing and revenue systems** and **audience** interests. The definition of the relevant market gets complicated, given the convergence of media platforms, the interrelations of international markets and the hardship in defining substitutable products.

To make things worse, **geopolitical processes also change** the whole picture every year. Shortly after the Commission took on the threat to media pluralism once again, the global financial crisis began in 2008. Only two years later did Orbán come into power. While Berlusconi's model of limited pluralism was tolerated, with Orbán and Kaczyński joining in 2010 and in 2016, it was no longer possible to regard political domination of the media system as an isolated exception to the rule. It affects a significant part of the European Union, and what is more, it appears to be going viral.

Considering that regulating media freedom and pluralism is a multidimensional, multidisciplinary and highly political process, the best thing to do is to **start with as small steps as possible, while keeping the ultimate goal in sight**.

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<sup>85</sup> Valcke, Peggy. 2009. 'From ownership regulations to legal indicators of media pluralism: Background, typologies and methods'. *Journal of Media Business Studies*. Vol. 6. No. 3. 19–42. at 23. and Nikoltchev, 2001. 2–3.

<sup>86</sup> Some countries (Austria, Belgium, Bulgaria, Denmark, Germany, Greece, Hungary) exclude political actors from acquiring broadcast licences or impose obligations of political independence on broadcast organizations, while others (Cyprus, Finland, France, Italy or Sweden) do not impose such restrictions at all. In Malta, the three political parties all own their own radio stations and the two largest parties even own their own television station. See Valcke (2009) at 26.

### 3.3. The new quality of the pluralism problem

In the past decades – as earmarked by the Commission Staff Working Document in 2007 – it became clear that the problem with media pluralism is more complex than one simply arising from concentration of ownership. A non-transparent **network of political and economic connections** can be unveiled in many countries. This prevents the media from fulfilling its democratic role of informing citizens about matters of public concern. Furthermore, **it affects the operation of the state in terms of structure and the use of public resources and threatens it with a systemic failure of democracy.** While elections are formally lawful, the lack of media freedom and pluralism is bound to influence election results. But a structure that is **fruitful to politicians and certain oligarchs** may be **copied** by other countries. The followers use their role models as a partner to garner solidarity and support. This creates a threat of **destabilising the EU by destroying common norms** and values and then **creating a coalition to support it.**

The problem affects all segments of the economy and politics, but the media is a key actor and accelerator of the events, by disguising the controversies and defining the political narratives.

The EU's **credibility** and image as a free and democratic formation of similarly free and democratic states will be eroded if illiberal and undemocratic governments are tolerated. States' interference with market processes, including but not limited to investments in the media market, creates an unfavourable economic environment for investment and weakening **the competitiveness of the European economy.** The structural dysfunction, which limits access to social resources to patrons and clients in exchange for deference and various types of support (clientelism), is a **waste of common European public resources.**

The phenomenon is not isolated, it affects more than the examined MSs, but in MSs with longer democratic traditions and a stronger media market, it does not create a qualitative decline in the freedom and pluralism of the media. In a state based on the rule of law, **in-built correction mechanisms compensate for the deficiencies** of a majority government. In this sense international correction mechanisms can be seen as **means of militant democracy**,<sup>87</sup> operating along the paranoid logics of constitutional law inserting precautionary measures into democratic systems to protect them against a future potential government acquiring and retaining powers at all costs, i.e. by superseding constitutional government by emotional government.<sup>88</sup>

Accordingly, we regard **international and EU norms and enforcement mechanisms as external tools of militant democracy**, whereby the unrepresented – whether an unrepresented majority or an oppressed minority – are granted protection against their substandard representatives, when all domestic channels of criticism have been effectively silenced and all domestic safeguards of democracy became non-operational – in short, when the rule of law has been efficiently deconstructed in the national setting.

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<sup>87</sup> For a full description see Loewenstein, Karl. 1937. 'Militant Democracy and Fundamental Rights'. *American Political Science Review*. Vol. 31. Nos. 1–6. at 417–433 and 638–658.

<sup>88</sup> On international mechanisms correcting the failure of domestic law to protect minorities, see, for example, Verdross, Alfred. 1923. *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*. Tübingen: Mohr.

## 4. THE CONCEPT AND KEY ELEMENTS OF MEDIA FREEDOM AND PLURALISM

### KEY FINDINGS

- Media pluralism is part of media freedom, and MSs have an objective obligation to ensure that this right is extended to all citizens – supported by jurisprudence, among others by the ECtHR and the BVerfG.
- Concentration of ownership is further aggravated by cross-sectoral ownership and with the involvement of political elites.
- In several MSs, economic, political and communicative power is aggregated in a few hands. These oligarchs use the media for their communicative power, to support their particular economic, political or social interests.
- A systemic failure of democracy is suspected, as all social subsystems are affected: the use of public resources, economy and state structure.
- Digital technology has transformed the media market, especially in terms of financing, distribution and consumption. The 'attention economy' results in users' actively reducing the diversity of content they consume.
- Journalists and media professionals are partly victims, but also accomplices of the malfunction of the media system.

There is a complex relationship between the citizens, political power, economic power and the media, which should act as a mediator of information and opinions between all of them. When the media behaves as an interested actor in one of these relationships, it is no longer an impartial mediator. A media system can be regarded as plural or diverse if the diffusion of media power is balanced in terms of ownership, economic structure and political influence.<sup>89</sup> If the media stands too close to either the economic or the political power, then its neutral role as observer and distributor of objective information is damaged.

There are several scholarly approaches to and divisions in media pluralism. One example is to view it in three layers: *macro*, *meso* and *micro* layers, where the *macro* layer describes the structure of ownership, services and market conditions.<sup>90</sup> The *meso*, or middle layer, focuses on the institutional level, the media companies and supervisory bodies, distribution and users' access. The *micro* layer refers to the content that materialises the function of media. In this discourse, diversity means that ultimately several different viewpoints are represented by the media, and the macro and meso layers are tools to achieve this end.<sup>91</sup> In contrast to this view, Edwin Baker holds that "source diversity – effectively ownership dispersal – is directly, substantively central". He applies the perspective of the democratic distributive value, according to which diverse ownership is similar to the separation of power branches, stating that communication power should be as diffused as possible. Even if there is no evidence that the output of content is always more divergent than without a diversity

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<sup>89</sup> Karppinen, Kari. 2007. 'Making a difference to media pluralism: a critique of the pluralistic consensus in European media policy.' *Reclaiming the media: communication rights and democratic media roles*. 9–30., at 13.

<sup>90</sup> Czepek, Andrea, Melanie Hellwig and Eva Nowak. 2009. *Press freedom and pluralism in Europe: concepts and conditions*. Intellect Books. at 46.

<sup>91</sup> Van Cuilenburg. 'Media Diversity, Competition and Concentration: Concepts and Theories'. in: Bens, Els de. 2000. *Media Between Culture and Commerce*. Intellect Books; McQuail, Denis. 2000. *Mass Communication Theory*. (4th edition). London: SAGE.

of ownership, **having a concentrated media ownership structure is a risk that no democracy should afford.**<sup>92</sup>

The media studies literature also differentiates between *external and internal* media pluralism. External pluralism describes the nature of the whole media system within a certain market (or society). Internal pluralism may refer to the balanced content of a certain medium: namely that it represents a broad variety of viewpoints, is impartial and does not bend to one specific opinion or position.<sup>93</sup> However, in a converging media environment, these distinctions are becoming blurred. The units of examination become unclear, for example, a broadcaster – even public service – may publish several thematic channels.<sup>94</sup>

Jan Van Cuilenburg differentiates between the European and the American model of media system and media pluralism, in which the former is a moral and normative model, also regarded as a “public-service model”, and the latter is based on the concept of a free market.<sup>95</sup>

We designed and applied a further new perspective on pluralism, relying on previous research:<sup>96</sup> **market pluralism, political pluralism and access pluralism.** The first two aspects do not need further explanation, and the third has been used as a work term to describe what others called exposure diversity (see below in 4.4.).<sup>97</sup>

#### **4.1. Freedom of expression and pluralism**

The fight for free expression concentrates on the relationship between the citizens and the political power: so that the media can openly criticise political power and the latter should not interfere. The European Convention on Human Rights lists the fundamental rights that are protected from state interference. States have both subjective and objective obligations in ensuring human rights. Under their subjective obligations, they have to protect individuals, whose rights may be threatened or violated by state interference. Under their **objective obligations**, they are obliged to **protect legal institutions**, such as marriage or **media pluralism, in order to ensure that these rights can be enjoyed by individuals.**<sup>98</sup> States have both negative and positive obligations flowing from freedom of expression and pluralism. On the one hand, the state is required to refrain from interference that would distort the market, and interference in media freedom. On the other hand, the state is required to pass the necessary legislation to ensure that a plurality of opinions are present in the media market.

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<sup>92</sup> ‘Commonly, commentators (wrongly) believe that the ultimate concern must be content and viewpoint diversity – with other differences being merely instrumental to this goal’. Baker, C. Edwin. 2006. *Media concentration and democracy: Why ownership matters.* Cambridge University Press. at 15.

<sup>93</sup> Czepek, Andrea, Melanie Hellwig and Eva Nowak. 2009. *Press freedom and pluralism in Europe: concepts and conditions.* Intellect Books. 2009. at 47.

<sup>94</sup> Jakubowicz, Karol. ‘New Media Ecology: Reconceptualising Media Pluralism’. in: Valcke, Peggy, Sükösd, Miklós and Robert Picard (eds) 2015. *Media pluralism and diversity: concepts, risks and global trends.* Palgrave Macmillan. 23–53. at 43.

<sup>95</sup> Van Cuilenburg, *ibid.*

<sup>96</sup> Helberger, Natali. 2011. ‘Diversity by Design’. *Journal of Information Policy.* Vol. 1. at 441–469; Hitchens, Lesley. 2011. ‘Media Regulatory Frameworks in the Age of Broadband: Securing Diversity’. *Journal of Information Policy.* Vol. 1 at 217–240; Napoli, Philip M. 2011. ‘Exposure Diversity Reconsidered’. *Journal of Information Policy.* Vol. 1. at 246–259; Valcke, Peggy. 2011. ‘Looking for the User in Media Pluralism Regulation: The Potential and Limits of Regulating Exposure diversity’. *Journal of Information Policy.* Vol. 1. at 287–320.

<sup>97</sup> See previous footnote.

<sup>98</sup> Donnelly, Jack. 2013. *Universal human rights in theory and practice.* Cornell University Press. at 8; Halmi Gábor and Tóth Gábor Attila. 2008. *Emberi Jogok.* Budapest: Osiris. at 103.

According to the decision of the German Constitutional Court, fundamental rights represent values that should be enforced **in the entirety of the legal system**. The state should guarantee that human rights can be realised in general, and not only in the specific cases.<sup>99</sup> The European Court of Human Rights (ECtHR) also declared that given the importance of what is at stake under Article 10, the **State is the ultimate guarantor of pluralism**.<sup>100</sup> The ECtHR discussed pluralism as part of freedom of expression on several occasions. Often its judgments about content-based restrictions of freedom of speech regard pluralism as a feature of a democratic society. In the *Lentia* case, the ECtHR found it a violation of Article 10 that the commercial broadcaster *Lentia* was not allowed to enter the Austrian market. The Court declared that the press cannot successfully perform its task to impart information and ideas of general interest unless the principle of pluralism is enforced.<sup>101</sup>

In its decision in the **Centro v. Italy case**, the court expressed several powerful statements regarding the importance of pluralism in ensuring freedom of expression.<sup>102</sup> The state's legislative measures did not satisfy the state's obligation to guarantee effective pluralism; therefore, a violation of Article 10 could be established. It stated that **"there can be no democracy without pluralism"** (para. 129.) The Court observed that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference, the State has a positive obligation to **put in place an appropriate legislative and administrative framework to guarantee effective pluralism** (para. 134). "To ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition [...] to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed" (para. 130).

It can be concluded beyond any doubt that **media pluralism is part of media freedom and that it is the obligation of the states to ensure that this right can be enjoyed by its citizens**. Media pluralism should ensure that the plurality of opinions and content reflects the diversity in society, and that new actors can enter the market. Below we examine the various aspects of pluralism.

## 4.2. Diversity in ownership

Media pluralism is a multidimensional issue and cannot be simplified to plurality of ownership and of content.<sup>103</sup> Traditionally, media pluralism was raised as an issue of ownership concentration. When a media company becomes too dominant in a market, it may distort the public dialogue between society, politics and the media.<sup>104</sup> First, a concentrated economic power will reduce the number of different media actors, and thus the number of different viewpoints will diminish on the market. Fewer actors get a chance to represent public opinion,

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<sup>99</sup> BVerfGE: 6,55, 72(1957)

<sup>100</sup> *Informationsverein Lentia and Others v. Austria, Informationsverein Lentia and Others v. Austria*, Application no. 37093/97, 24 November 1993, 24 November 1993, § 38, *Manole and Others v. Moldova*, no. 13936/02, 17 September 2009, § 99; *Socialist Party and Others v. Turkey*, Application No. 21237/93, 25 May 1998, §§ 41, 45 and 47.

<sup>101</sup> <http://www.ivir.nl/publicaties/download/421> (last retrieved on 15 June 2016)

<sup>102</sup> ECtHR, *Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy*, Application no. 38433/09, 7 June 2012

<sup>103</sup> Czepek, Andrea, Melanie Hellwig and Eva Nowak. 2009. *Press freedom and pluralism in Europe: concepts and conditions*. Intellect Books. at 46.

<sup>104</sup> Baker, C. Edwin. 2006. *Media concentration and democracy: Why ownership matters*. Cambridge University Press; Bagdikian, Ben H. 2014. *The New Media Monopoly*. Boston: Beacon Press; McChesney, Robert W. 2015. *Rich media, poor democracy: Communication politics in dubious times*. The New Press.

which decreases the effectiveness of democratic publicity – however, in the internet age, this argument of scarcity is somewhat less relevant. Concentration becomes especially dangerous when the various media owners are interconnected with other economic actors in society, or even with political actors, which is the case in present-day Europe. **The affected media actor becomes disinterested in shedding light on the controversial events that affect any member of this extended network of politicians and companies**, including public procurement and the muddy transactions within its members, sometimes even amounting to corruption. The media becomes an accomplice in these matters, and in some countries it is consciously used to conceal questionable political and economic processes.<sup>105</sup>

Karppinen argues critically that research on media pluralism has not examined the quality of content and whether it contributes to democratic discourse. (According to Baker, the quality of content is a myth of the consumer society – apparently better graphical appearance does not correlate to the democratic value of the content.) Karppinen also argues that pluralism needs to be viewed in terms of power relations between different social actors and not in terms of diversity or variety.<sup>106</sup>

A plural media shall be **media that is able to represent the different viewpoints and opinions in society, and ensure democratic participation**. While diverse ownership yields theoretically – and statistically – better results, in underfinanced markets, strong media actors sometimes do better to resist state influence. In media systems that suffer under the weight of a network of political and economic power, where media is captured by political interests, ironically, multinational media companies are sometimes better in independent reporting and providing professional quality, because they cannot be dominated by the state. Nevertheless, they are not interested in becoming oppositional to the state; they prefer to remain non-political until it is possible, and then to leave the market. Coincidentally, several international companies left the CEE market during or after the economic crisis, to give room to national oligarchs. Most of these **oligarchs** are rich and influential local business elites, who were **not involved with the media before**, and whose **main sources of profit come from other economic branches** – energy production and distribution, real estate, investments, construction, etc.<sup>107</sup> They have close ties to the governing parties and use their media branches to provide services to their political clients.

This situation will be resolved either from a regulatory perspective, or from a pro-market perspective. **The market and the state shall be regulated at the same time, and this can be done only by a supranational body.**

**The states examined in our research are not in the position to ensure media pluralism and media freedom, because they too, are captured by the network of economic and political actors.**

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<sup>105</sup> The power of the strong media outlets has been a cause for concern since the beginning of the 20th century. It was said to influence political decisions, through influencing public opinion. Contrary to this, in the Middle Ages, books were blamed for influencing public opinion despite the will of the Church, the holder of spiritual power. It might appear that the media has served the people in both times better than today.

<sup>106</sup> Karppinen, Kari. 2013. *Rethinking Media Pluralism*. Fordham University Press. at 59–61.

<sup>107</sup> Balčytienė, Auksė, et al. 2015. 'Oligarchization, de-Westernization and vulnerability: Media between democracy and authoritarianism in Central and Eastern Europe'. *Tidsskrift for Medier, Erkendelse og Formidling* 3.1; Bajomi-Lázár, Péter. 2014. *Party Colonisation of the Media in Central and Eastern Europe*. Central European University Press.

The oligarchs' alliance with the political elite class introduces 1) overwhelming pressure on the media, which is almost impossible to resist;<sup>108</sup> 2) a media incapable of fulfilling its role as a watchdog, or even to be able to deliver news objectively; and 3) an unhealthy accumulation of communicative power. Economic, political and communicative power are in the hands of those persons who own meaningful enterprises in various other sectors, possess or are closely linked to governing political power and own popular media outlets.<sup>109</sup>

**Oligarchs' primary purpose is to possess this communicative power, they operate the media enterprise for their communicative power, and not for the financial gain.**

This is the main difference between the oligarchic and the multinational media owners. **This structural malfunction of power affects not only media freedom but all social subsystems, including political decisions and the operations of the economy.** Consequently, severe deficiencies can be identified in the political and economic system, while the guarantees and healing mechanisms of a democratic political system are eroded.

### 4.3. Funding

European media industry strives hard to compete in the global economic environment, and the European Union should support this struggle with all the means that it has at hand. The **digital convergence and new services have dramatically changed the business models and funding possibilities for media companies.** Traditionally, they could be funded either from subscriptions, from advertisements and in some cases, from state subsidies. Today, the income from advertising has greatly diminished and subscriptions are also on the decline – not only in the printed press, but generally because of the abundance of content. New financing models like crowd-funding, the new subscription in forms of micropayment (paying for one or a few articles), alternative promotion services or revenue-share agreements are just gaining place in the media market. In terms of the media content, it is not necessarily the “best” which survives.

The EU should recognise the importance of smaller, national, independent media outlets, and encourage Member States to allow them to flourish by providing **subsidies**. Media products and services are not only of economic nature, but also fulfil **cultural and democratic needs** in a society. It is therefore reasonable that MSs support some of the media enterprises especially if the market appears too weak to sustain a variety of sources.

The research found that indirect funding is often channelled into media in a non-transparent manner.

State advertising [...] either rewards supportive or non-critical media outlets, or it subsidizes critical yet ailing media companies that the government wants to silence. The impact of state advertising on the editorial line is not always easily detectable, but testimony abounds from journalists at government-funded media about prohibited investigations or attacks on rival politicians. In most Western

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<sup>108</sup> While journalistic ethics help, that is a very soft instrument compared to the existential threats presented by the mentioned political-economic alliance.

<sup>109</sup> In this approach, communicative power can be defined as the capacity of a social actor to mobilize means of communication for the purpose of influencing other social actors. Jakubowicz, Karol. 'New Media Ecology: Reconceptualising Media Pluralism'. in: Valcke, Peggy, Sükösd, Miklós and Robert Picard (eds) 2015. Media pluralism and diversity: concepts, risks and global trends. Palgrave Macmillan. 23–53. at 24.

markets, state advertising is dwarfed by the total private ad spending. However, it may make its real impact at the local level.<sup>110</sup>

Extensive interviews with media experts, editors and journalists in the country reveal that state funding for media is a principal tool of “soft” censorship in Bulgaria.<sup>111</sup>

Public funding received in a public procurement procedure is also often channelled into the media market. Many indirect owners of the media company participate in public procurement and then receive public funds, which are in some cases used to cross-finance the media company, to cover losses of the otherwise not profitable media outlet. This phenomenon occurs in several MSs of the European Union, as shown by our country reports.

This matrix of relationships is unhealthy for several reasons: 1) Public assets are used for other purposes than defined in the procurement – without a transparent procedure. 2) The route of the public resources cannot be tracked by the public or by the authorities. 3) The media company that is cross-financed in this way would not otherwise be profitable on the market. 4) In the rare case when the route of the money is known to government officials who decide about the public procurement, the media outlet receives illegitimate public funding without a transparent procedure, which raises the harsh question of political interference into the freedom of media and pluralism.<sup>112</sup>

Unfortunately, the recent Guidance issued by the Commission on the notion of state aid<sup>113</sup> liberates several forms of public procurement including construction, and also holds a narrow view about what can have an effect on cross-border trade. For example, funding provided to local services that are unlikely to attract customers from other MSs does not fall under EU state aid rules. Public financing of certain cultural activities that are not commercial, but provided for free or against a minimal fee, will not be covered by state aid rules.

Some of the subsidies to media outlets would fall under the “*de minimis* exemption”.<sup>114</sup> A state aid is deemed to be exempt from the notification requirement if it is below €200,000 to a single undertaking per MS over any period of three years, with the reason that such a small aid would not distort or threaten to distort competition. There are no comparative statistics as to the amount of state subsidies granted to individual media enterprises. State advertising is certainly above this level, and it should also be considered as indirect state aid. The EU puts great emphasis on **fair competition** and allows the use of **state aid** only in well-defined cases. State aid distorts the market by definition: and in this case, it is not only the economic market and competition, but also **the marketplace of ideas** that is **distorted**. By subsidising various media outlets, various viewpoints are supported by the state, which is an **interference in the freedom and pluralism** of the media. Therefore, while subsidies should be allowed, they should respect specific rules to maintain fair competition in both the economic and the idea-marketplace – rules that are monitored and **enforced** by the EU.

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<sup>110</sup> Open Society Foundations. 2014. ‘Lapdogs vs. Watchdogs: State Advertising and Media’. 18 November 2014. <https://www.opensocietyfoundations.org/voices/lapdogs-vs-watchdogs-state-advertising-and-media> (last retrieved on 15 June 2016)

<sup>111</sup> Heslop, Andrew. 2016. ‘Bulgaria: More Transparency Required to Combat ‘Soft’ Censorship. WAN-IFRA – World Association of Newspapers and News Publishers’. <http://www.wan-ifra.org/articles/2016/03/31/bulgaria-more-transparency-required-to-combat-soft-censorship> (last retrieved on 15 June 2016)

<sup>112</sup> ‘Capturing Them softly: Soft Censorship and State Capture in Hungarian Media’. [http://mertek.eu/sites/default/files/reports/soft\\_censorship\\_angol.pdf](http://mertek.eu/sites/default/files/reports/soft_censorship_angol.pdf) (last retrieved on 15 June 2016)

<sup>113</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (2016), published on 19 May 2016

<sup>114</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

#### 4.4. Online pluralism: Content offered vs. content accessed

Digital technology **is transforming the media** in a process that is still ongoing and even accelerating. This transformation affects the whole media market and regulating a transforming market is rather difficult and also risky.

Our digital world is sometimes characterised as the age of “**attention economy**”. This refers to the fact that the most precious scarce resource is no longer information but rather **human attention**. While an abundance of media content is available in most developed countries, the members of the audience are not capable of consuming it all: they have to make choices, and these choices are far from being rational. Audience members tend to favour 1) what they already know, 2) what confirms their prior beliefs and 3) what their friends recommend. The first aspect signals the importance of brands and the network effect: trusted content attracts more attention, and **entering the “attention” market becomes difficult despite the low costs of publishing**.<sup>115</sup> The second signals the tendency towards polarisation, or “cyberbalkanisation”<sup>116</sup> and the fact that **users effectively isolate themselves from listening to the “other party”**. The constant reinforcing of their opinions among their “comrades” might help develop extremism, although research results are controversial.<sup>117</sup> The third element shows the **importance of user-generated content** (UGC) and the changing marketing models. This has a huge transformative effect on media financing on the one hand, and significant effect on the distribution of media products, on the other. Media consumers choose what their friends “recommend” and also algorithm software programmes reinforce these tendencies by recommending further links to the user with similar content.

The precise selection of content to their own taste **drastically limits people’s exposure to pluralism**. The three levels of pluralism in media theory are reworked: pluralism of sources, of content and of exposure,<sup>118</sup> or pluralism of supply, distribution and use.<sup>119</sup> Jakubowicz also noted “a major pluralism concern: not in the sense of ensuring the availability of pluralistic content, but of the ability easily to avoid it”.<sup>120</sup>

It is not the internet that limits pluralism: this **technology is flexible beyond our imagination**, and it allows us to do whatever developers programme in it. It would be, for example, easier to achieve **internal pluralism** than ever before, because **diverse pieces of content could be hyperlinked to each other**. How a content package is picked depends on the decision of the editor and the programmer of the **algorithm**. If all decision is left to

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<sup>115</sup> Barabási, Albert-László. 2002. *Linked: the new science of networks*. Perseus; Jakubowicz, Karol. ‘New Media Ecology: Reconceptualising Media Pluralism’. in: Valcke, Peggy, Sükösd, Miklós and Robert Picard (eds) 2015. *Media pluralism and diversity: concepts, risks and global trends*. Palgrave Macmillan. at 23–53.

<sup>116</sup> Sunstein, Cass R. 2009. *Republic. com 2.0*. Princeton University Press.

<sup>117</sup> Barberá, Pablo, et al. 2015. ‘Tweeting From Left to Right Is Online Political Communication More Than an Echo Chamber?’ *Psychological science*; O’Hara, Kieron, and David Stevens. 2015. ‘Echo chambers and online radicalism: Assessing the Internet’s complicity in violent extremism’. *Policy & Internet* Vol. 7. No. 4 at 401–422; Iványi, Márton. 2014. ‘Közösségi média: a nyilvánosság elektronikus agorája vagy posztmodern panoptikum? *Médiakutató*. 2. sz. [http://www.mediakutato.hu/cikk/2014\\_02\\_nyar/10\\_kozossegi\\_media\\_hatalom.pdf](http://www.mediakutato.hu/cikk/2014_02_nyar/10_kozossegi_media_hatalom.pdf) (last retrieved on 15 June 2016)

<sup>118</sup> Karppinen cites Napoli in ‘Rethinking media pluralism: A critique of theories and policy discourses’. Publications of the Department of Social Research (2010).

<sup>119</sup> Valcke, Peggy. 2009. ‘From ownership regulations to legal indicators of media pluralism: Background, typologies and methods’. *Journal of Media Business Studies*. Vol. 6. No.3. at 19–42.

<sup>120</sup> Jakubowicz, Karol. ‘New Media Ecology: Reconceptualising Media Pluralism’. in: Valcke, Peggy, Sükösd, Miklós and Robert Picard (eds) 2015. *Media pluralism and diversity: concepts, risks and global trends*. Palgrave Macmillan. 23–53 at 44.

the user, they appear to be inclined to limit their choices to the narrowest selection.<sup>121</sup> Giving users' ample autonomy in pre-defining the algorithm that delivers the daily news to them is also an option: a form of **user-empowerment**, while encouraging conscious decisions (instead of going with the tide).

Despite the foregoing, policy intervention is not recommended at this stage. Partly because freedom of expression is affected, even by compulsorily linking more speech to the speakers' expression. Furthermore, an appropriate selection of the "diverse" content, its control and enforcement is highly dubious. Therefore, while this problem merits further research and exploration, it is recommended that we reserve this area for **self-regulation** and address the problem with **user education** and **user empowerment**.

UGC is taking the lead in the content market: in 2013, 70% of users consumed UGC,<sup>122</sup> while 51% created UGC.<sup>123</sup> According to a marketing statistic, 80% of all internet content is user-generated.<sup>124</sup> UGC is also changing the business models of advertising, which affects the media industry in a significant way.<sup>125</sup>

UGC should be divided into sub-categories: some appear on social networking sites; others on professional online journals in the form of comments; others on semi-professional or private blogs as blog entries and comments; auction sites trade goods offered by ordinary citizens: commercial sellers invite product reviews written by consumers, and some appear on professional platforms dedicated to aggregate and distribute UGC.

The common element in all types of UGC is that they appear on the site of another *content provider* that is unrelated to the user and has no editorial control over the UGC, but is capable of removing or modifying some of the content (but not all, because of its sheer volume).

Development of online services should be encouraged with **clear liability rules**. The E-commerce Directive (ECD) exempts access providers and hosting providers from the liability for third-party content, and from the obligation to monitor, but its definition of "access provider" and "hosting provider" **cannot be applied to the activities that platform providers do** – as this was officially declared by the ECtHR in the *Delfi v. Estonia* judgment.<sup>126</sup>

Therefore, **the ECD cannot be applied to exempt platform providers from liability** for UGC content simply because it is outdated. The various European MSs apply different solutions to the problem, resulting in divergent practices in an area that belongs under Community legislation. Because of the legal uncertainty, many platform providers stopped carrying UGC, and others censor UGC content.

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<sup>121</sup> „The new media have the perverse effect of encouraging audiences to select content so as to reduce its pluralism to a bare minimum.” Jakubowicz, Karol. 'New Media Ecology: Reconceptualising Media Pluralism'. in: Valcke, Peggy, Sükösd, Miklós and Robert Picard (eds) 2015. *Media pluralism and diversity: concepts, risks and global trends*. Palgrave Macmillan. 23–53. at 43.

<sup>122</sup> Ametys. 2012. Rules and recommendations for building User-Generated Content. <http://www.ametys.org/us/en/news/expert-advice/user-generated-content-ugc.html> (last retrieved on 15 June 2016)

<sup>123</sup> The Kapost Blog. Content Marketeer. The Go to Resource for B2B Marketers. <http://marketeer.kapost.com/user-generated-content-marketing/> (last retrieved on 15 June 2016).

<sup>124</sup> Social Media Today. 2014. Matista, Sarah. 'Turning Social User Generated Content into Sales [INFOGRAPHIC]'. 18 June 2014. <http://www.socialmediatoday.com/content/turning-social-user-generated-content-sales-infographic> (last retrieved on 15 June 2016).

<sup>125</sup> Anderson, Simon P., Joel Waldfogel and David Stromberg. (eds) 2015. *Handbook of Media Economics*. vol 1B. Elsevier. at 568–573.

<sup>126</sup> *Delfi v. Estonia*, Application no. 64569/09, 16 June 2015.

The notice and take-down procedure applied by the ECD puts the service provider in the position of having to decide on the lawfulness of a content material and is therefore objectionable from a freedom of expression perspective. In Canada in 2005, the “notice and notice” system was invented in which the ISP mediates a dialogue between the content provider and the notifier. The notice is forwarded to the actual content provider, which may choose to contradict and start a dialogue personally with the notifier, or may choose to remain silent, in which case the content is removed.<sup>127</sup>

The same system has been enacted in 2013 by the UK Defamation Act. The procedure allows the claimant to have his right enforced, by having the actual content provider identified. It allows the actual content provider to stand up for his right of freedom of expression and enter a legal dispute, and it allows the ISP to remain intact from liability, provided that it acted without malice. The website operator remains intact also if it moderates the UGC.<sup>128</sup>

The UK Defamation Act applies only to defamation cases, while the Canadian Intellectual Property Act applies only to intellectual property infringement. We see no reason why this scheme could not be applied to all kinds of contents, whether assumed to be harmful or illegal.

The new proposal on Article 28a AVMSD provides for compulsory self-regulation of video-sharing platform providers, who are already self-regulating. In addition, it allows MSs to impose stricter obligations on them relating to illegal content. In sum, it would oblige them to deal with harmful content in terms of self-regulation, and with illegal content under the national law, if MSs so order.

Instead, liability for content should be assigned to actual authors of the content, even if they are private individuals, and **platform providers should be exempted from liability for illegal third-party content at the EU level**; otherwise, they are going to censor user-generated content. Censorship by private parties is a threat to internet users’ freedom of expression, and it would stifle flourishing of this industry. An **enormous amount of lawful speech would be controlled and often censored by platform providers** to avoid liability, causing financial burden to platform providers and nuisance to users whose content cannot appear real-time, but only with a delay.

Although in traditional media all expressions were edited and no ordinary citizens could claim the right to have broadcast time or a written text published, that was necessary because of reasonable physical and financial constraints. On the internet, no such constraint can be identified – this restriction would be solely created by law, and **would also have a substantial chilling effect on all lawful expressions.**

#### **4.5. Journalistic ethics, media literacy and protection of sources**

Achieving a diversity of media content in the media market – especially under less-than-ideal conditions – depends to a great extent on the professional behaviour of the journalists.

Individual journalists make choices every day when they write an article or shoot a story.<sup>129</sup> While the *macro* (i.e. the ownership and the structural) level of pluralism is in the focus of

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<sup>127</sup> Bayer, Judit. 2007. Liability of Internet Service Providers for Third Party Content. Wellington: Victoria University of Wellington. Faculty of Law. at 60–61.

<sup>128</sup> UK Defamation Act Section 5(12) reads: ‘The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.’

<sup>129</sup> Even though today robots can also write articles, some of which are not worse than what journalists publish. The ethics of automated journalism are already in process: ‘Guide to Automated Journalism’. 7 January 2016. <http://towcenter.org/research/guide-to-automated-journalism/>. (last retrieved on 15 June 2016).

policy and research, **the quality of media content depends ultimately on the quality of individual journalists' performance**. Jakubowicz described post-communist journalists as paternalistic and didactic, pointing out that the media and journalists are not victims but rather accomplices in reproducing this awkward system.<sup>130</sup>

Journalists should be well equipped with professional skills and act independently, but they also need to be protected against influence from both economic and political interests. The weight of influence can vary: journalists with solid morals would resist even strong pressure, while **low professional ethics lead to voluntary self-censorship** in the interest of the sponsor or owner. Institutional representation of journalists' interests, labour protection against dismissal and intimidation, and good professional education and training are all needed to achieve a working model of independent and diverse journalism. Rules and practical implementation of the right to access to public information, along with protection of journalistic sources and freedom from **search of premises and from secret surveillance** are also necessary to ensure that journalists enjoy proper working conditions.

It is sometimes argued that low-quality content and tabloidisation is what the audience prefers, as opposed to investigative and other "serieux" journalism. Indeed, **media literacy is one of the key factors in media pluralism**. Not only should the audience be able to interpret the media messages according to their weight, calculating distortions and read behind the lines. But citizens should be **supportive** of the journalistic profession, respond in case of scandals, show interest in revealed corruption cases and recognise the democratic importance of media pluralism.

The examined countries belong to the group where "political parallelism" is the ruling model. Journalists' independence is interpreted as their freedom to choose which political opinion to support with their work. Even in such a media landscape, theoretically there should always be a couple of media actors that support the opposition and fulfil the watchdog function. This fragile balance is broken when **both the government and the opposition are involved in muddy relationships**.

One of the key characteristics of the Mediterranean media system, according to Hallin and Mancini,<sup>131</sup> is **political parallelism** in which the media outlets systematically align with various political lines. Expressing political opinion is not regarded as unprofessional. On the contrary, the press had a traditional role of mobilising society and fuelling social changes; going so far as to instrumentalise the media by political power. (Other features of this model are a greater involvement of the state or clientelism, cross-ownership between various other economic sectors and a weak corporate representation of the journalistic profession.)<sup>132</sup>

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<sup>130</sup> Jakubowicz, Karol. 2001. 'Rude awakening social and media change in Central and Eastern Europe'. *Javnost-The Public*. Vol. 8. No.4. 59–80. <http://javnost-thepublic.org/article/2001/4/3/> (last retrieved on 15 June 2016).

<sup>131</sup> Liberal, democratic corporative, and polarised pluralist, or Mediterranean model. Hallin Daniel C and Paolo Mancini. 2004. *Comparing Media Systems: Three Models of Media and Politics*. Cambridge: Cambridge University Press.

<sup>132</sup> Hallin, Daniel C and Paolo Mancini. 2004. *Comparing Media Systems: Three Models of Media and Politics*. Chapter Five. Cambridge University Press.

## 5. EUROPEAN COMPETENCES IN FREEDOM AND PLURALISM OF THE MEDIA

### KEY FINDINGS

- **There are no powers explicitly conferred upon the European Union to regulate media pluralism, but non-explicit competences are present** at various levels of the EU's legal system.
- Under its negative competences, the EU can attach consequences to not respecting EU values enshrined in Article 2 TEU, including "freedom, democracy, the rule of law and respect for human rights". Article 7 TEU procedures have not been used as a means of intervention – due to their high thresholds and lack of political compromise – nor has the ordinary infringement procedure under Article 258 TFEU been interpreted by the Commission as an empowerment to protect this foundational part of the Treaties.
- All existing enforcement mechanisms are crisis-driven. Instead, a methodologically sound, reliable, permanent and periodic monitoring and evaluation process based on objectivity and equality (monitoring) is recommended to assess potential risks in MSs.
- The Charter of Fundamental Rights of the European Union, in Article 11(2), states that the "freedom and pluralism of the media shall be respected". Although the Charter's scope is limited, case law may render its provisions applicable to cases beyond implementation of EU law to cases when the MSs act within the scope of EU law.
- Establishing Union citizenship also meant concluding an unwritten social contract with the peoples of Europe. In the Lisbon Treaty, the Union explicitly undertook to ensure certain rights to these citizens. Harming media pluralism has multiple detrimental effects on the citizens of the EU beyond the borders of the given MS.
- MSs' policies restricting media pluralism hinder the very idea of European integration, including the free movement of media services and of persons.
- In all cases of legislation in the given field, a corresponding monitoring mechanism should complement EU actions.

**No powers are explicitly conferred upon the European Union to regulate media pluralism. Nevertheless, competences are present in a hidden, non-explicit way** at various levels of the EU's legal system.

**The EU has negative and positive competences in the field.** Under negative competences, the EU does not have the power to legislate, but can attach consequences to not respecting EU values. By positive competences, we mean powers conferred upon the European Union to legislate a matter that directly or indirectly concerns media pluralism. **Both** negative and positive competences **can only be meaningfully exercised if a corresponding monitoring mechanism complements EU actions.**

As has been pointed out above, media pluralism is closely intertwined with foundational EU values, most notably the rule of law, democracy and fundamental rights.

**Democracy and the rule of law.** Even the thinnest understanding of the rule of law presupposes a minimum element: that people retain the right of expressing their discontent,

if only at the next round of democratic, i.e. free and fair, elections.<sup>133</sup> Voters can only meaningfully participate in elections, if they have free access to a wide variety of information that gives them “sufficient basis for making enlightened judgments and informed political choices”.<sup>134</sup> Since such pieces of information are mediated mainly through the media, this makes media freedom an essential element of democracy. It is little wonder that authoritarian regimes try to oppress and abuse the media through censorship and propaganda. The EU already has some instruments to enforce its own values, but there is certainly room for improvement. Both current mechanisms and possible future scenarios for extending EU powers in the field will be summarised in this chapter.

**Fundamental Rights.** Media freedom is closely intertwined with fundamental rights, finding its historical roots in freedom of expression. Over time, in most recent texts of a constitutional nature, media freedom and pluralism are treated as separate rights, each in its own right.

The relationship between media freedom and media pluralism is a contested one, but if we accept for the sake of the argument that there is causality between the two,<sup>135</sup> it follows that the EU has the power to regulate whenever democracy or fundamental rights are jeopardised.

**Four freedoms.** Media pluralism is closely connected to the four freedoms and therefore whenever the EU element is present, the European legislative has the right to legislate on free movement of goods and services.

**Citizenship of the Union.** The European element of media freedom and pluralism as a right that EU citizens should be able to meaningfully exercise is closely intertwined with the concept of Union citizenship.

**Competition law.** Media pluralism should not be subject to political influence, but commercial influence should also be avoided – even though it is increasingly difficult to distinguish between the two.<sup>136</sup> EU competition law may be invoked in such cases.

## 5.1. Democracy

**The European Union is founded on a set of common principles listed in Article 2 of the Treaty on European Union (TEU),** namely “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. As the High-Level Group on Media Freedom and Pluralism formulated: “Given the important role media plays as part of a functioning democracy – by creating transparency, by having the ability to challenge those in power and by helping to develop informed citizens – these concerns go to the heart of (values) on which the European Union is based”. It further pronounced: **“There can be no genuine democracy at the EU level if media freedom and pluralism are not guaranteed throughout the European**

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<sup>133</sup> Schumpeter, Joseph A. 1950. *Capitalism, socialism, and democracy*. New York: HarperCollins.

<sup>134</sup> Viķe-Freiberga, Vaira, Herta Däubler-Gmelin, Ben Hammersley, Luís Miguel Póiares Pessoa Maduro. 2013. *A free and pluralistic media to sustain European democracy*. The Report of the High Level Group on Media Freedom and Pluralism.

[http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/hlg/hlg\\_final\\_report.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf) (last retrieved on 15 June 2016).

<sup>135</sup> Karppinen, Kari. 2008. ‘Media and the paradoxes of pluralism’. *The media and social theory* 1. 27; Czepek, Andrea, Melanie Hellwig, and Eva Nowak. 2009. *Press freedom and pluralism in Europe: concepts and conditions*. Intellect Books; Klimkiewicz, Beata. 2010. *Media freedom and pluralism: media policy challenges in the enlarged Europe*. Central European University Press; Karppinen, Kari. 2007. ‘Making a difference to media pluralism: a critique of the pluralistic consensus in European media policy’. *Reclaiming the media: communication rights and democratic media roles* at 9–30.

<sup>136</sup> Calderaro, Andrea and Alina Dobrova. 2012. *Exploring the current state of media pluralism and media freedom in the European Union – Political and social aspects*. at 13.

**political space.”<sup>137</sup>**

MSs are vetted for their compliance with these values *before* they accede to the Union<sup>138</sup> by way of applying the so-called “Copenhagen criteria” established in 1993.<sup>139</sup> Indeed, freedom of expression and media freedom are key indicators of a country’s readiness to become part of the EU.<sup>140</sup> That notwithstanding, no similar method exists to supervise and regularly monitor adherence to the above-mentioned foundational legal principles *after* accession takes place. A gap emerged between the proclamation of foundational values and principles, and their actual enforcement. MSs may thus abuse the fact that EU membership is a one-way-street without compelling exclusion criteria, and might jeopardise EU values including democracy, freedom of expression, media freedom and pluralism. This may reach an extent that MSs would not be permitted to accede, had they not been already member countries – a phenomenon referred to by Vice-President of the European Commission Viviane Reding as the “Copenhagen dilemma”.<sup>141</sup>

**5.1.1. Existing instruments**

The Copenhagen dilemma should not be misinterpreted to imply that the EU lacks any possible tools to enforce its values. The EU has certain instruments at hand, even though they are difficult to identify, not least because Article 2 occupies a somewhat awkward position in the Treaties. Whereas the values enshrined therein are the foundational elements on which the Union is based, they cannot serve as the basis of secondary legislation, the enforcement of which would be more straightforward. There are at least two reasons for this situation. The first is non-interference into the sovereignty of the MSs, while the second flows from the specific nature of many of the values. Several EU values, most notably democracy and the rule of law “are fluid concepts and phenomena, and there is no single ideal formula to achieve them. Rule of law is a contested concept, and even the most detailed definition, to be true to the idea of the rule of law, has to contain a share of vagueness in order to accommodate rule of law’s very nature.”<sup>142</sup> A community respecting the sovereignty of its

<sup>137</sup> Viķe-Freiberga, Vaira, Herta Däubler-Gmelin, Ben Hammersley, Luís Miguel Póaires Pessoa Maduro. 2013. A free and pluralistic media to sustain European democracy. The Report of the High Level Group on Media Freedom and Pluralism. at 3. [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/hlg/hlg\\_final\\_report.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf) (last retrieved on 15 June 2016).

<sup>138</sup> Article 49 (1) EU

<sup>139</sup> The criteria read as follows: “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union”. Cf.: Hillion, Christophe. ‘The Copenhagen Criteria and Their Progeny’. in: Hillion, Christophe. 2004. *EU Enlargement: A Legal Approach*, Oxford: Hart. at 1–23; Kochenov, Dimitry. 2004., ‘Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law’. *European Integration online Papers*. Vol. 8. No.10.

<sup>140</sup> ‘Freedom of expression and media’. [http://ec.europa.eu/enlargement/policy/policy-highlights/media-freedom/index\\_en.htm](http://ec.europa.eu/enlargement/policy/policy-highlights/media-freedom/index_en.htm) (last retrieved on 15 June 2016)

<sup>141</sup> European Parliament (2012), Plenary debate on the political situation in Romania, statement by V. Reding, 12 September 2012. See also V. Reding, ‘The EU and the Rule of Law: What Next?’, speech delivered at CEPS, 4 September 2013.

<sup>142</sup> Bárd, Petra, Sergio Carrera, Elspeth Guild, Dimitry Kochenov, With thematic contribution by Wim Marneffe. European Parliament, European Parliamentary Research Service, 2016. ‘An EU mechanism on Democracy, the Rule of Law and Fundamental Rights’. [http://www.europarl.europa.eu/EPRS/EPRS\\_STUD\\_579328\\_AnnexII\\_CEPS\\_EU\\_Scoreboard\\_12April.pdf](http://www.europarl.europa.eu/EPRS/EPRS_STUD_579328_AnnexII_CEPS_EU_Scoreboard_12April.pdf) (last retrieved on 15 June 2016), 24., also published as CEPS Paper in Liberty and Security, No. 91/April 2016, <https://www.ceps.eu/system/files/LSE%20No%2091%20EU%20Mechanism%20for%20Democracy.pdf> 81. (last retrieved on 15 June 2016)

constitutive elements must therefore not interfere with their constitutional identity, as long as the common values – in one way or another – are respected.

Not serving as basis for more detailed legislation does not mean that the list of values in Article 2 TEU is only a solemn political declaration.<sup>143</sup> “Not being part of ordinary *acquis* does not disqualify them as law (...) their binding nature is crystal clear and unquestionably operates equally within and outside the scope of conferred EU competences.”<sup>144</sup> It also means that the EU is obliged to intervene if values come under threat in a MS.<sup>145</sup> In looking at the existing instruments for assessing MSs’ compliance with its founding values, very few supervisory tools could be identified.<sup>146</sup> Nevertheless, one must acknowledge the existence of Article 7 TEU, and ordinary infringement procedures.

**The seminal Article 7 TEU offers a specific enforcement mechanism for situations of clear risk of a serious breach of Article 2 values in a MS or of an existing serious and persistent breach of the same values.** Once a breach is proved, Article 7 also foresees sanctions.

It must be emphasised that Article 7 can be invoked without an EU element, since deterioration of the listed values in any one MS would seriously affect other countries and the EU as a whole. As the Commission formulated, “[t]he fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union’s possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.”<sup>147</sup>

In the history of the EU, neither of the Article 7 TEU procedures has ever been used. Their activation is in the hands of the various EU institutional actors, and is triggered only when high thresholds are exceeded. This leaves **serious doubts as to the provision’s operability.**<sup>148</sup>

**Via the ordinary infringement procedure under Article 258 TFEU, the Commission is empowered to protect the Treaties, of which Article 2 unquestionably forms a part.** The possibility of making use of infringement procedures is there, even if instigation of

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<sup>143</sup> For an analysis, see Pech, Laurent. 2010. “A Union Founded on the Rule of Law”: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’. *European Constitutional Law Review*. Vol. 6. at 359–396.

<sup>144</sup> Bárd, Petra et al, 2016, 99.

<sup>145</sup> Hillion, Christophe. ‘Overseeing the Rule of Law in the EU’. in: Closa, Carlos and Dimitry Kochenov 2016. *Reinforcing the Rule of Law Oversight in the European Union*. Cambridge: Cambridge University Press. forthcoming; Closa, Carlos, Dimitry Kochenov and Joseph H.H. Weiler. 2014. ‘Reinforcing the Rule of Law Oversight in the European Union’. 2014/25 RSCAS Working Paper; Piris, Jean-Claude. 2010. *The Lisbon Treaty*, Cambridge: Cambridge University Press.

<sup>146</sup> Carrera, Sergio, Elspeth Guild and Nicholas Hernanz, CEPS. European Parliament, DG IPOL, Policy Department C: Citizens’ Rights and Constitutional Affairs, 2013. *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/493031/IPOL-LIBE\\_ET%282013%29493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf) (last retrieved on 15 June 2016) and at <http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf>, 4–15, and Annex 1 of the study (last retrieved on 15 June 2016).

<sup>147</sup> Commission Communication on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM 606 final, 15 October 2003, page 5.

<sup>148</sup> European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM (2014) 158, 11.3.2014. 6.

the procedure is hypothetical, as the **Commission opted to interpret this power restrictively** and has not relied on Article 258 TFEU in this vein.<sup>149</sup>

Because of a failure to make use of either Article 7 TEU or Article 258 TFEU, scholars and institutions proposed a number of solutions to tackle the Copenhagen dilemma. **The EU Framework to strengthen the rule of law**,<sup>150</sup> adopted in the form of a Commission Communication COM(2014)158,<sup>151</sup> is outstanding as the first procedure ever applied. The EU Framework can be seen as an instrument used as a substitute for the preventive arm of Article 7 TEU, which is not in use. Its proclaimed objective is to prevent situations in EU Member States from reaching the level or scope where Article 7 TEU needed to be applied. The first case in which the EU Framework was used in practice was against Poland.<sup>152</sup>

### 5.1.2. Future possibilities to enforce EU values

**All existing enforcement mechanisms** have a number of drawbacks – even apart from the fact that they are practically not in use. They **are crisis-driven and only are triggered once a state takes a path towards rule-of-law backsliding**.<sup>153</sup> **Instead, regular, periodic assessment was needed for each individual EU MS, evaluating potential risks on an equal and objective basis.** The High-Level Group on Media Freedom and Pluralism endorses this view with regard to media freedom and pluralism – and in this regard praises the Centre for Media Pluralism and Media Freedom, MEDIADEM, the Media Pluralism Monitor, the EU Media Futures Forum, the “No disconnect strategy” and a number of other media organisations.<sup>154</sup>

**Media monitoring activity could also feed into the wider monitoring and enforcement of European values more generally.** In its Resolution of 10 June 2015 on the situation of Hungary,<sup>155</sup> the European Parliament called for an annual monitoring of compliance with democracy, the rule of law and the situation of fundamental rights in all MSs through a Scoreboard, to be established on the basis of common and objective indicators.<sup>156</sup> Various possibilities of the establishing such a Scoreboard and its details are extensively discussed by Petra Bárd, Sergio Carrera, Elspeth Guild, Dimitry Kochenov and Wim Marneffe in their study of 2016 for the European Parliament.<sup>157</sup> They propose to establish an “EU Rule of Law Commission” as an independent body of scholars. In their proposal the EU Rule of Law Commission is placed at the centre of the EU Rule of Law Scoreboard, which makes a

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<sup>149</sup> Bárd, Petra et al, 2016, 24.

<sup>150</sup> European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM (2014)158, 11.3.2014. 6. [http://ec.europa.eu/justice/effective-justice/rule-of-law/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm). (last retrieved on 15 June 2016).

<sup>151</sup> European Commission, Communication. A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11.3.2014.

<sup>152</sup> Rule of law in Poland: Commission starts dialogue, 13 January 2016, [http://ec.europa.eu/news/2016/01/20160113\\_en.htm](http://ec.europa.eu/news/2016/01/20160113_en.htm) (last retrieved on 15 June 2016) which states: “The College agreed to come back to the matter by mid-March, in close cooperation with the Venice Commission of the Council of Europe. Echoing what President Juncker said last week, First Vice-President Timmermans underlined after the College meeting that this is not about accusations and polemics, but about finding solutions in a spirit of dialogue. He underlined his readiness to go to Warsaw in this context.” See also European Commission – Fact Sheet, College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers, Brussels, 13 January 2016 [http://europa.eu/rapid/press-release MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm) (last retrieved on 15 June 2016).

<sup>153</sup> Müller, Jan-Werner. 2013. ‘Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order’. *Working Paper* No. 3 (Washington, DC: Transatlantic Academy).

<sup>154</sup> The Report of the High Level Group on Media Freedom and Pluralism. 2013 at 18–19.

<sup>155</sup> European Parliament 2015. Resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)).

<sup>156</sup> European Parliament, Plenary debate on the ‘Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015’, 2 December 2015

<sup>157</sup> Bárd, Petra et al, 2016

context-specific assessment in light of available data or calls for extra information. The EU Rule of Law Commission would then draw up Annual (Country Specific) Reports on the basis of available and additional materials, covering various aspects, among others the health status of the media. These annual reports would point to the strengths and weaknesses, and suggest specific ways to overcome the latter. The Rule of Law Commission would identify three scenarios depending on the level of adherence to EU values by MSs, from the least problematic Scenario 1 to Scenario 3, where a state systematically undermines democracy, violates the rule of law and engages in massive human right violations.

As to the legal basis of such a monitoring mechanism, the option of an inter-institutional agreement without any further legal basis was offered. Second, Article 352 TFEU (former Article 308), which constitutes the foundations for Regulation 168/2007 establishing the FRA, could be invoked.<sup>158</sup> Article 352 TFEU can cover Union action "within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties", with the exception of the common foreign and security policy. The procedure is however rather burdensome, as it would require unanimity in the Council, on a proposal by the Commission and the consent by the EP. Third, the Court of Justice could get involved. The main purpose of the Framework is to address threats to the rule of law, which are of a systemic nature.<sup>159</sup> No definition of the notion systematic deficiencies is given. If the EU Rule of Law Commission determines that there are systematic deficiencies, one could consider calling the Court to intervene and conduct a substantial assessment even before invoking Article 7 TEU.<sup>160</sup> Fourth, the EU Rule of Law Commission could follow a similar format as the Venice Commission.<sup>161</sup> For the EU, prospective potential members should pass the test of the European Parliament before nomination, and they could be chosen from candidates proposed by Council and the Commission.

Once it has been determined that a MS is in Scenario 3, the current supervisory mechanisms, Article 7 TEU or Article 258 TFEU, could be triggered, or novel procedures could be designed. A widely cited one is the so-called systemic infringement procedure, where problems are bundled in order to give a more nuanced picture of a country's rule of law situation and show their overall detrimental impact.<sup>162</sup> Alternative options are formulated by scholars and politicians in the field.<sup>163</sup>

## 5.2. Fundamental rights

**Media freedom finds its historical roots in freedom of expression.** In more recent texts of constitutional value, media freedom and pluralism are mentioned separately, each in its

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<sup>158</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

<sup>159</sup> Council of the European Union, Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10296/14, Brussels, 27 May 2014, 7.

<sup>160</sup> Case C-404/15 Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, 5 April 2016

<sup>161</sup> Venice Commission, Adopting the Revised Statute of the European Commission for Democracy through Law. CDL(2002)027-e Resolution RES (2002) 3, Article 2.

<sup>162</sup> Scheppele, Kim Lane. 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions.' in: Closa, Carlos and Dimitry Kochenov. (eds) 2016. *Reinforcing Rule of Law Oversight in the European Union*. Cambridge: Cambridge University Press; Scheppele, Kim Lane. 2013. 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions'. [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion_en.pdf) (last retrieved on 15 June 2016); for the proposal in brief, see Scheppele, Kim Lane. 2013., 'EU Commission v. Hungary: The Case for the "Systemic Infringement Action."' *Verfassungsblog*. 22 November 2013. <http://www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.Uw4mfPuzm5I> (last retrieved on 15 June 2016).

<sup>163</sup> Bárd, Petra et al., 2016. 48-67.

own right. In the EU, both the ECJ protected media pluralism and it was later incorporated into black letter law.

From relatively early on, the ECJ pushed for the incorporation of fundamental rights in a Community law that was still insensitive towards rights issues, by protecting them as general principles of EU law, and by heavily relying on the ECHR. Influence of the Strasbourg case law on the Luxembourg court was also considerable.<sup>164</sup> Over time the ECJ developed a vast body of its own case law up until the point when the *Herren der Verträge* decided to come up with the EU's own bill of rights, the Charter of Fundamental Rights agreed on in 2000. The document was highly persuasive even before its formal adoption as a constitutional basis for the EU, but with the Lisbon Treaty's entry into force the Charter became officially binding. The adoption of the Lisbon Treaty also reinforced the commitments to the ECHR, by way of Article 6 (2) TEU obliging the EU to accede to the Convention<sup>165</sup> and Article 6(3) TEU declaring that fundamental rights, as guaranteed by the Convention. And since they result from the constitutional traditions common to the MSs, they now constitute general principles of Union law. In addition, the Charter specifies in Article 52(3) that the meaning and scope of the rights are the same as those guaranteed by the ECHR. Therefore any limitations that might be imposed on a given right must not exceed those provided for in the Convention.

**The Charter of Fundamental Rights of the European Union, in Article 11(2) states: "The freedom and pluralism of the media shall be respected."** The provision can be interpreted as a consequence of Article 11(1) of the Charter on freedom of expression with regard to the media. According to the explanations,<sup>166</sup> the provision was based at the time of drafting in particular on ECJ case-law regarding television,<sup>167</sup> on the Protocol on the System of Public Broadcasting in the MSs annexed to the EC Treaty, and on Council Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in MSs concerning the pursuit of television broadcasting activities. Article 11(2) also corresponds to MSs' constitutional traditions, even though media pluralism is not necessarily expressly embedded in national constitutions, but derived from freedom of expression by way of constitutional interpretation.<sup>168</sup> Article 11(2) of the Charter may well serve as a tool of interpretation of existing law, but also as a potential additional tool for shaping future EU laws or as a yardstick may contribute to framing national laws in the MS setting.<sup>169</sup>

**Notwithstanding the explicit reference to media pluralism, the horizontal provisions take away a lot of its strength.** The Charter narrows its scope considerably by way of Article 51(1), which states that the provisions of the Charter are addressed to the

<sup>164</sup> Brogi, Elda, Paula Gori. 'European Commission Soft and Hard Law Instruments for Media Pluralism and Media Freedom'. in: Schuman, Robert. 2013. *Centre for Advanced Studies, The Centre for Media Pluralism and Media Freedom, European Union Competencies in Respect of Media Pluralism and Media Freedom*. RSCAS Policy Papers. No. 01. at 66.

<sup>165</sup> Even if the procedure is halted for the time being. See Opinion 2/13 (*ECHR Accession II*) ECLI:EU:C:2014:2454. For critical accounts see, e.g. Halberstam, Daniel. 2015. "'It's the Autonomy, Stupid!' A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward". *German Law Journal*. No. 16. 105–146; and Piet Eeckhout. 2015. 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' *Fordham International Law Journal*. Vol. 38. No. 4.955–992; Dimitry, Kochenov. 2015. 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*.

<sup>166</sup> Explanations relating to the Charter of Fundamental Rights, OJ 2007/C 303/02, 14 December 2007

<sup>167</sup> See especially ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others*, [1996] ECR I-4007 (judgment of 25 July 1991)

<sup>168</sup> EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*. 2006. [http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf) 116.(last retrieved on 15 June 2016).

<sup>169</sup> Brogi, Elda, Paula Gori. 'European Commission Soft and Hard Law Instruments for Media Pluralism and Media Freedom'. in: Schuman, Robert. 2013. *Centre for Advanced Studies, The Centre for Media Pluralism and Media Freedom, European Union Competencies in Respect of Media Pluralism and Media Freedom*. RSCAS Policy Papers No. 01. at 66–67.

EU institutions and to the MSs “only when they are implementing Union law”. Since EU law fails to cover various aspects of media pluralism, that provision may take away from the strength of Article 11(2) of the Charter. **Nevertheless, case law along the lines of Åkerberg Fransson,<sup>170</sup> may render Charter provisions applicable to cases when MSs are strictly speaking not implementing EU law, but the matter is of relevance to EU law.** In Åkerberg Fransson, the Court equated “implementation” with “scope of application” and held that the requirement to respect fundamental rights as defined by Union law is binding on the MSs when national legislation falls within the scope of Union law (paragraphs 20-21).

In her speech of 4 September 2013, the former Commission Vice-President Viviane Reding indicated a preference for the abolition of Article 51(1) of the Charter,<sup>171</sup> so that it would eventually apply “irrespective of the subject-matter at issue, that is to say irrespective of whether it falls within federal or State competence.”<sup>172</sup> Such a move would make all fundamental rights directly applicable in the MSs, including media freedom and pluralism. Whereas it is unlikely that this scenario will materialise due to the reluctance of several MSs to revise the Charter and subject internal situations to it, if it happened, the Court of Justice would be entrusted with “the task performed by the US Supreme Court, that of protecting any individual citizen, on the basis of a “federal” standard of respect for fundamental rights, against any public authority of any kind and in any area of substantive law.”<sup>173</sup>

### 5.3. Union citizenship

The European Union plays an increasing role in upholding the rights of Union citizens. **If a MS breaches fundamental values including democracy or fundamental rights, this is likely to undermine the very foundations of the Union, the trust between its members and jeopardise the genuine enjoyment of rights derived from Union citizenship.**<sup>174</sup> When the European Communities transformed into a Union and established European citizenship, it also concluded an unwritten social contract with the peoples of Europe. In the Lisbon Treaty, it explicitly undertook to ensure certain rights to these citizens.<sup>175</sup> Harming media pluralism has multiple detrimental effects beyond the borders of the given MS. Beyond harming nationals of a MS, **all Union citizens in that state will also be detrimentally affected.** Lack of limits to violations of EU values may encourage other MSs’ governments to follow, and subject other countries’ citizens to abuse. In other words, rule of law violations – if no consequences occur – may also transgress borders and become contagious. Furthermore, there is a **direct link between a free and pluralistic media at the national level, and the exercise of democracy at EU level:** any mistakes in the organisations and procedures related to elections will directly affect the EU democratic process and local elections where all Union citizens may participate. Moreover, all EU citizens will to some extent suffer due to the given State’s participation in the EU’s decision-making

<sup>170</sup> CJ, Case C-617/10, Åklagaren v Hans Åkerberg Fransson, 26 February 2013

<sup>171</sup> Reding, Viviane. 2013. ‘The EU and the Rule of Law: What Next?’, speech delivered at CEPS, 4 September 2013. The Charter’s potential is as far-reaching as it is unused: Hoffmeiser, Frank. ‘Enforcing the EU Charter of Fundamental Rights in Member States: How Far Are Rome, Budapest and Bucharest from Brussels?’ in: Bogdandy, Armin. von and Pal Sonnevend (eds.) 2015. *Constitutional Crisis in the European Constitutional Area: Theory. Law and Politics in Hungary and Romania*. Oxford: Hart. 195–234; Łazowski, Adam. 2013. ‘Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings’ 14 *ERA Forum*, 573–587. See also Eeckhout, Piet. 2002. ‘The EU Charter of Fundamental Rights and the Federal Questions’. *Common Market Law Review*. No. 39. at 945–994.

<sup>172</sup> Lenaerts, Koen. 2000. ‘Respect for Fundamental Rights as a Constitutional Principle of the European Union’. *Columbia Journal of European Law*. Vol. 6. No. 1, 1–25. See also Knook, Allard. 2005. ‘The Court, the Charter and the vertical division of powers in the European Union’. *Common Market Law Review*. Vol. 42. No. 2. at 367–398.

<sup>173</sup> Lenaerts, Koen. 2000. ‘Respect for Fundamental Rights as a Constitutional Principle of the European Union’. *Columbia Journal of European Law*. Vol. 6. No.1, at 1–25.

<sup>174</sup> CJ, Case C-34/09, Gerardo Ruiz Zambrano v Office national de l’emploi, 8 March 2011, paragraph 42.

<sup>175</sup> Article 3 (2) TEU.

mechanism, or to say the least, the legitimacy of Union decision-making will be jeopardized.<sup>176</sup> Therefore, a state's departure from democracy and rule of law standards will ultimately hamper the exercise of rights of individuals throughout the EU.

#### 5.4. Free movement

Ever since the existence of the single market, EU legislation is present in all areas of cross-border trade in goods and services, also covering media products. **Discriminatory criteria of media companies' licensing, arbitrary sanctions, etc. are to be considered as restrictions to the right of establishment.**

**Sub-issues of freedom of expression are also influencing the exercise of free movement rights.** Intrusions into media freedom, journalists' intimidation, harassment, threatening, censorship, or their undue criminal prosecution all hinder the free movement of journalists, beyond also **hampering rights derived from European citizenship.** The lack of minimum harmonisation of libel laws, financial subsidies and data protection may result in "jurisdiction shopping" or "libel tourism"<sup>177</sup> and **interfere with free movement rights.** Article 114 TFEU allowing for legislation to be adopted for the achievement of the internal market could therefore be invoked as the legal basis of future legislation. MSs' policies restricting media pluralism "are naturally bound to also hinder the exercise of the movement to that Member State by media companies and journalists."<sup>178</sup>

**In order to improve the single market, the EU could engage in further harmonisation of EU legislation.** One possibility is to rely on Article 352 TFEU, which allows the legislative to adopt appropriate measures, if action by the Union is necessary to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers. It should be noted, however, that the procedure requires high thresholds, i.e. unanimity in the Council on a proposal from the Commission and after obtaining the consent of the European Parliament.

National regulatory authorities also contribute to common standards; therefore, their harmonisation should have a positive effect on the status of media freedom and pluralism in the European Union. Article 30 of the Proposal on Amendment of AVMSD is very welcome in this respect as it provides for MSs to ensure that national regulatory authorities exercise their powers impartially and transparently and in accordance with the objectives of (...) media pluralism, cultural diversity, consumer protection, internal market and the promotion of fair competition.<sup>179</sup>

#### 5.5. Competition law

MSs clearly conferred competences to the European Union in the field of competition policy in Articles 101-118 TFEU. **The Commission could engage in a more active market assessment** paying due regard to concentration of media ownership in a wide variety of sectors covering press, the audiovisual media, or digital intermediaries alike.

Because of the intricate relationship between competition law and culture, the EU legislative could also rely on Article 167(4) TFEU, according to which "the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures."

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<sup>176</sup> Bárd, Petra et al., 2016. at 95., The Report of the High Level Group on Media Freedom and Pluralism. at 20.

<sup>177</sup> The Report of the High Level Group on Media Freedom and Pluralism, 2013. at 22.

<sup>178</sup> The Report of the High Level Group on Media Freedom and Pluralism, 2013. at 19.

<sup>179</sup> Article 30 of the Proposal for amending AVMSD. COM(2016) 287 final.

## 6. SUMMARY OF COUNTRY STUDIES

### KEY FINDINGS

1. (Ownership) Cross-ownership and also cross-sector ownership is prevalent in all of the examined MSs and many of the partner industries receive public resources, such as construction, defence or telecommunication. Media owners that are involved in other economic sectors often have direct (France, Romania, Italy) or indirect (Bulgaria, Hungary) links to political power, which results in journalistic self-censorship. The share of the politically affiliated media companies is estimated above 50% in Bulgaria, Romania, Poland and Hungary, between 25-50% in Italy and Greece, and well below 25% in France.
2. (Transparency) There is scope for improvement of transparency of ownership and funding in all examined MSs.
3. (State Aid) State advertising has a formative effect on the market in Bulgaria, Hungary, Poland, Romania and Greece, whereas in Italy and France, it is not influential and there is a modest level of regulation on their distribution.
  - The relationship between state advertising and biased news coverage appears massive in Poland, Romania, Greece and Hungary; and is not typically present in Italy and France.
  - EU restrictions of state aid are not respected in several countries. In many cases, financial management is not supervised or is supervised only by an internal, or a politically defined body.
4. (Journalistic independence) The high moral standards and clear rules of the journalistic profession may correct some minor mistakes in the system of media freedom and pluralism, and lead to a more plural and independent media (France, Italy).
  - All examined states protect journalistic sources, but authorities appear to abuse loopholes through secret surveillance, for example.
5. (Online market) Liability of internet content providers for user-generated content is problematic for all countries' judicial systems, and the solutions are diverse. There is strong interest in having a unified EU regulation in this respect.
  - Online content's democratic relevance is growing in those countries where traditional media has failed to fulfil the watchdog function. While young people consume media more and more through their mobile devices, terrestrial television retains its status.
6. Impact of international norms is measurable only if they are compulsory. Soft law does not have an impact beyond generating discussion in the MSs.

The countries France, Italy, Greece, Poland, Hungary, Romania and Bulgaria were selected for this study, because of their supposed comparability in the examined questions relating to media pluralism. As it turned out, France and Italy share more common traits with each other than with the other countries. Romania is similar in many respects to France (and sometimes, Italy), while in others to Hungary. Bulgaria shares some features with Greece and Italy, but in many other aspects it is the country where independent media are in the most difficult position.

## 6.1. Classic pluralism issues

### a. Ownership concentration and transparency

*Ownership concentration.* In all examined MSs, media concentration is a cause for concern and regulation is attempting to secure an acceptable level of pluralism. In Bulgaria, no specific rules regulate media-sector ownership; only the rules of general competition law apply. A Europe-wide tendency of liberalisation can be observed also in the examined MSs (France, Hungary) with the policy aimed to help the industry to flourish in the deteriorating market circumstances. Cross-ownership is not regulated in most of the case countries, and cross-sector ownership is not regulated in any of them. Cross-ownership is significant in Greece, Poland, Romania and Hungary, but not in France.

In all countries, the regulatory authority has some rights to approve mergers, and the markets are relatively flexible to allow new market entrants. In several countries, foreign investment is differentiated and domestic media ownership is regarded as desirable by the government or in the public discourse (France, Poland). In other countries, the market constraints (Romania) or political pressure (Hungary) led foreign media companies out of the market.

The media distribution and the ISP market is relatively concentrated in most examined MSs, because three or four big companies dominate the market, while dozens, or even hundreds of tiny others may be present. The Internet content market is more diverse and typically has a "long tail",<sup>180</sup> that is, innumerable small content providers add colour to the online picture. Traditional big media companies tend to have strong positions in the online content market as well, but the competition overall is higher in the online environment.

*Cross-sectoral ownership.* The study aimed at revealing links between owners and members of the economic or political power. In all countries, the media sector is closely intertwined with other economic sectors, most typically construction, but tobacco, postal distribution and defence also appear on the list. All of these economic activities are connected to the state budget (tobacco through the massive taxation and excise). Caution is required in checking for cross-financing between the businesses. As the media industry struggles with the changing business models, loss in advertising revenues and decline in newspaper distribution numbers, owners may be tempted to supplement financing from the other business branches. When those are financed from public money, that means that the public assets 1) are not being optimally used and 2) are being indirectly channelled to subsidise certain media content.

The other – even greater – threat to media freedom posed by such cross-ownership is when media content is used as an instrument to achieve a more favourable position in the governments' public tenders. In other words, favourable media coverage of political parties is offered for compensation in exchange for winning public procurement contracts. In Romania and Hungary, there is evidence of such malpractice, which distorts not only the fairness of competition but also lawfulness of public procurement procedures, and in many cases, media pluralism. Without alleging that this is the case in all occasions, there is reason to be wary. It is worth considering the prohibition of any relationship between media owners and actors in publicly financed industries or at least the introduction of a notification obligation of such.

*Political ties.* In many cases, the economic actors that are related to media have direct (France, Romania, Italy) or indirect (Bulgaria, Hungary) links to political power. Media

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<sup>180</sup> Anderson, Chris. 2010. *The Long Tail: How Endless Choice is Creating Unlimited Demand*. Random House.

companies themselves often have links to political actors (Greece, Italy, Romania, Hungary, Bulgaria, France). Poland is the only country where no objective evidence was found of such relationship, but strong political parallelism can be observed. There is agreement that such relationship is the cause of self-censorship, i.e. a journalistic culture that is cautious about reporting unpleasant news to state officials (Italy, Greece). Instead of a watchdog function, the press acts more as a lap dog of politicians, or in even worse cases, a bulldog of the power.<sup>181</sup> In Bulgaria, such relationship is not prohibited by law; therefore certain media are officially owned by political figures or parties. However, these (far-right and nationalist) channels have very low audience shares.

*Transparency of ownership and funding.* There is scope for improving transparency of ownership and funding of the press and media in all examined MSs. In Romania, Bulgaria and Greece recent efforts have been made to increase transparency. In Romania, the ultimate owners in the broadcasting sector are known, and in Bulgaria those in the printed sector. Offshore companies are secret, and in Romania this is clearly a problem, along with the use of “proxy owners”, while in Bulgaria this practice was reported to be not prevalent. In Greece a new governmental project has been started to enhance transparency. In France, owners are presented by the NRA’s website, just like in Hungary, but beyond the names and domiciles, other information cannot be derived from these files.

Access is often difficult for ordinary people, especially in Romania and Bulgaria, where the information in a file is well hidden, deep in a website. Searching is possible at the company register for remuneration; searching for complex structures could cost hundreds of euros (Romania).

In several countries, the informal ties between the political elite and media owners are generally known to the public at large (Bulgaria, France, Romania, Hungary). In Poland and Italy these are mainly known only by some well-informed people, and in Hungary, while the existence of these ties are generally known, the breadth and depth of the influence are concealed. These questions were discussed by the independent press in all countries examined. Affected media outlets are bound to exercise self-censorship in these topics. In Bulgaria, a prestigious journal “Capital Weekly” was even fined by the Commission for Protection of Competition for publishing articles about the triangle scheme between the media group, the bank and the state.

*Political bias of the affected media.* Measuring political impartiality is very difficult. Even a thorough content analysis could give misleading results. Our results on political bias cannot be regarded as evidence, but they provide an impression – based on the judgment of renowned media experts – on the impartiality of those channels that have a political affiliation.<sup>182</sup> Still, it is instructive that none of the experts evaluated that reporting in these affected media outlets would lack bias. While “representing a political opinion, but presenting news objectively”, was typical for France, and a few journals in Hungary, most of the given scores suggested that the representation of the news is also influenced by political opinion and values (Poland, Bulgaria mainstream channels, Greece, Romania, most traditional media in Hungary). In some cases (Hungary, Bulgaria) the incidence of even “obvious bias” was reported.

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<sup>181</sup> Preoteasa, Manuela and Schwartz, Andrei. Country Report of Romania (see the Annex at the end of this report).

<sup>182</sup> Even the term “political affiliation” was considered too vague. For the purposes of this study, a media outlet was regarded as having political affiliation if its owner, or any of its direct or indirect owners had a formal or informal relationship to political actors, political parties, or persons who hold political power.

The aggregated audience share of those media outlets that have political affiliation has a profound effect on pluralism. In four countries, this share is estimated to be above 50% (Bulgaria<sup>183</sup>, Romania, Poland, Hungary), in France well below 25%, and in Italy and Greece between 25-50% of the market. In the age of information abundance, having a low level of biased media content should be regarded as normal. The danger is if a significant proportion of the total media scene provides partisan, or biased coverage.

One of the striking lessons from the country studies was that transparency of political or economic affiliation does not necessarily make a difference. Even if the political and business relationships are widely known (Bulgaria, Italy, France, Hungary), this does not seem to disturb the audience, or result in any consequences. It was only in Poland, where the lack of transparency was regarded as an important influence on the politicisation of the debate about the media, partly because disclosing the political relationship was used as a political weapon and partly because misinformation is published sometimes in the press.

The conclusion from this part of the research is that transparency alone does not lead to improvement in the field of media freedom and pluralism. First, it is not known how many among the viewers/listeners/readers have actual knowledge about the real ownership background of their medium. Second, the extent to which the relationships between political elites and business sectors induce self-censorship and distort media freedom and pluralism has not been measured. The country reports support the assumption that high journalistic ethical standards help maintain independent reporting, or at least the appearance of it. Content analysis should be used to provide further evidence on the avoidance of certain topics, to protect owners' interests – on which we have anecdotal evidence (France, Greece, Hungary). Third, higher media literacy of the citizens would be needed to enable members of the audience to make informed choices.

What appears to be sure is that if it is not prohibited by law, then nothing prevents politicians from acquiring ownership in the media (usually the printed press) (France, Bulgaria). At the same time, however, prohibition might lead politicians to resort to subtler techniques to realise the same goal (Hungary, Romania).

## **b. State subsidies and state advertisements**

In France and Italy, there are both direct and indirect subsidies to the press, which are distributed according to a complex scheme of regulation. In Poland, Hungary and Romania, there is currently no press subsidies system, but in Hungary its press is subject to a reduced, 5% VAT (as compared to 27% general VAT). In Bulgaria and Greece, subsidies are granted on a non-transparent and arbitrary basis, often in exchange for services.<sup>184</sup> In Romania, at the time of consolidating the press market, tax rescheduling, tax exemption and state advertising were used to such an extent as to distort the market, providing substantial advantages to some actors (Pro TV, Antena Group, Prima TV). While this lasted only for a limited period of time, these actors secured a strong position on the market to the detriment of others, also making it difficult for new actors to enter the market.

France is the eminent example in this group of countries, where no clear rules of funding are followed, no evidence of political bias or market distortion emerged, and the funding did not constitute more than 10-15% of the journals' budgets. In Italy, where some journals became dependent on the subsidies, they ceased operating after the funds stopped, and the same has happened in Greece and Bulgaria. While Greek subsidies did not necessarily result in government control, they were neither clear nor transparent, and they worked on the basis

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<sup>183</sup> This applies to print media.

<sup>184</sup> Friedrich-Ebert-Stiftung. 2014. Balkan Media Barometer: Bulgaria 2014. Available at: [http://www.fmd.bg/wp-content/uploads/2014/10/balkan\\_media\\_barometer\\_bulgaria\\_2014\\_eng.pdf](http://www.fmd.bg/wp-content/uploads/2014/10/balkan_media_barometer_bulgaria_2014_eng.pdf) (last retrieved on 15 June 2016)

of mutual benefits. Some media outlets became dependent on the irregular direct government financial support, and in 2011, when all subsidies were cut because of the financial crisis, many found themselves to difficulty.

As regards state advertisements, these are influential in the market especially in Bulgaria, Hungary, Poland, Romania and Greece. In France and Italy, state advertising is not influential, and there is a modest level of regulation on their distribution. In Romania state advertisements were distributed on the basis of arbitrary criteria in the years 2000-04, but since then, a public procurement procedure is required for each advertisement above €30,000. However, the law is often evaded in an increasingly sophisticated manner, and fraud starts as early as when tenders are first written. This calls attention to an important feature of regulations in this field: without a complex strategic approach, a legal norm alone remains just "a piece of paper", not capable of changing human behaviour. In most countries no data exist on state advertising, except in France where official government sites might share some information. Nor is state advertising as a share of the whole advertising market known, except in Hungary, where state advertising was 20% of the total. In Hungary, some journals received 29-80% of their advertising revenue from the state (while opposition journals received zero).<sup>185</sup> The relationship between state advertising and biased news coverage appears massive in Poland, Romania, Greece and Hungary; (in Bulgaria mainly present in the local media), and not typical in Italy and France. It can be concluded that in countries where state advertising is used as a primary source of financing by the media market, one finds a severe distortion of media pluralism both in terms of content and of the media market.

In Italy, France and Bulgaria, no correlation was found between non-transparent state funding (including subsidies and advertising), political affiliation and political bias, but for different reasons: in Italy and France, there was no political bias in the news, whereas in Bulgaria, state funding was found to be transparent (although this transparency was sporadic).

In Poland, Bulgaria and Hungary, there was agreement that the local media markets are particularly vulnerable, whereas they were not more affected in Italy and in France. In the former countries, the local media lack independence, are usually financed by the local governments and are expected to provide a positive coverage on all matters concerning the mayor, the local government, etc. In Bulgaria, there are even written contracts during election periods to this effect ("buying the media").<sup>186</sup>

### **c. Protecting journalists from undue influences**

In most countries, there are no ethical or legal rules that make it the duty of journalists to be independent and to resist political or economic pressure. In most countries, ethical codes provide that journalists have the "right" to resist pressure, but this right is not expressly declared as a professional ethical obligation, which it should be. The ethical codes of the journalistic associations have either very limited effect (Romania, Greece, Hungary) or contain only vague provisions (Poland, Bulgaria, Romania's Unified Code of Ethics). Or the Codes are impossible to apply in a highly politicised media landscape (Romania), as the provisions seem useless if applied only to journalists but not to media owners and managers (Romania). In Italy and France, however, the codes place emphasis on the journalistic ethics and professional quality. Italian journalists have one common ethical code, but also the

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<sup>185</sup> This information is aggregated by a private agency which normally trades these data for advertisers, and is not generally known to the public. [www.kantarmedia.com/hu](http://www.kantarmedia.com/hu) (last retrieved on 15 June 2016)

<sup>186</sup> Drevnik. [http://www.dnevnik.bg/bulgaria/2016/04/09/2731324\\_regionalni\\_medii\\_blagoevgrad\\_da\\_si\\_kupish\\_pozitiven/](http://www.dnevnik.bg/bulgaria/2016/04/09/2731324_regionalni_medii_blagoevgrad_da_si_kupish_pozitiven/) (last retrieved on 15 June 2016)

Constitution and the Law on Journalists expresses this duty. In both Hungary and Italy, a “conscience clause” acknowledges political parallelism and concentrates on the freedom of journalists. A similar clause is present in the code of Hungary’s most prominent journalistic association. However, while the Italian model focuses on journalists as the pillars of professionalism, in Bulgaria and Hungary journalistic independence and professional quality are generally low.

The labour law status of journalists may cause concern in all countries, but less so in France. In other countries, many journalists are employed on short-term contracts, or intellectual property contracts, and do not enjoy the protection and benefits of labour law: paid holidays, sick-leave, protection from dismissal, etc. (Poland, Hungary, Italy, Bulgaria, Romania, Greece).

Journalists are protected in all countries from being obliged to disclose their sources, with narrow (Hungary, Poland) or no exceptions (Bulgaria, Romania). However, in practice the authorities appear to abuse the existing loopholes, specifically that of secret surveillance (Hungary, Poland). In Bulgaria, several journals were fined for refusing to disclose journalists’ sources by the Financial Supervision Commission.

## **6.2. Impact of soft law and EU legal instruments**

In most countries, soft law was used as a reference point by civil activists, but they had no measurable effect (Poland, Hungary, Italy).

ECHR judgments are well respected in most countries (Poland, Romania); only Hungary’s Parliament has expressly denied their implementation on several occasions. The decisions are often cited by ordinary courts (Poland) or Constitutional Courts (Hungary).

## **6.3. Internet concentration**

In most countries, there are no specific rules regarding concentration of either ISPs or content providers, apart from competition law rules. However, in Bulgaria, the national regulatory authority has the right to define ISPs with significant impact and impose certain obligations on them. In some countries there is a surprisingly high number of ISPs (Poland: 1,700, Bulgaria: 1,143, Romania: 1,000, Hungary: 390), but in most countries three or four big ISPs dominate the market, with at least one or two big ISPs having a 30% market share. The Italian market appears more concentrated, with only 13 ISPs and with the dominant IPS having 58% of the market, followed by 13% and 11% of its “competitors”. In Romania, too, the dominant ISP has 53% of the market share. The relevant market is defined not only by internet services, but includes mobile, telephone and cable TV. Only big companies that are able to sell integrated packages of mobile and cable access can successfully compete; the rest are left behind.

Cross-ownerships are reported in all examined countries in the telecommunication and TV-distribution sector, while in Romania a new trend is emerging: in 2015, the top two ISPs have decided to enter the energy sector.

An international research project, with the participation of our Romanian experts Manuela Preoteasa and Andrei Schwartz, found that ownership transparency is an important problem for this sector in the region. “The study looked at the most powerful companies in terms of market share and found that almost all of them have intricate ownership structures that include multiple off-shores and proxy owners. In addition, the analysis identified several close

political connections within the analysed ownership structures, as well as multiple links to criminal investigations."<sup>187</sup>

*Internet content.* Internet content cannot be regulated, banned or blocked in the examined countries, except for Hungary and Italy. The Italian NRA empowered itself to review and block content in case of copyright violation, which was rejected by the Constitutional Court, but due to technical problems no decision could be delivered. The Italian district attorney can order removal or blocking of content under antiterrorism regulation.

In Poland, an anti-terrorist law was adopted in June 2016 that grants power to the head of the Internal Security Agency to ban and block content for 30 days, but the court must authorise the blockage within five days, or otherwise the blockage has to be lifted.<sup>188</sup>

Regarding liability of ISPs, all countries rely on the E-commerce Directive, but the diverging trend can be clearly observed. As noted in the main text of this study, the Directive does not provide a clear solution to the case when a content provider transmits UGC.

In Italy at the end of 2011, the Constitutional Court declared that editors of online magazines were not responsible for defamatory comments posted by readers. Although occasional cases still occur when judges impose responsibilities on intermediaries to regulate UGC, other decisions have repeatedly affirmed that intermediaries should not be liable for UGC. In a specific case, *Google v. Vividown*, the court specified that host providers do not have a duty to monitor the content uploaded on their platforms.<sup>189</sup> This decision could serve as a best practice example as it follows the logic of the Directive, interpreting it in light of the new services.

Not all countries follow this route: courts are likely to impose liability on ISPs for third party's illegal content, especially in the case of hate speech and defamation (Poland, Bulgaria, Hungary).

Broadband penetration is between 60-90% in the observed countries. A staggering 90% of youngsters around the age of 18 own an internet-enabled smartphone (Poland, France, Hungary). TV-watching statistics consistently show that the time of TV consumption grows with the age, from approximately two hours per day in childhood up to six hours above 60.

Terrestrial television<sup>190</sup> still holds its strong positions in Italy, Greece, Poland and France (between 55%-100%), whereas Romania, Bulgaria and Hungary rely more on cable and satellite, terrestrial access being below 20%.

The most popular online content sites are online appearances of traditional media outlets in Poland, Romania, Italy and France; while new, independent news sites are the most popular in Hungary and Bulgaria.

Democratic relevance of online media is regarded as crucial in Poland and Hungary, because independent journals have a chance to enter the market, and take the place of the dysfunctional traditional media. In France, Italy, Romania and Greece, online investigative journalism is present, but less influential, as the traditional media's online version dominates. However, online content is often regarded as low quality (Bulgaria and Greece). The

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<sup>187</sup> "Who are the Gatekeepers of the Internet?" project – implemented by OCCRP, Rise Project and the European Actors Association, project platform at <https://www.reportingproject.net/internetownership/> (last retrieved on 15 June 2016).

<sup>188</sup> Art. 32 c of the Law from 10 June 2016, Official Journal 2016, pos. 904.

<sup>189</sup> Criminal Supreme Court, judgment no. 5107/2014.

<sup>190</sup> Terrestrial television (or broadcast television) is a type of broadcasting in which the television signal is transmitted by radio waves from the terrestrial (Earth based) transmitter of a television station to a TV receiver with an antenna.

relevance of online media is growing especially among youth and with special regard to mobile devices. Financial struggles of the media push both existing and new actors towards online publishing.

#### **6.4. Public-service media**

The principles of providing state aid in the European Union are respected in France and Italy, which have already had encounters with the European Commission in this area. Other countries do not appear to take notice of the guidelines in the Commission Communication on State Aid to Public Service Broadcasting.

Public-service broadcasters are supervised through politically defined bodies in France, Romania, Hungary, and in Poland there is currently a bill under discussion in Parliament to this effect.

The financial management of the public-service broadcasters is regarded as neither transparent nor efficient in France, Hungary and Romania. Financial mismanagement, corruption or clientelism are suspected. The Romanian public-service broadcaster faces an unprecedented crisis, and efforts are underway to solve the situation in compliance with the EU rules on state aid.

Independent financial supervision is reported in Poland and Bulgaria. In Greece generally all the other requirements are met except for financial control. Overbidding for sports premium rights have been criticised in both Greece and Hungary. The financial status of public-service broadcasters is problematic in Romania, Bulgaria and Greece. In Hungary, after the 2011 media reform, public-service broadcasting was reorganised and provided with adequate financing (approximately €268 million in 2016). There is no evidence of independent supervision of any kind, however, and contracting practices and new services potentially distort the market.

## 7. CONCLUSIONS AND RECOMMENDATIONS

### 7.1. Conclusions

#### 7.1.1. Key conclusions on the status of freedom and pluralism in the media

This study examined the problem of freedom and pluralism of the media in the EU. Considering that several descriptive studies have been prepared in recent years by excellent researchers, this study had the privilege of concentrating on specific matters. Our basic assumption was that the media are pressured from both political and the economic powers. The research hypothesis was that when these two forces ally, the media lose their independence and cannot fulfil their watchdog function, but rather serve particular interests of either the political or economic powers, or both.

We found that several MSs interfere in the media market with indirect state aid, indirect ownership and informal relationships between the political actors and media actors. More precisely, in almost all MSs some media companies are owned by companies that are active in other business sectors, typically those that receive public resources or are otherwise connected to the public sphere, such as construction, defence, energy and transport. The transparency of ownership and of direct or indirect state funding is not satisfactory in any of the examined MSs. However, even transparency would hardly change this practice without a prohibition of informal ownership ties.

The findings supported the hypothesis that the examined processes severely distort media pluralism and undermine press freedom because the press cannot fulfil its democratic role. While no clear violation of legal rules can be proved, in many instances the loopholes of the system are exploited to such an extent that systemic infringement is suspected.

The reason for selecting this specific research question was the undesirable trend that has been observed in the field in the past few years. Although the selected phenomena have a longer history, the magnitude of the cumulative events has reached such a high level that the problem has changed from a quantitative one into a qualitative one. This qualitative deficiency is causing dysfunction of the democratic system, the rule of law and the fundamental rights of EU citizens. The new threat to pluralism has embedded itself in the political systems of various MSs.

It is argued that despite the decline in pluralism in ownership, citizens may still receive ample information to exercise their democratic rights in elections. But in those media systems where the media is captured by economic and political interests, their democratic rights are severely restricted. This affects democratic elections at both national and European levels – which form the foundations of European democracy. A democratic deficit in one country affects the whole of the EU, and through decisions of the European institutions all Union citizens are affected by the democratic deficit of one Member State. There is an imminent danger that this phenomenon might spread to other countries as well, which threatens mainly countries with a totalitarian past – but the number of such MSs is substantial in the European Union. Without a clear action plan, and with further EU enlargement, this problem could well become central in the European Union.<sup>191</sup> While these anomalies are not present in all EU MSs, a regulation to clarify the principles of state interference and strengthening the rule of law would be beneficial to all MSs.

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<sup>191</sup> Brogi, Elda, Alina Dobrova and Pier Luigi Parcu. 2014. European Parliament, Directorate-General For External Policies Of The Union Directorate B Policy Department: Freedom Of Media In The Western Balkans. Brussels.

[http://www.europarl.europa.eu/ReqData/etudes/STUD/2014/534982/EXPO\\_STU\(2014\)534982\\_EN.pdf](http://www.europarl.europa.eu/ReqData/etudes/STUD/2014/534982/EXPO_STU(2014)534982_EN.pdf) (last retrieved on 15 June 2016).

We find that this problem requires urgent policy intervention, in order to safeguard the foundational principles of the EU, which are expressed in the Treaties and in the Charter on Fundamental Rights.

### 7.1.2. Conclusions on the findings

The goal of the country reports was to reveal the illegal or unethical methods that are used in certain MSs to influence the media system, among others informal involvement in ownership and informal state aid. The field research was carried out specifically in those MSs where the research hypothesis could be observed in detail. It was found that the problem is even deeper and more extensive than first thought. The detailed questions were answered by national media scholars with extensive insight and expertise in the area. Because of the nature of the inquiry, relying on official legal sources was not possible for most questions; rather the country experts had to rely on sporadic or anecdotal evidence, case law, press reports and previous research.

State subsidies and state advertisements were examined in the selected MSs. In some MSs – but not all – these instruments are consciously used by the government to support friendly media, and in some MSs this has a decisive effect on the market. The objectionable practice is also contrary to the principles of state aid enshrined in the TFEU.

The effect of digital transformation was also included in the research. Intermediaries are expected to play an increasingly important role in transmitting information, a huge part of which is UGC. The Commission Proposal on the amendment of AVMSD has – for the first time – set out provisions on a certain category of intermediaries, video-sharing service providers, which could be made liable for illegal UGC by MSs. Also, they would be required to impose measurements against UGC that may be harmful to minors or may contain violence and hatred. This would put a burden on intermediaries on the one hand, and empower them to censor UGC on the other, because if they are liable for UGC, they would be interested in prior censorship of UGC. We strongly oppose this proposed piece of regulation. The liability for content should be assigned to actors who actually contribute the content: the content providers themselves, even if they are private individuals.

It was noted that the business models of media financing are in a state of transformation. The traditional advertisement model can no longer sustain all media outlets. Advertisers prefer online advertising and other innovative forms of marketing, partly because the technology allows users to avoid advertisements. Even online media faces new difficulties as parts of their content are consumed via social network sites (such as Facebook), which do not generate advertisement revenue. For these reasons, this is not an optimal time for new market regulation.

It was found in the research that the online media is becoming more popular in those MSs where the traditional mainstream media has lost its credibility. Television still holds its popularity, but the younger generation consumes less television, as opposed to the Internet.

### 7.1.3. Feasibility

The feasibility of the recommended actions was also considered in the course of conducting the research. Careful consideration was given to the possible EU competences. It was established that although no explicit competences exist in the field of media freedom and pluralism, there are hidden competences, and some areas can be regulated under the exclusive competence of state aid and competition.

Regarding the policy recommendations, it was also considered that an EU regulation on ownership concentration has been put on hold several times because of a lack of political consensus; and that several MSs might hesitate to support a complete scheme of regulating

pluralism. For this reason, a careful examination of the various elements of the pluralism issue was recommended, so as to take small steps at a time, and to set up priorities among the goals to be achieved.

National decision-makers and influential market actors are beneficiaries of this structure; therefore there is no realistic chance to change these informal rules from within the MSs. When there is no chance to achieve positive changes within a country based on the available internal legal instruments – and also considering the legislative power and the legal implementation – then international fora remain as a last resort to generate change.

## **7.2. Reasoning of the recommended actions**

1) There is ample data to support the assertion that media freedom and pluralism are at high risk in the EU.<sup>192</sup> The monitoring should be continued but with the effect of serving as an appropriate basis for Community action in the scrutinised MSs. Since media freedom and pluralism are fluid concepts, a detailed legislative regulation might not serve the ultimate goal, or its enforcement would be problematic. Instead, a regular context-specific assessment in the field is recommended by an independent committee of experts. If the media system is found to be free and plural, no actions are needed (Scenario 1). By pointing out the specific strengths and weaknesses of each media system, specific steps and measures could be recommended to each individual MS (Scenario 2). The achievement of the recommended measures is then monitored in the field to ensure that they are effectively implemented to reach the desired outcome. In case the cooperation fails, or if it is established that a state systematically undermines freedom and pluralism in the media, Scenario 3 is applied, which either can take the form of an infringement procedure, or an Article 7 procedure.

2) Subsidising media outlets appears reasonable with regard to the low profitability of some types of professional content. Many markets' size and wealth do not enable a sufficient number of media outlets to flourish. Thus, media subsidies have the potential to enhance the level of pluralism. But public subsidies might also distort pluralism, if not adequately distributed.

The Ninth Protocol attached to the Treaty of Amsterdam allows MSs to provide state aid for the purposes of public-service broadcasting within limits.<sup>193</sup> The Commission's Communication interpreted the words of the Protocol and defined the principles on its implementation.<sup>194</sup> The Commission also had several procedures in this regard. Many of the examined countries do not fulfil the Commission's requirements on providing state aid to public-service broadcasting.

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<sup>192</sup> For example, the monitoring project by the CMPF EUI gave the result that "no EU member state is today free from risks for media pluralism". In the first two pilot projects, out of the 28 countries 17 showed medium risk and 4 showed high risk in the field of political pluralism, and 12 showed medium risk, 11 high risk in the field of market pluralism. 'Political Pluralism in the Media. <http://monitor.cmpf.eu/results-2014/political/>, <http://monitor.cmpf.eu/results-2014/ownership/>, <http://monitor.cmpf.eu/wp-content/uploads/mpm2015.jpg>. (last retrieved on 15 June 2016).

<sup>193</sup> "insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account" Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States

Official Journal C 340, 10/11/1997 P. 0109, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11997D/PRO/09&from=EN> (last retrieved on 15 June 2016).

<sup>194</sup> Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance) OJ C 257, 27.10.2009.

3) The AVMSD is currently under review. This review offers a good opportunity to complete the legislation by requiring MSs to maintain pluralism in the audiovisual media market, using their own instruments. In light of the fact that the original title of the Directive "Television Without Frontiers" applied to the free flow of services, this should not be regarded as straying far from its original goal.

4) Transparency of ownership is an important prerequisite for pluralism in the media market. All media enterprises, including printed and online press, should identify their direct owners, their indirect owners and every person who benefits from ownership. Several states oblige media outlets to report their ownership and any changes in their ownership to the NRA.<sup>195</sup> This information should be accessible to all European citizens and made searchable for purposes of monitoring and supervision by European and national authorities, researchers, industry stakeholders and citizens.

5) The new regulation of platform providers is needed to ensure that freedom of expression of UGC can be enjoyed by all users of online platforms. Platform providers need to be exempted from the obligation to monitor UGC, and from liability for illegal UGC. The correct place to insert such a rule is the ECD.

The Proposal on AVMSD sets forth a planned provision on liability of video-sharing platform providers.<sup>196</sup> Regulation steps on a slippery slope when it imposes responsibility on platform providers regarding third-party content. For this reason, we strongly oppose provision 28a (5):

Member States shall not be precluded from imposing stricter measures with respect to illegal content.

It language sounds like an implied encouragement for MSs to impose liability on platform providers for third-party content, which would stifle the sharing of UGC without prior, private censorship. Only large platform providers would be able to exercise a 24/7 real-time filtering of videos; the smaller platforms would be obliged to terminate their services, dramatically affecting online pluralism. Users would lose control over their own content and be exposed to the censorship of a private party.

AVMSD is not the right directive to regulate this area, because the content in question is not industrial content but user-generated content. Users are subject to general laws and should enjoy freedom of expression without the chilling interference of private companies.

Otherwise, the proposed Articles 28a and 28b provide for compulsory self-regulation of video-sharing platform providers against harmful and violent content. Self-regulation exists currently, and therefore it is unnecessary overregulation. It does not add enough benefit compared to the threat it poses by opening the door to the regulation of platform providers.

The proposed Article 28a refers to the sections in the ECD (Articles 14-15) that exempt service providers from liability for third-party content, but these do not apply to platform providers, as seen in the *Delfi v. Estonia* judgment.<sup>197</sup>

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<sup>195</sup> For example, a change of ownership ratio over 10%, or in the case of public ownership any change should be reported to the database.

<sup>196</sup> Proposed Article 28a–28b.

<sup>197</sup> *Delfi v. Estonia*, Application no. 64569/09, 16 June 2015.

To sum up, the planned 28a of AVMSD proposes a section that a) is redundant, as self-regulation already exists;<sup>198</sup> b) poses a threat to freedom of expression, because it encourages MSs to impose liability on video-sharing-platforms for users' illegal content; and c) does not contain exemptions of liability for third-party content, because the reference to Articles 14 and 15 of the ECD is useless.

6) All media systems are inherently rooted in the society in which they operate and are inseparably connected with the political system. Therefore, it is not possible to change the media system without changing the society. In the absence of the proposed educational projects, the legislative domain is likely to have only a limited transformative effect on the media landscape and on pluralism.

As Sandra B. Hrvatin put it:

...the issue of transparency of media ownership and funding is merely the tip of the iceberg. At the heart of the problem lies a densely interwoven network of alliances between economic and political elites.<sup>199</sup>

Furthermore, in the age of the "attention economy", access to plural content depends to a large extent on the conscious decision of the audience.

Most of the recommended educational projects will be equally beneficial in all EU MSs, such as for example enhancing digital literacy. All projects will serve the goals of the EU to create a common market and an area of freedom and pluralism for its citizens.

Education should target people as citizens, as members of the media audience and as internet users. Younger democracies in Europe still keep many of their social traditions from the times of dictatorships or monarchies.<sup>200</sup> Modifying the deeply embedded package of values that are transferred from one generation to the next is possible only through conscious external interference. Of course, there are good and bad examples of such intervention, e.g. the activities of missionaries in overseas colonies, Soviet propaganda programmes and the educational campaigns conducted in West Germany following World War II.<sup>201</sup> Such programmes were rarely offered after 1989 in the post-communist region.<sup>202</sup>

Political extremism and social problems are also present in Western European MSs. The sustained reinforcement of democratic values, human rights and the rule of law, which are the building blocks of European culture, should remain high on the policy agenda. Media

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<sup>198</sup> YouTube: Don't cross the line.

<https://www.youtube.com/yt/policyandsafety/en/communityguidelines.html#communityguidelines-line-crossing> (last retrieved on 15 July 2016).

<sup>199</sup> Hrvatin, Sandra B. and Brankica Petković. 'Financial engineering for state and media capture'. <http://mediaobservatory.net/radar/state-media-financial-relations-countries-south-east-europe>. 30. March 2016. (last retrieved on 15 June 2016).

<sup>200</sup> On problems see for example: Pew Research Center: End of Communism Cheered but Now with More Reservations, 2009. <http://www.pewglobal.org/2009/11/02/end-of-communism-cheered-but-now-with-more-reservations/> (last retrieved on 15 June 2016); Krémer, Ferenc, Fleck Zoltán, Uszkiewicz Erik, Navratil Szonja. 2012. Technika vagy érték a jogállam? – A jogállami értékek átadása és az előítéletek csökkentése a jogászok és rendőrtisztek képzésében. Budapest: L'Harmattan Kiadó; Fleck, Zoltán. 2010. Változások és változatlanóságok – A magyar jogrendszer a rendszerváltás után. Budapest: Napvilág Kiadó.

<sup>201</sup> After the second world war, education projects on democracy and the political system were carried out in Germany for decades long. Similarly, the Soviet Union invested in civil education of both adults and minors in its conquered countries to spread the ideology of socialism and communism.

<sup>202</sup> 'This total transformation is featured by a new viral video prepared for the German public service television ZDF' in March 2016. <http://www.zdf.de/ZDFmediathek/beitrag/video/2650942/BE-DEUTSCH%2521-Achtung%2521-Germans-on-the-rise#/beitrag/video/2650942/BE-DEUTSCH!-Achtung!-Germans-on-the-rise> (last retrieved on 15 June 2016).

freedom and pluralism are rooted in the human right of freedom of expression, which is a cornerstone of democracy, constituted by individual members of society.

In an era when democratic discourse is said to be in crisis,<sup>203</sup> it is crucial that the constituent elements, i.e. the people, are aware of their rights and the consequences of their decisions.<sup>204</sup>

The European Union should assume the role of educator of European values and the laws of our society. This role can be regarded as an opportunity to strengthen European identities and forge a stronger cohesion among members of the new generation. The topics for education that we recommend also serve as good basis on which to build an informed society, which is a prerequisite to forming a growing and knowledge-based economy.

(7) We recommend further research and follow-up on this topic. The steps we recommend are intended to **create a solid basis for further steps**.

### 7.3. Final remarks

The research yielded some observations that may be useful in policy-making:

1. No complex regulation in media pluralism, especially in ownership concentration, would – in the foreseeable future – fit all MSs, owing to their differences. This fact provides further grounds for decomposing the problem into its constituent parts and, in the first instance, dealing with the most urgent problems on the one hand (like the rule of law), and the least politicised issues on the other (such as education, training, European subsidies, etc.).
2. We recommend taking a gradual approach, in which the greatest anomalies would be addressed first. The rules of media freedom and pluralism should be clearly established one-by-one, starting with broad principles that are nevertheless clearly enforceable.
3. The behaviour of the online media is increasingly non-professional. The regulation of UGC is problematic both for constitutional and technical reasons. Mass media-type content regulation should therefore be avoided, because in an online environment, it is bound to severely restrict freedom of expression.
4. Intermediaries are not appropriate subjects to bear liability for third-party content. The rights and obligations of intermediaries should be defined in the context of the principles of neutrality, mediation and cooperation.

In light of the above, we propose six recommendations, presented below.

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<sup>203</sup> Fukuyama, Francis. 2012. 'Future of History: Can Liberal Democracy Survive the Decline of the Middle Class'. *Foreign Affairs* 91 at 53. Holden, Barry (ed.) 2013. *Global democracy: Key debates*. Routledge; Kellner, Douglas. 2015. *Media spectacle and the crisis of democracy: Terrorism, war, and election battles*. Routledge; McChesney, Robert W. 2015. *Rich media, poor democracy: Communication politics in dubious times*. The New Press.

<sup>204</sup> The importance of this may be symbolised by the Brexit referendum.

## 7.4. Recommendations

### KEY FINDINGS

#### Recommendation #1

- MSs' compliance with the Charter obligation to ensure media pluralism and media freedom should be monitored every two years by an independent body of experts, appointed by the European Commission.
- In the event that the result indicates a "medium threat", first-stage actions would be taken; in the case of "high threat", second-stage actions would be applied.

#### Recommendation #2

- The principles of granting state aid should be defined. These would include political impartiality, fairness, equity, transparency of the funding and accountability of the grantee.
- State aid should be interpreted broadly and include all benefits that competing enterprises receive selectively. State advertising should also be defined as state aid and limited to cases in which advertising has a valid purpose.
- State subsidies provided to the media should be subject to the monitoring system (see Recommendation #1).
- The Regulation on the notification procedure<sup>205</sup> should be amended in order to require systematic reports on state aid granted to the media.
- MSs should be required to regularly report on all public funding provided to media enterprises.
- Participation in public procurement by companies whose ultimate owner also owns a media company should be prohibited or at least be made transparent.
- The principles of the Commission Communication on public service broadcasting should be enacted in the form of a Directive.

#### Recommendation #3

The AVMSD should be amended to require MSs to ensure freedom and pluralism in the audiovisual media markets by achieving the following goals.

1. Adequate rules combating concentration in the market should be put in place.
2. Steps should be taken to enhance the level of the journalistic profession in all countries, by encouraging self-regulation, promoting education and applying best practices in the field of journalists' source protection.
3. Media literacy should be promoted via cooperation with EU programmes to enhance the level of media literacy among European citizens.
4. The independence of NRAs should be ensured (appears to be covered by the proposed Article 30).
5. Cultural and social diversity should be protected.

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<sup>205</sup> Regulation 659/1999/EC laying down detailed rules for the application of Article 93 of the EC Treaty.

#### **Recommendation #4**

- In the context of the AVMSD, a searchable database should be created to contain information on all direct and indirect owners of media service providers and be maintained by European Platform of Regulatory Authorities (EPRA) or the Commission. MSs should ensure that the complete chain of ownership of media companies is registered in the database, up to the ultimate owner.
- The Transparency Directive should be extended to include the print and online press.

#### **Recommendation #5:**

- New text should be inserted after Articles 12-14 in the ECD for the purpose of defining the role of a new actor in the media industry, namely platform providers. We suggest that the text (to become Article 14a) should read as follows:
  - 1. Where an information society service is provided that consists of the conveyance or distribution of information provided by another person, Member States shall ensure that the service provider is not liable for the information conveyed or distributed at the request of the other person, on the condition that:
    - (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
    - (b) the provider, upon obtaining a complaint, acts expeditiously to inform the other person, and asks for his or her approval to forward personal contact information to the complainant.
  - 2. Paragraph 1 shall not apply when the other person is acting under the authority or the control of the provider.
  - 3. The defence under this section shall not be defeated by reason of the fact that the service provider moderates the statements posted on it by the other person.
  - 4. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.

#### **Recommendation #6**

European-wide educational projects should be designed at the European level and organised locally, devoted to promoting the following concepts and principles:

- Democracy, fundamental rights and the rule of law
- Media literacy
- Journalistic ethics and professional quality

Our recommendations contain suggestions on how to make better use of existing instruments, how to amend existing directives or adopt new ones with the aim of protecting pluralism more efficiently. We also propose the launch of new projects and the continuation of existing ones.

None of the suggestions necessitates Treaty change, which is a rather burdensome exercise that is unlikely to take place in the near term.

## 7.5. Recommendations on legislative actions

### 7.5.1. Monitoring and Commission action on media pluralism

The Media Pluralism Monitor project should be continued with the aim of defining **benchmarks** of media pluralism and media freedom within the European Union.

Media pluralism should be monitored regularly by an independent body of experts, appointed by the Commission (preferably every two years). As media pluralism and freedom are fundamental rights rooted in freedom of expression, monitoring can be performed under the framework of the Fundamental Rights Agency (FRA) or under a Rule of Law framework.

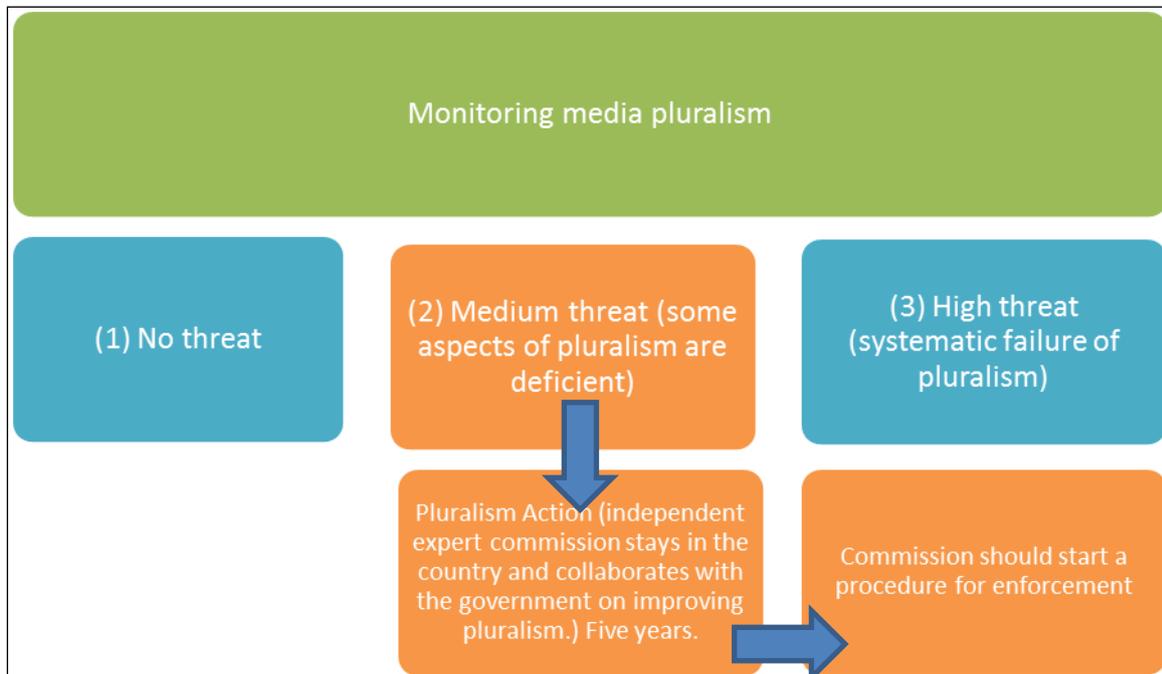
MSs should be required to cooperate in the monitoring procedure. The monitoring process should finish with conclusive results: whether there is no threat to media pluralism, medium (first stage), or high threat (second stage). Distribution of the results should be widely published, especially in forms of infographics or searchable databases.

In both cases of medium or high threat, the MS would be obliged to cooperate with the European Union in further actions.

Actions of the first stage (medium threat) entail that an independent expert commission would stay in the Member State and work together with the Member State's appropriate institutions to improve the aspects of media freedom and pluralism that have been found deficient. A programme will be developed within the first year, which is planned to run for at least three following years. The progress and the results of the cooperation will be evaluated every year, for four consecutive years.

If the results ultimately produced by this procedure are unsatisfactory, the expert commission should establish that there is a very high threat to media freedom and pluralism in the Member State (second stage) and refer the case to the Commission, with a view to starting an infringement procedure or an Article 7 TEU procedure.

**Figure 1: Stages of the recommended monitoring process**



**Source:** Petra Bárd and Judit Bayer, 2016.

## Expected impact

Each MS receives specific support tailored to its needs to improve pluralism. The ongoing presence of the expert panel in the MS would ensure that the projects are carried out appropriately.

**Competence:** Based on the Treaties, more specifically Articles 2 and 6 TEU and the Charter of Fundamental Rights, the EU has competence to act in the field.

States have an obligation to ensure fundamental rights on their territories, among them freedom of expression, which includes freedom of information and pluralism. This obligation flows also from their constitutional traditions, from the ECHR, and from the Treaty of Lisbon and the Charter. The European Union therefore is competent to issue legislation in this subject matter, as already stated by the HLG for Freedom of Information and Pluralism. MSs also have the obligation to take all appropriate measures to ensure fulfilment of the Union's goals arising out of the Treaties. In addition, fundamental rights, as guaranteed by the ECHR shall constitute general principles of the Union's law.

### Recommendation #1

- MS's compliance with the Charter obligation to ensure media pluralism and media freedom should be monitored every two years by an independent body of experts, appointed by the European Commission.
- In the event that the results indicate a "medium threat", first-stage actions would be invoked; in the event of "high threat", second-stage actions would be applied.

#### 7.5.2. Legislation should be developed on state aid and subsidies granted to media outlets

a. State aid is a part of competition law, which has been regulated for a long time in the European Union. The Treaty prohibits "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition*",<sup>206</sup>i.e. which would distort the market, with several exceptions.<sup>207</sup>

To reap the benefits of subsidising worthy media outlets, while preventing the misuse of this tool, **specific rules on how state aid can be granted, should be defined.** The principles should include political impartiality, fairness, equity, transparency of the funding, and accountability of the grantee. State subsidies provided to the media should be subject to the requirement of transparency (see below at 7.5.4.), and a monitoring system (see above in 7.5.1.). The Regulation 659/1999/EC on the notification procedure should be amended in order to require systematic report on state aid granted to the media.<sup>208</sup>

MSs should be required to submit a **yearly report on the state subsidies** they provided to any media outlets, including state advertising, identifying which media received public resources and how much.

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<sup>206</sup> Article 107 TFEU.

<sup>207</sup> Relevant state aid legislation is: Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02). EUROPEAN COMMISSION Communication from the Commission on State aid for films and other audiovisual works (2013/C 332/01)

<sup>208</sup> Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty Text with EEA relevance

b. (Definition of state aid) The definition of state aid includes all sorts of public resources which an undertaking receives on a selective basis, and which brings it in a better economic situation than its competitor which does not receive that asset or service. This can extend to postal or print services, publishing state advertisements, or ordering services from the media enterprise.

For these reasons it is recommended that participation in public procurement of companies whose ultimate owner also owns a media company, should be prohibited, or at least be made transparent (according to 7.5.4. below). Participation in public procurement should also be regarded as a form of state aid for the purposes of media enterprises.

c. (*De minimis* exemption) It is recommended to exempt media enterprises from the *de minimis* exemption, just as agricultural production and fisheries are exempted, or as road freight transport for hire or reward are exempted from notice only under €100,000, because competition in the media market has special importance for its democratic relevance.

d. (Public-service broadcasting) Proper control of public-service media on the basis of the Commission Communication on State Aid to Public Service Broadcasting<sup>209</sup> is expected to exclude the possibility of political influence and clientelism. The same rules will also be applied to state-funded national news agencies.

#### **Expected impact:**

- **Competition distortion is minimised** if state aid is distributed on a fair and transparent basis.
- Providing state aid to the media sector on a clear, transparent and impartial basis may improve the quality of media content and the level of pluralism.
- Transparency of such funding shows respect to the **rule of law** and citizenship, which is duly informed about the spending of public resources.
- Proper control, supervision and transparency of public-service media and of the distribution of state resources to private media can be expected to diminish the possibility of **political influence and clientelism**.
- Regulated subsidising should improve prudent economic management in both private and public-service media.

#### **Competence:**

The European Union has exclusive competence in the field of competition and state aid.

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.<sup>210</sup>

State aid is generally prohibited, and only allowed, if specific regulatory exemption is granted.

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<sup>209</sup> Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance) OJ C 257, 27.10.2009.

<sup>210</sup> Article 3 TFEU and Articles 107–109 TFEU.

In this case, the European competence is justified not only by the interest of a strong European economy, but also respect for fundamental rights, including the right to free expression, freedom of information, and pluralism, which are set as goals by Article 2 TEU.

### **Recommendation #2**

A new Directive on state aid in the media sector should be issued, which defines the frames of providing state aid to private commercial media, and state aid to public service broadcasting.

- The principles of granting state aid should be defined. These should include political impartiality, fairness, equity, transparency of the funding, and accountability of the grantee.
- State aid should be interpreted broadly and include all benefits that competing enterprises receive selectively. State advertising shall also be defined as state aid, and limited to cases when advertising has valid purpose.
- State subsidies provided to the media should be subject to the monitoring system (see above in Recommendation 1.).
- Regulation on the existing notification procedure should be amended in order to require systematic report on state aid granted to the media.
- MSs should be required to regularly report to the Commission on public funding provided to media enterprises.
- Participation in public procurement by companies whose ultimate owner also owns a media company, should be prohibited, or at least made transparent.
- The Commission shall consequently enforce the state aid rules according to the Communication on State Aid to Public Service Broadcasting.

#### 7.5.3. Legal requirement to realise the conditions of media pluralism and freedom

AVMSD should require MSs to achieve and maintain freedom and pluralism on the audiovisual media market with their own instruments. Elements of media pluralism should be defined in AVMSD as follows:

1. MSs shall ensure that they have adequate anti-concentration rules in place.
2. MSs shall make the necessary steps to enhance the level of journalistic profession in their countries, by encouraging journalistic self-regulation, promoting education, apply best practices in the field of journalists' source protection.
3. MSs shall make the necessary measures to promote media literacy and cooperate with European Union programmes (set out below under 7.6. Educational Projects) to enhance the level of media literacy among European citizens.
4. MSs shall ensure cultural and social diversity.
5. MSs shall ensure independence of NRAs, ensuring the requirements of the Council of Europe's Recommendation 2000(23) and Article 3 of the Framework Directive;

The last recommendation appears to have already been implemented by the proposed Article 30 of the Proposal on AVMSD, which provides for several safeguards relating to NRAs. Article 30 and Article 31 on ERGA are both warmly welcome. Independence of NRAs have already

been prescribed by the Framework Directive,<sup>211</sup> as pointed out by the ERGA Report on the independence of NRAs (published in December 2015).<sup>212</sup> It is also set out in more detail in the Council of Europe Recommendation on independent media authorities.<sup>213</sup>

**Expected Impact:** Defining elements of pluralism helps the monitoring procedure defined in Recommendation #1. The above-enumerated elements of pluralism should be achieved by the MSs themselves, using their own instruments; in that way, the proposed process does not intrude on national sovereignty. Requiring MSs' to maintain and define certain elements of pluralism can be regarded as a first step towards creating a harmonised EU law on pluralism. There is a danger that this justification would provide a weaker basis than that suggested in Recommendation #1, which is based on the Treaty. The final decision should be based on political realities.

**Conferral:** Article 11 of the Charter of Fundamental Rights,<sup>214</sup> Articles 101-118. TFEU, Article 167 (4) TFEU, as for the AVMSD.

**Subsidiarity:** Europe is a common market of services, with an increasingly international media landscape. The European Union is a democratic formation, in which not only MSs, but also European citizens are formative elements. This fact is reflected in the direct elections to the European Parliament, the legal institution (*instituto giuridico*) of the European Citizens' Initiative, Article 3 of the TEU,<sup>215</sup> Article 20 of the TFEU<sup>216</sup> and Article 22 of the TFEU,<sup>217</sup> just to mention the most important citizens' rights. Exercising the right of free movement and the right to vote in European Parliament elections and in municipal elections in the MS where the citizen resides would become nominal, and not in practice freely applicable to European citizens if the European Union does not ensure the same level of fundamental freedoms, including freedom of expression and pluralism, throughout the whole European Union.

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<sup>211</sup> Article 3. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

<sup>212</sup> 'ERGA Report on the independence of NRAs'. 15. December 2015. [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=12952](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=12952) (last retrieved on 15 June 2016).

<sup>213</sup> Council of Europe Recommendation (Rec (2000)23) on independent media authorities.

<sup>214</sup> As declared by AVMSD Recital 16: to enhance „compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union in particular Article 11 thereof“.

<sup>215</sup> Article 3: The Union's aim is to promote peace, its values and the well-being of its peoples.

<sup>216</sup> Article 20. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

<sup>217</sup> 22.1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. 2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State.

### **Recommendation #3**

The AVMSD should be amended with the requirement on MSs to ensure and maintain media freedom and pluralism in the audiovisual market.

Elements of this obligation should be as follows:

1. Adequate anti-concentration rules should be put in place in the market.
2. The necessary steps should be taken to enhance the level of journalistic profession in their countries, by encouraging journalistic self-regulation, promoting education, apply best practices in the field of journalists' source protection.
3. Media literacy and cooperation with European Union programmes should be promoted to enhance the level of media literacy among European citizens.
4. The independence of NRAs should be reinforced, ensuring the requirements of the Council of Europe's Recommendation 2000(23) and Article 3 of the Framework Directive;
5. Cultural and social diversity should be ensured.

#### **7.5.4. Transparency database**

A transparency database should be maintained by the European Platform of Regulatory Authorities (EPRA), or alternatively, by the European Commission. The database should identify the direct owners, indirect owners and all legal or natural persons who benefit from the ownership up until the final natural person. Changes regarding the ownership should be reported within three months.<sup>218</sup> The "Database on TV and on-demand audiovisual services and companies in Europe" (MAVISE database) kept by the Council of Europe is a good example.

Ideally, the activity of the owner company should also be stored in this database, and whether it is funded from public resources, among others, from public procurements or state subsidies. The database should be searchable, with various filters, to allow getting informative results.

The requirement of submitting data to the database should be incorporated in the AVMSD. In addition, the scope of the Transparency Directive<sup>219</sup> should be extended in order to include not only audiovisual media services, but also printed press and online written (non-audiovisual) media outlets.

#### **Expected impact:**

A transparency database will provide a credible information system in the EU. It will create a safer environment for investors, provide public information for the citizens, authorities, for future research and for policy strategy. The information can be filtered and ordered along various aspects. In a few years it will yield longitudinal and comparative data on the transformation of the media markets in the various countries. The database would provide

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<sup>218</sup> The problem of offshore companies probably cannot be resolved in this round of legislation. Prohibition of offshore ownership would belong among rules on anti-concentration, which is planned to come as second.

<sup>219</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings

some stability to maintain the achieved improvements in media pluralism. The proposed legislative action only interferes to a very limited extent with the MSs' sovereignty.

**Competence:** Article 11 of the Charter of Fundamental Rights, Articles 101-118. TFEU.<sup>220</sup>

#### Recommendation #4

- A searchable database should be created by the AVMSD and maintained by EPRA or the European Commission.
- AMVSD shall require MSs to ensure that media companies' ownership is registered in the database up to the ultimate owner.
- The Transparency Directive should be extended to include printed press and online press.

#### 7.5.5. Clarification of the rights and obligations of internet service providers

This proposed action requires an amendment to the E-Commerce Directive (ECD), and to the Proposal on AVMSD.<sup>221</sup>

It is recommended that the ECD is updated by inserting reference to a new type of actor, called "**platform provider**", which conveys other users' content. The liability for content should be assigned to actors who actually contribute the content: the content providers themselves, even if they are private individuals.

It is strongly recommended that **Articles 28a and 28b are omitted** in their entirety from the amended AMVSD.<sup>222</sup>

It is recommended that the **ECD is completed with the following additions:**

A) A new definition of platform providers:

*1. Where an information society service is provided that consists of the convey or distribution of information provided by another person, Member States shall ensure that the service provider is not liable for the information conveyed or distributed at the request of the other person, on the condition that:*

*(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*

*(b) the provider, upon obtaining such knowledge or awareness, expeditiously follows the procedure set out below (notice-notice procedure).*

B) A notice-and-notice procedure for all illegal content, similar to the UK Defamation Act 2013. This procedure would consist of the following steps:

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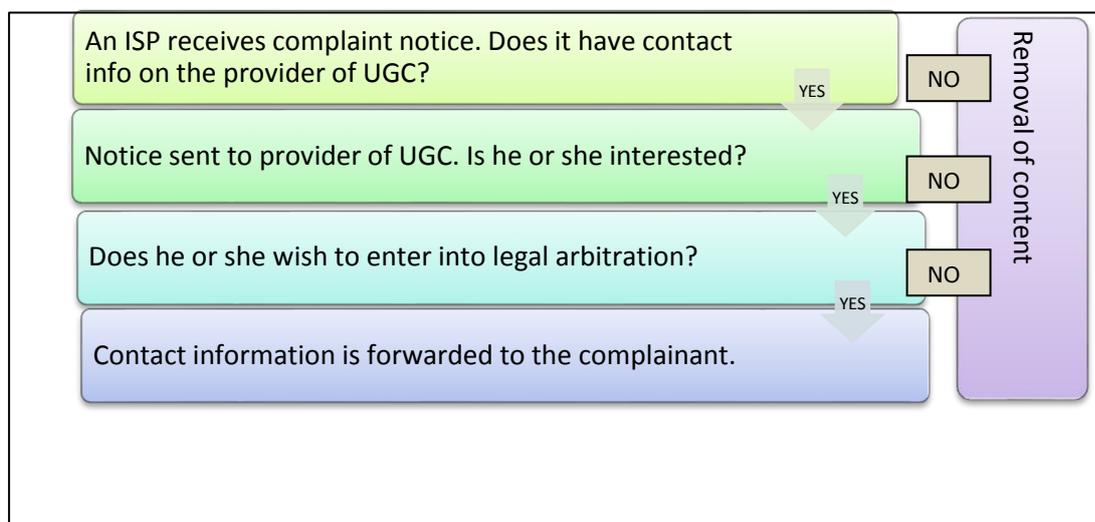
<sup>220</sup> As declared by AVMSD Recital 16: to enhance „compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union in particular Article 11 thereof“.

<sup>221</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

<sup>222</sup> At a minimum, Article 28a (5) should not be passed because of its expected chilling effect on freedom of expression.

1. When the ISP receives a notification on illegal content, it forwards the notification to the provider of the objected content.
2. The content provider has to decide whether to enter into a legal dispute or remove the content. If it chooses to enter into legal proceedings, the contact details are forwarded to the complainant.
3. If the content provider is not known to the ISP, the content is removed.
4. If the content provider does not respond within the specified deadline, or declines to enter into legal arbitration, the content is removed.

**Figure 2: Simplified scheme of the notice-and-notice system**



**Source:** Petra Bárd and Judit Bayer, 2016.

As has been noted on several occasions, the result is the removal of the content objected to, which is what happens today under Article 14 of the ECD. The difference, however, is that the content provider would have the opportunity to take responsibility for his or her content.

**Expected impact:**

- Through the notice-and-notice procedure, freedom of expression would be respected, but balanced against other rights. Content providers would have the opportunity to take responsibility for their own content. (The absence of such a procedure might even immorally encourage users to upload illegal content in the knowledge that the responsibility falls on the platform provider.)
- All industry actors enjoy legal security: ISPs, users, authorities, courts and investors. Strengthening the common market, encouraging innovation and the provision of information society services.
- The chilling effect caused by the planned regulation of video-sharing platform providers by AVMSD and consequently by MSs would be avoided.

**Conferral:** Article 114. TFEU as defined in the ECD, and beyond: freedom of expression, pluralism of the media and democratic participation of citizens in public discussion shall also serve as a reason.

**Subsidiarity:** There is already a divergent practice among MSs, which creates insecurity among industry and consumers. Online media and other actions and transactions are inherently international. A strong interest stands to remove barriers from the free movement of online services as well as to the development of cross-border services.

### Recommendation #5

- Remove planned Article 28a and Article 28b from the Proposal on amendment to the AVMSD.
- Insert a new actor after the articles 12-14 of E-Commerce Directive: the role of platform provider. Text of the recommended section (Article 14a):
- *1. Where an information society service is provided that consists of the convey or distribution of information provided by another person, Member States shall ensure that the service provider is not liable for the information conveyed or distributed at the request of the other person, on the condition that:*
- *(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*
- *(b) the provider, upon obtaining a complaint, acts expeditiously to inform the other person, and ask for his or her approval to forward personal contact information to the complainant.*
- *2. Paragraph 1 shall not apply when the other person is acting under the authority or the control of the provider.*
- *3. The defence under this section is not defeated by reason of the fact that the service provider moderates the statements posted on it by the other person.*
- *4. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.*

## 7.6. Educational projects

In order to achieve long-term improvement in the social setting of freedom and pluralism of the media, as well as respect for the rule of law, **preventive policy instruments** should be devised in the form of **educational projects**.

It is recommended that the projects are designed, organised and supervised by the EU institutions, and only technical tasks are transferred to local institutions, in order to ensure that the programs are successful in changing traditional patterns of thinking rather than reinforce traditional structures and beliefs.

Recommended topics:

a. **Democracy, fundamental rights and the rule of law.** Information on these subjects should be distributed from the early childhood on, in forms appropriate for the age and group of youngsters. Older generations should be targeted by way of social activism and travelling libraries. We regard as a good example the German Bundeszentrale für Politische Bildung,<sup>223</sup>

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<sup>223</sup> <https://www.bpb.de/>

which has maintained a dialogue with all shifts of the society in an entertaining, open and informative fashion.

b. **Media literacy.** Besides information about the features and effects of traditional media, the usage, the threats and opportunities of the online media shall also be introduced to all generations. Specifically pluralism-related subjects should be included relating to the conscious selection of content; skills of finding trustable information; the illusory universe that can be experienced through social networking; and the technical, moral and legal conditions of generating content. User education and user empowerment should be in the focus point. Users shall be taught to regulate for themselves: to avoid harmful and to access diverse and high quality content. „outsourcing of regulation.”

c. **Journalistic ethics and professional quality.** More effort should be placed on educating journalists to resist pressure, to apply investigative methods, access public information and separate facts from opinions.

### **Recommendation #6**

Europe-wide educational projects designed at the European level and organised locally in the following topics:

- Democracy, fundamental rights and the rule of law
- Media literacy
- Journalistic ethics and professional quality

## **7.7. Follow-up and further research**

To support long-term success in the correction of bad practices, and prevention of the deterioration of the situation on the one hand, and the emergence of new problems in the realm of media freedom and pluralism or other democratic rights and the rule of law, the results of this project require follow-up.

1. Further analysis and wide publication of the comparative research results are recommended. MPM should be carried on, or possibly cooperate with the official monitoring procedure in Recommendation #1. The factors influencing pluralism should be scrutinised also one-by-one, (for example, concentration of ownership), separating out the effect of other factors. For example, having low concentration levels is not necessarily the result of good legal regulation, on the contrary.
2. It is recommended that the EU promotes and encourages academic and policy research on the new forms of online mass communication content and user behaviour, including user empowerment.

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## **MEDIA PLURALISM IN BULGARIA**

**Report by Alexander Kashumov<sup>1</sup>**

### **Summary**

The Bulgarian Constitution provides for the freedom of everyone to hold opinions,<sup>2</sup> the right to seek, receive and impart information<sup>3</sup> and the freedom of the press from censorship.<sup>4</sup> A Radio and Television Act (RTA) (1998) lays down the rights and obligations of broadcast media. Print and online media are not regulated by law; neither is there a state body responsible for overseeing their functioning. The protection of journalistic sources is not subject to a constitutional guarantee and is only briefly mentioned in the RTA. The practice of courts and oversight bodies in this respect is based mainly on Council of Europe standards.<sup>5</sup>

Print media have been legally bound to disclose their real owners since 2010,<sup>6</sup> including in an online database.<sup>7</sup> Failure to comply is punishable by a fine imposed by municipal mayors, but no such cases have been reported. Broadcast media report on ownership to the Council for Radio and Television (CRT), which oversees the implementation of the RTA. Internet outlets do not report anything to any public body. Internet providers register with the Committee for Regulation of Communications.

There are links between owners and other actors on the economic landscape. An influential player in the field of print and online media is the New Media Group,<sup>8</sup> owned by Delyan Peevsky, an MP.<sup>9</sup> Alongside newspapers and online outlets he also controls businesses in

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<sup>1</sup> Attorney-at-law, Head of Legal Team of the non-governmental organization "Access to Information Programme".

<sup>2</sup> Article 39.

<sup>3</sup> Article 41.

<sup>4</sup> Article 40. The rights enshrined in Articles 39-41 of the Constitution are interpreted broadly vis-à-vis restrictions and referred to as communication rights by the Constitutional Court in its Decision No 7 of 4 June 1996 on constitutional case No 1/1996.

<sup>5</sup> The practice of the European Convention on Human Rights under Article 10 of the European Convention on Human Rights. However, in 2014-2015 the Commission for Financial Supervision imposed fines on media who reported on the case of the bankruptcy of the fourth biggest commercial bank and related government policies. Part of the sanctions were imposed for failure to comply with the Commission's order to disclose information, where the Commission rejected the right to protection of journalistic source argument. A fine of 100 000 BGN (around 50 000 EURO) was repealed by the court, two smaller fines were approved however and two other cases are still pending in the summer of 2016.

<sup>6</sup> Under the Mandatory Deposition of Print and Other Materials Act.

<sup>7</sup> Administered by the Ministry of Culture. The online register is not easily found. See its website at: <http://mc.government.bg/page.php?p=58&s=429&sp=63&t=436&z=0>.

<sup>8</sup> The group started with financing from the 4th biggest commercial bank (Corporate Trade Bank), which went bankrupt in 2014. In 2010 it was discovered that a large proportion of ministries' budget money and state-owned businesses' deposits were in that bank.

<sup>9</sup> Belonging to the political party Movement for Rights and Freedoms, which for many years was (and probably still is) the third biggest party. Various media have reported that the party is connected with businesses and affairs involving possible corruption and wrongdoings in public procurement, while the party controls a number of municipalities, especially in the regions inhabited predominantly by the ethnic-Turkish population.

different sectors such as construction, tobacco and newspaper distribution.<sup>10</sup> The two TV channels owned by other parties do not have a large market or audience share.<sup>11</sup>

The two biggest TV groups had market shares totalling above 80% and audience shares exceeding 60% in 2015.<sup>12</sup> The public service television is ranked third.<sup>13</sup> Recent discussions suggest a merger with Bulgarian national radio.

There is cross-ownership concentration between Internet service providers (ISPs) and content providers, for example cable TV groups. The biggest share in the ISP market belongs to the three mobile-communications providers.<sup>14</sup> The most influential online media, as assessed in 2015, are Offnews.bg, Blitz.bg, Vesti.bg, Dnevnik.bg. Two of them belong to groups embracing other print and online media, one of them to the New Media Group.<sup>15</sup>

The overall share of people using the Internet is 59.1%. Around 38.7% access the Internet via a smart phone or tablet.<sup>16</sup>

Broadcast content is supervised by the CRT. In the case of press and online outlets there is not a single supervisory body. In cases of insult and defamation, the civil and criminal courts are competent; discrimination is considered by the Commission for Protection from Discrimination; claims for privacy violations are reviewed by the Commission of Personal Data Protection; and the Commission on Protection of Competition is in charge of handling complaints of unfair competition. In 2014, the Commission of Financial Supervision took action in cases involving the alleged need to protect the financial system in cases of media reporting on banks and other public enterprises.

## **I. Classic issues of pluralism**

### **1. Ownership concentration: Law, practice and context**

The Protection of Competition Act (PCA) defines market concentration and the exemptions from it.<sup>17</sup> The law obliges businesses to report to the Commission on the Protection of Competition (CPC) if their income exceeds a certain threshold.<sup>18</sup> In such cases, the CPC permits concentration if it does not lead to establishing or increasing a dominant position, which would significantly prevent competition in the relevant market.<sup>19</sup> In cases of failure to report concentration, or of concentration prohibited by CPC or not in compliance with

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<sup>10</sup> The ambitious project *Lafka* provisioned the construction of shops (kiosks) all over the country that sell newspapers and tobacco, thus facilitating a monopolization of press circulation. Although it did not succeed in covering the whole country, still *Lafka* is the biggest chain of kiosks in the country. In its Decision No 1454 of 28 October 2013 the Commission on the Protection of Competition found concentration in the print media distribution market for the period 2009-2011.

<sup>11</sup> Alfa and Skat are owned by two nationalistic political parties.

<sup>12</sup> Btv Media Group and Nova/MTG.

<sup>13</sup> Bulgarian National Television, state owned.

<sup>14</sup> M-Tel, Vivacom and Telenor.

<sup>15</sup> This is the case with Blitz.bg .

<sup>16</sup> Data from the National Statistics Institute 2015.

<sup>17</sup> Articles 22 and 23 PCA.

<sup>18</sup> Article 24 PCA.

<sup>19</sup> Article 26, para. (1)f PCA.

conditions set by the Commission it may impose sanctions in the amount of up to 10% of the previous year's income.

The legal regime under PCA applies also to the media sector. There are no provisions in the Radio and Television Act pertaining to market concentration. Print media are not regulated by law so there are no rules related to competition either. Issues related to concentration of Internet media ownership have not been discussed at all to date. In 2010 draft amendments of the media regulation were prepared, including provisions on media market concentration. The CPC commented on the proposal's compliance with existing competition law and criticised the proposed amendments with the argument that market concentration can be assessed only by means of an economic analysis.<sup>20</sup> CPC also emphasised the need to assess the media market also from the perspective of pluralism and freedom of expression. It made such an assessment separate from the one connected with the identification of market concentration, applying potentially higher standards and indicating that there might be a situation in which the CPC would not find concentration, but an authority exerting oversight on the issue of media pluralism would permit even less concentration.<sup>21</sup>

The amendments related to media concentration were not adopted. In its practice on media concentration, the CPC applies an assessment of the market share, considering the audience share and share in the advertising market, but it does not use other methods of measuring pluralism.<sup>22</sup> CPC is of the opinion that the significance of the audience share in assessing the market share has a limited effect.<sup>23</sup>

Media concentration issues have been publicly debated in Bulgaria since the 1990s. Relatively soon after the change from communism to the market economy, in the late 1990s, the country faced the question of concentration in the print media sector in the case of the purchase of the two most influential newspapers at that time, Trud and 24 hours by the WAZ Group. The proceedings were started under the then-applicable Protection of Competition Act. The case did not reach a final court decision. The group dominated the market until the late 2000s.<sup>24</sup>

In the late 2000s, the creation and rapid enlargement of the New Media Group were seen again as a case of media ownership concentration. It focused mainly on the print media market and on online media to a certain extent. The new issue was the group's close link with politics and a particular bank. By purchasing local media it took a dominant position in the local media market and in print media distribution. It was estimated that the company had gained a 70-80% share in the print media distribution market.<sup>25</sup>

After the public exposure of the effects of the operating model of the New Media Group on other media and the subsequent public debate in 2011, the Commission on the Protection of Competition made a sectoral analysis of the concentration in the print media distribution market.<sup>26</sup> It found, among other things, that the concentration in 2009-2011 constituted an

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<sup>20</sup> Decision No 1498 of 25 November 2010 of CPC, available [in Bulgarian] at: <http://www.cpc.bg/reg/Decision.aspx?DecID=300038293>.

<sup>21</sup> Ibid., p.12.

<sup>22</sup> See Concentration of media market: existing situation and challenges [in Bulgarian], p. 7, in survey of CIS: Media ownership in Bulgaria: existing situation and problems: [www.csd.bg/fileSrc.php?id=22655](http://www.csd.bg/fileSrc.php?id=22655).

<sup>23</sup> Decision No 385 of 8 April 2010, p. 20.

<sup>24</sup> A survey of 2016 qualifies such cases of media ownership concentration as a tool for "taking the state". See State Capture Unplugged report by CSD 2016, page 36, available at: <http://www.csd.bg/artShow.php?id=17723>.

<sup>25</sup> Ibid.

<sup>26</sup> Decision No 1454 of 28 October 2013 of CPC.

obstacle to new competitors entering the market. It concluded that there was a lack of transparent rules in the sector. Nevertheless, the CPC issued permission for such concentration, accepting that it would not establish or increase its dominant position in the distribution market.<sup>27</sup>

## **2. Ownership: How transparent is ownership of media enterprises?**

With regards to print media in Bulgaria, information about the ownership of media enterprises is accessible to the public, but share ratios are not, meaning that one can identify whether a person holds an interest in a certain enterprise, but not the extent of this interest. The public database contains data about registered ownership and about the real owner standing behind it. The legal basis for this is the Mandatory Deposition of Print and Other Materials Act (MDPOMA) as amended on 5 November 2010 (Article 7a, para. (1)). However, cross-referencing the information disclosed under the MDPOMA with information obtained from the Companies Register (publicly available online) will help in revealing the shareholding ratios. Foreign companies owning media are also registered and can be identified in the registries. One area in which it might be difficult to establish ownership is that of companies registered offshore. In reality, however, such companies do not have substantial ownership on media in Bulgaria so the problem is not a significant one. The Ministry of Culture is obliged to publish the information in an online register on its website (Article 7a, para. (5) MDPOMA). The site contains a list of print media and relevant data for the periods up to April 2016 in Excel spreadsheets.<sup>28</sup> The real media owners must also be disclosed there.

With regards to broadcast media, ownership information is available via the online public register provided by the Council for Electronic Media.<sup>29</sup> In addition, licence applicants are required to provide information on the capital structure and shares as part of their submission (Article 111 para. (2), subpara. (2) RTA). Finally, one can access ownership information by filing a request under the Access to Public Information Act (APIA) of 2000. It should also be noted here that broadcast media are under no obligation to disclose beneficial interests.

## **3. Political and economic influence on media owners**

There are links between media owners and other actors operating in the economic landscape. This fact was disclosed following a joint access to information request submitted by the 11 biggest newspaper editors-in-chief in 2010, which revealed that a media group owning newspapers, internet outlets and a TV station borrowed a large amount of money from a big corporate bank – Corporate Trade Bank (CTB). In response to the request, the Minister of Finance also revealed that a considerable amount of budget money was deposited by ministries in the same bank, and that state-owned companies operating in the sectors of energy, public transport, defence and information service also held bank accounts of considerable size in that same bank. In 2014 CTB's licence was withdrawn by the Bulgarian National Bank (the Central Bank) and CTB fell into bankruptcy, being at the time the fourth-biggest commercial bank in Bulgaria. The said media group's owner Delyan Peevsky saved most of the media in the group. He also runs businesses in different sectors such as construction and tobacco and newspapers distribution (Lafka). Businesses controlled by Mr.

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<sup>27</sup> Decision No 1455 of 28 October 2013 of CPC, available [Bulgarian] at: <http://www.cpc.bg/reg/Decision.aspx?DecID=300038293>

<sup>28</sup> See at <http://mc.government.bg/page.php?p=58&s=429&sp=63&t=436&z=0>.

<sup>29</sup> See at [http://www.cem.bg/linear\\_reg.php?cat=1](http://www.cem.bg/linear_reg.php?cat=1).

Peevsky are allegedly involved in big public procurements, especially in the field of construction.

The media group (which named itself New Media Group) is informally connected with the political party, the Movement for Rights and Freedoms (DPS). For many years, DPS was (and probably still is) the third-biggest party on the political landscape. Its leader for many years, Ahmed Dogan, who formally resigned in 2013 (but is still influential), was remembered for saying, publicly, that the party was surrounded by a circle of companies. Journalists' investigations have linked the party with corruption and wrongdoings in public procurement, while the party controls a number of municipalities, especially in the regions inhabited by ethnic Turks.

The aforementioned ties are clear and known to the public. Mr. Peevsky is an MP from DPS and his mother, Irena Krasteva, was the official owner of many of the print media within the New Media Group, as could be seen from the public register of print media ownership. The existence of the linkages of New Media Group with a political party and other businesses was revealed by the press. Such revelations were often not without consequences. For example, in 2014 the owner of the prestigious Capital Weekly (Iconomedia) was fined by the Commission for Protection of Competition for publishing an article about the 'triangle scheme' between the media group, the bank (CTB) and the state, as described above.

With regards to political influence, there are media owned by political-party-affiliated actors. As already described above, the New Media Group, embracing several print and online media, is known to be affiliated with DPS. Also, there are certain media that are officially owned by political figures or parties, as this is not prohibited by law in Bulgaria. For instance, the far-right party "Ataka" has registered a TV channel called Alpha TV. Likewise, the co-chair of the nationalist party "National Front for the Salvation of Bulgaria" is also the owner of a TV channel called SKAT TV. These affiliations are completely known to the public, as they are disclosed on the websites of the relevant channels.<sup>30</sup>

The media outlets whose political affiliation is known are clearly politically biased. In consequence, channels such as Alpha TV and SKAT TV have a very limited audience. In fact, their audience share is far below 25%. A study by Market LINKS from May 2015 shows that SKAT TV was watched by 0.9% of the audience, whereas Alpha TV did not even rank in the top 15, meaning that it was followed by less than 0.8% of people watching television.<sup>31</sup> The outlets within the New Media Group are also biased inasmuch as their news and political reporting is usually directed against public figures that advocate reform in the spheres of justice and corruption (e.g. former Minister of Justice Mr. Ivanov, President of the Supreme Court of Cassation Lozan Panov, etc.), and attack social entities (e.g. Open Society Institute and America for Bulgaria Foundation) and public speakers (informal leaders of 2013 protests against the government where DPS was in the ruling coalition). These media are more influential in terms of market and audience share, but rarely express direct political messages. They belong to the top four print media groups whose joint market share is above 80% for daily newspapers, above 70% for weekly newspapers and above 80% for magazines.

At the same time, the TV market is not prone to politics, as the two biggest groups (Btv Media Group and Nova/MTG) are not politically affiliated and are assessed to have a market share above 80% and an audience share above 60% in 2015.<sup>32</sup>

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<sup>30</sup> See Alpha TV - <http://www.predavatel.com/bg/tv/alfatv> ; SKAT TV - <http://www.skat.bg/nfsb.php>.

<sup>31</sup> Available at: <http://www.marketlinks.bg/bg/news/top-15-na-nay-gledanite-tv-kanali-za-may-2015-28.html>.

<sup>32</sup> See <http://clubz.bg/31425-kak-izglejda-bylgarskiqt-medien-pazar-prez-2015-g>.

In a nutshell, in the case of Bulgaria there is no clear correlation between non-transparent ownership, political affiliation and political bias. In the biggest case involving the New Media Group, which is connected with political parties and businesses, the name of the owner is known. It was listed in the public register of print media for years under the name of Irena Krasteva, until recently the name of Mr. Peevsky was officially published. However, the audience was informed of the real situation by the other media. These public revelations or at least some of them were followed by various kinds of legal prosecutions.

#### **4. Funding: How transparent is the allocation of public money in the media landscape?**

There are media subsidies using public money based on contracts concluded by state authorities with media for communication services. The money is often distributed on an unequitable basis, usually in exchange for shaping or maintaining a good image of the political authorities. According to the "Balkan Media Barometer: Bulgaria 2014", there is a growing trend where more and more media turn out to be subsidised.<sup>33</sup> Thus, media owners are subjected to political influence and, as a result, begin to monitor and filter the content produced by the journalists they employ. There are cases where a media outlet that has received government funding stops publishing critical opinions about the work of the relevant government ministry or institution that has provided the funding. This is, in effect, a form of media censorship. Moreover, the role of advertiser is on many occasions abused by the state, as it allocates funds in exchange for the promotion of its self-interest (e.g. giving only to media maintaining its good image), rather than on a fair and equitable basis. Thus, state advertising becomes a tool for manipulating editorial content. The largest share of state advertising is directed at television channels, which suggests that they are the most susceptible among the media to political influence.<sup>34</sup>

Regarding local markets, journalistic investigations conducted in 2016 show that local authorities engage in practices of buying a good image from the media. A good example is the contract for municipal funding made between the mayor of Blagoevgrad city and the media. The contract stipulates an obligation on the part of the media to safeguard the good image of "Blagoevgrad Municipality, City Council, Mayor, Chairman of the Municipal Board and authority of municipal officials" by withholding the publishing of any unconfirmed, obscene, or defamatory information about them.<sup>35</sup> In short, the funding is conditional on respecting a prohibition to discredit the local authorities. The annual report of the Media Democracy Foundation (2016) shows that the tendency of politicians to influence media content is pervasive. In effect, this creates a political monopoly on the media market. As a result, media that do not conform to political whims are bound to suffer from a lack of funding. For instance, in 2015 the newspapers *Pressa* and *Tema* were forced to close down due to financial problems that they could not cope with. They could have perhaps continued to operate if funding was available to all media on an equitable basis.<sup>36</sup>

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<sup>33</sup> See Friedrich-Ebert-Stiftung (2014). *Balkan Media Barometer: Bulgaria 2014*, p.13. Available at: [http://www.fmd.bg/wp-content/uploads/2014/10/balkan\\_media\\_barometer\\_bulgaria\\_2014\\_eng.pdf](http://www.fmd.bg/wp-content/uploads/2014/10/balkan_media_barometer_bulgaria_2014_eng.pdf).

<sup>34</sup> See Blagov, Krum and Spassov, Orlin (2014). *Influence on the Media: Owners, Politicians and Advertisers*. Konrad Adenauer Stiftung, Sofia. Available at: [http://www.kas.de/wf/doc/kas\\_39402-1522-2-30.pdf?141117155526](http://www.kas.de/wf/doc/kas_39402-1522-2-30.pdf?141117155526).

<sup>35</sup> See [http://www.ati-journalists.net/bg/investigations/Razsledvania/205492/Regionalni\\_medii\\_Blagoevgrad\\_da\\_si\\_kupish\\_pozitiven\\_imi\\_dj/20160409002484/](http://www.ati-journalists.net/bg/investigations/Razsledvania/205492/Regionalni_medii_Blagoevgrad_da_si_kupish_pozitiven_imi_dj/20160409002484/).

<sup>36</sup> See the report *Dilemma for media: journalism or propaganda. Bulgarian media monitoring 2015*. Available at: <http://www.fmd.bg/?p=9322>.

There is a link between subsidies and politically biased content in the case of local media. Often local newspapers consist of two to four journalists together with an editor-in-chief, and are particularly vulnerable due to limited financial resources. This makes them subject to both legal action, in cases of critical publications, and subsidies, in cases of “acceptable” reporting on local authorities’ affairs. Combined with the fact that local subsidies are often not distributed in a transparent way, this creates a difficult environment for local media committed to genuine reporting. Regarding audiovisual media, IREX (2016) found that a plurality of news sources does exist, but that journalists generally experience severe financial difficulties which makes them give up their independence and start serving external interests.<sup>37</sup> Thus, although there is a diversity of both radio and television programmes, the predominant share of broadcasting features content favourable to (potential) investors. This creates a huge problem, as independence is crucial for the proper functioning and purpose of the media, i.e. to present balanced and objective information to the public.

Despite the problems mentioned above, the general conclusion is that in the case of Bulgaria there is no clear correlation between non-transparent ownership, political affiliation and political bias. And in the biggest case involving the New Media Group, which is connected with a political party and various businesses, as mentioned in the previous section, the name of the owner is known.

## **5. Protection of journalists from undue influence**

There are no legal rules, soft laws, codes of ethics or editorial statutes that require journalists to *resist* political or economic pressure. There is no legal regulation on that matter, nor is it touched upon by the existing Code of Ethics of Bulgarian Media. Only the editorial statutes of the Bulgarian National Televisions and Bulgarian National Radio are detailed; in other cases there are no such documents or they are not detailed. Moreover, journalists are usually not offered long-term contracts except those in the public service media, the big TV groups and the reputable print media. The consequence is that many journalists are financially vulnerable and their professionalism is at risk. The Union of Bulgarian Journalists is weak and does not provide support to its members in cases of pressure coming from politicians, state officials, business persons or employers. The associations of media employers are better structured. The situation of local journalists is particularly problematic.

## **6. Protection of journalistic sources**

The protection of journalist sources is provided for in the Radio and Television Act, but, as formulated there, it is weak. The European Convention of Human Rights standards on the protection of sources apply directly, based on Article 5 para. (4) of the Constitution. However, there are pending cases to determine the limits of the right and its content. In 2015, the Journalist Ethics Commission adopted an opinion as regards the protection of journalistic sources.

There are not many cases involving the revelation of journalists’ sources. In 2014, the Commission on Financial Supervision imposed fines on several media for either: reporting

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<sup>37</sup> See IREX (2016). 2016 Media Sustainability Index: Bulgaria. Available at: <https://www.irex.org/sites/default/files/pdf/media-sustainability-index-europe-urasia-2016-bulgaria.pdf.pdf>.

that created risk (according to the Commission) for the financial system; or for refusing to disclose sources. The cases are still subject to ongoing litigation in the courts.<sup>38</sup>

Furthermore, formally, neither the Criminal Procedural Code nor any other law provides journalists with the right to decline to give testimony in criminal cases. Such a right, however, can be claimed under Article 10 of the European Convention of Human Rights, which is directly applicable.

## II. Impact of international legislation

In Bulgaria, the Audiovisual Media Services Directive and the E-commerce Directive, as with all EU directives, are subject to direct implementation in the Member States. So far no problems with the transposition have been identified or reported. No litigation has been initiated in the country for failure to comply with EU legislation in this area. Nor are there any relevant decisions of the ECJ or the ECtHR against Bulgaria.

'Soft law' norms have had some impact on national media law. For instance, Resolution 2065 (2015) on increasing the transparency of media ownership was used to amend the domestic law in a positive way. In addition, Recommendation No. R (2000) of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information was also influential and was even referred to by the Commission on Financial Supervision, although in a distorted way, when it started sanctioning procedures against several media in 2014. The most considerable impact, however, has come through Article 10 of the European Convention on Human Rights and its jurisprudence.

However, soft law is generally not much respected, including when it comes to EU law. The documents are of relevance, but state authorities are usually unwilling to apply them due to different reasons. On the one hand, apart from the Council for Electronic Media, there is no state body in charge of the media. It does not have any competences, however, over print and online media. The latter are subject to some minor supervision by the Committee for Regulation of Communications, but not as regards professional content. Print media are not regulated at all except for the obligation to report on ownership. They report to the Ministry of Culture, but failure to fulfil that obligation is sanctioned by mayors. The information society sector is within the ambit of the Ministry of Information Technologies, Transport and Communications, which is reluctant to extend its competence to any media activity.

In conclusion, there is no strong public body to develop state policy regarding media in Bulgaria. This is a particular problem also when it comes to the question of consistency with international (Council of Europe) standards and EU soft law.

## III. Internet

The concentration of ISPs (Internet Service Providers) on the market is not regulated separately from the legislation related to the general protection of competition. The Commission on the Regulation of Communications (CRC) is entrusted with the task of monitoring the market for electronic services and communications with the aim of preventing

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<sup>38</sup> See the 2015 Report by the Council of Europe Human Rights Reporter, available at: [http://www.coe.int/en/web/commissioner/country-report/bulgaria/-/asset\\_publisher/IICM6m5KhFKp/content/progress-on-human-rights-protection-remains-slow-in-bulgaria?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fbulgaria%3Fp\\_id%3D101\\_INSTANCE\\_IICM6m5KhFKp%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-1%26p\\_p\\_col\\_pos%3D1%26p\\_p\\_col\\_count%3D2](http://www.coe.int/en/web/commissioner/country-report/bulgaria/-/asset_publisher/IICM6m5KhFKp/content/progress-on-human-rights-protection-remains-slow-in-bulgaria?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fbulgaria%3Fp_id%3D101_INSTANCE_IICM6m5KhFKp%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_pos%3D1%26p_p_col_count%3D2)

limitations on competition. CRC presents annual reports to Parliament that include, among other things, evaluation of the development of competition in the market of electronic services and communications. ISP ownership is known by the CRC. In cases where it identifies a significant impact of an ISP on the market, the CRC should impose specific duties on it, which may include the obligation to make public financial reports, specifications, charges (fees), etc. Moreover, there is an obligation under the law to maintain a public register of ISPs similar to the registers about the ownership of the print and broadcast media. The CRC maintains a public register of ISPs that contains data on the companies. The public may connect these data with the company register and identify the owner, but the information is not easily accessible, in a single registry. Information about the real owner is not identified.

According to the data published on the CRC's database of ISPs, there are 1,143 providers registered. At least in the regular cases (especially in cities) it can be concluded that consumers have the option to choose between various service providers. There are few national search engines, but they are widely used. There are no indications that those search engines are not free or are dependent. The diversity of ISPs is satisfactory. The country is well covered and for a population of 7 million, 1,143 registered ISPs seem a reasonable number.

There is some cross-ownership concentration between ISPs and content providers, for example cable TV groups. This is not a big market share as long as the two biggest TV groups have a joint market share above 80% and a joint audience share above 60% in 2015. Another trend in cross-ownership concentration between ISPs and other businesses is in the case of mobile communications providers. The biggest share in the ISP market is for the three mobile communications providers (M-Tel, Vivacom and Telenor).

There are no official surveys on the market share of the internet content providers. The most influential ones, as assessed in 2015, are Offnews.bg, Blitz.bg, Vesti.bg, Dnevnik.bg. Among them, the latter belongs to the group Iconomedia, which also maintains other print and online media (the most popular among them being Capital Weekly). Blitz.bg is considered part of the New Media Group.<sup>39</sup>

In 2014, 56.7% of the Bulgarian population had registered access to the Internet, which represents a 3% increase compared to 2013.<sup>40</sup> According to the official figures provided by the National Statistics Institute in 2015, around 38.7% of the population use the internet via a smartphone or a tablet.<sup>41</sup> There is no cluster according to age group in the published data. The overall share of people using the internet is 59.1%. And 89.4% of the population watched TV every day in 2010.<sup>42</sup> Another survey showed that in 2014 the number of daily TV watchers was 78%.<sup>43</sup> According to official data from the Ministry of Information Technology, Transport and Communications:

- 19.2% of households watch TV through terrestrial frequencies,
- 49.3% of households watch cable TV,
- 21.8% of households watch satellite TV and

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<sup>39</sup> See <http://www.blitz.bg/news/article/81589>.

<sup>40</sup> Penev, P., 2015. 'More and more Bulgarians are using the Internet according to the National Statistics Institute', *Forect*, 08.02.2015 at <http://forect.bg/blog/analizi/vse-poveche-blgari-polzvat-internet-spored-nsi-0> .

<sup>41</sup> See <http://www.nsi.bg/bg/content/2808/достъп-на-домакинствата-до-интернет>.

<sup>42</sup> See <http://www.duma.bg/node/6620>.

<sup>43</sup> See <http://news.ele.bg/novini/balqarite-gledat-poveche-televiziya-na-vse-po-moderni-televizori-analiz-i-infografika/>.

- less than 1% of households watched IP TV in 2011, but the number has been increasing rapidly since.

The regulatory authority (CRC) lacks any power to ban or block online content, either foreign or domestic. It also has no power over online journals. Their work could be subject to complaints addressed to the journalists' ethical body (the Journalist Ethics Commission) or civil claims to courts. Alleged victims of online publications could launch a criminal case. There are practically no court cases ordering the ban, blocking or removal of online content. The civil court may award moral damages for a harmful publication. Damages can be claimed also in a criminal case. Moreover, there are no specific rules or court decisions so far on the rights and obligations of search machines (*vis-à-vis* neutrality, etc.) There are no legal rules on the concentration of internet content providers, whether audiovisual or written press providers, apart from the general regulation under the Protection of Competition Act. ISPs who fail to meet the common requirements as set by a decision of the CRC or special duties imposed by the CRC on a certain provider are punishable by a fine from 3,000 up to 15,000 BGN (from €1,500 up to €7,500).

Neither kind of online content provider is regulated separately from the general ISP regulation, as provided under the Electronic Communications Act. This means that neither content providers nor platforms for user-generated content such as blogs, social network sites, commenting, forums etc. are subject to regulation. However, content providers were found liable for third-party content to which they provided a platform in several cases of claims against discrimination. Some of the cases were started before the Commission on Protection against Discrimination, while others were decided by the Journalist Ethics Commission. Few decisions of the Commission on Protection against Discrimination declared a violation of the Protection of Discrimination Act by failure to control hate speech on forums and in particular, to remove such comments. The decisions were appealed to the administrative courts and so far there is no final decision.

To conclude, the significance of the online media is increasing. Still TV is the leading source of news and discussion on matters of public interest. The audience for print media is decreasing. Online media give more opportunity for participation, but often lack the capacity of the biggest TV groups to moderate content and ensure pluralism and adherence to ethical standards. Compared to TV and print media, they also are less involved in in-depth journalistic investigations. Among the top online outlets, Dnevnik.bg is best in conducting in-depth investigations, which can be explained by their affiliation with the media group Iconomedia, which has experience in print media journalism.

#### **IV. Public service broadcasting**

The definition of public service, as given in the Law on Radio and Television, is satisfactory. The Council for Electronic Media exercises supervision of the operation of all the broadcast media and monitors different aspects of media performance. Inasmuch as that body is elected by Parliament, the integrity of their monitoring is ensured. The reports are published on the website of the public body. However, the Council for Electronic Media is not sufficiently supplied with the necessary administrative, expert and financial capacity to impose appropriate remedies as regards public service obligations. In addition, the financial management of public service broadcasters is not transparent. There is no factual distinction between accounts of public and non-public service and there are no clear cost-accounting principles applied to public service broadcasters.

The financial control exercised over all the bodies benefiting from public funding is exerted by a special outside body – the Agency for State Financial Inspection. Its financial control measures are not carried out at regular intervals like audits or annual accounts are. Rather,

such control is exercised on a planned-inspections basis or on the basis of information submitted, which implies a violation of the rules. The press releases and summaries of reports issued by the Agency for State Financial Inspection are publicly available on its website. The whole content of a given report can be obtained under the Access to Public Information Act.

Bulgarian National Television is weaker than the two biggest commercial TV groups (which are its competitors in the advertising market), and as the only public service broadcaster in the TV market it does not apply price-undercutting practices. The same applies in the case of the radio market. Bulgarian National Television and Bulgarian National Radio are present also through their online content. There is a separate staff and editorial team for the online public service content in both, but not a separate editorial board. The national news agency is called the Bulgarian Telegraph Agency (BTA) and is established in law (2011). As the activities of BTA are defined by law, it is defined as a public service activity in the general sense. However, the law is not detailed and only very generally describes the BTA's functions. At the same time, only broadcast media in Bulgaria are regulated by law, and the news agencies and online outlets do not fall under that legal regime. Consequently, news agencies are outside the scope of the Radio and Television Act and the categories defined in it, including the definition of "public service provider". The BTA is influential from the perspective of news dissemination. Nevertheless, it cannot be concluded that it has "a market-distorting affect".

## **MEDIA PLURALISM IN FRANCE**

**Report by Raymond Kuhn<sup>1</sup>**

### **Summary**

As in other countries, media in France have changed significantly over the past 20 years, with the growth of online platforms, the roll-out of digital terrestrial television, the decline of the printed press and the spread of social media. These changes have brought renewed focus to the issues of ownership and pluralism.<sup>2</sup> This report analyses the degree of ownership concentration in this changed media landscape, both within specific market sectors (press, broadcasting, online) and across them. In particular, this country report notes the recent emergence of relatively new forms of concentration involving the movement of telecommunication companies into the media sector, as key actors seeking to gain control of both platforms and content.

The report also outlines and evaluates the policy measures taken by the French state to ensure plurality in this hybrid media environment.<sup>3</sup> Some of the state's policy instruments are designed to secure 'external pluralism', defined in terms of plurality of supply: selected measures deemed appropriate by the government have included legislation on ownership concentration, a system of state financial aid to the press, and government support for a designated public service component in broadcasting.<sup>4</sup> The enforcement of 'internal pluralism', defined in terms of equity and diversity of voice, has been restricted to the broadcasting sector. Here the main policy instrument has been the regulation of political expression across all domestic radio and television services, with compliance monitored by the relevant regulatory authority, the Conseil Supérieur de l'Audiovisuel (CSA). The report argues that in terms of political views there is a reasonable degree of plurality in terms of supply under both 'external' and 'internal' pluralism, even if minority views tend to be marginalised, especially in broadcast coverage.

Policy instruments designed to maximise external and internal pluralism are by necessity confined to the supply-side aspects of the issue. They seek to create the conditions for the expression of diversity of opinion and voice in the production and distribution of political content. In practice, they cannot directly influence audience consumption habits, with the result that there can be no guarantee that media users will routinely access the full range of choices made available. It is quite possible – and even likely – that most media users will in practice be highly selective in terms of the outlets and messages they access. Although the spread of online media sources has expanded pluralism in terms of supply, it has exacerbated rather than attenuated the practice of selective filtering in terms of audience reception. More than ever before media users can choose media content that is in line with their political views and, to a significant extent, abstain from exposing themselves to counter-views – the so-called 'silo' effect. In short, however extensive the systemic changes in terms of the variety in supply, and whatever measures French policy-makers may implement to create the conditions for a pluralistic marketplace of ideas, there is no sure-fire way of ensuring the pluralist usage of different outlets and reception of diverse content by audiences.

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<sup>2</sup> Barnett, S. and J. Townend (eds) (2015) *Media Power and Plurality: From Hyperlocal to High-level Policy*, Basingstoke: Palgrave.

<sup>3</sup> Chadwick, A. (2013) *The Hybrid Media System*, Oxford: Oxford University Press.

<sup>4</sup> Kuhn, R. (2011) *The Media in Contemporary France*, Maidenhead: Open University Press.

## **I. Media ownership and pluralism**

### **1. Introduction**

Since the end of WWII the notion of pluralism has been an important objective of media policy-making in France. In 1944 the Liberation government introduced legislation to ensure pluralism in the ownership and control of newspapers as part of a comprehensive package of structural reforms of the press, while in broadcasting a succession of statutory regulatory authorities has sought to guarantee pluralism in the political coverage of radio and television since the early 1980s.

Some of the state's policy instruments are designed to secure 'external pluralism', defined in terms of the plurality of supply, or the range and distinctiveness of outlets operating both within and across specific media sectors. In this context selected measures deemed appropriate by the government have included legislation on ownership concentration, a system of state financial aid to the press, and government support for a designated public service component in a broadcasting system which, since the late 1980s, has to a significant extent been dominated by privately owned commercial radio stations and television channels.

The enforcement of 'internal pluralism', defined in terms of equity and diversity of voice, or the range and balance of different political views disseminated within any single media outlet, has been restricted to the broadcasting sector. Here the main policy instrument has been the regulation of political expression across all domestic radio and television services. Compliance is monitored by the relevant regulatory authority, which since 1989 has been the CSA.

Policy instruments designed to maximise external and internal pluralism are by necessity confined to the supply-side of the issue. They seek to create the conditions for the expression of diversity of opinion and voice in the production and distribution of political content. In practice, they cannot directly influence audience consumption habits, with the result that there can be no guarantee that media users will routinely access the full range of choices available. It is quite possible – and even likely – that most media users will in practice be highly selective in terms of the outlets and messages they access. If anything, the spread of online media sources has exacerbated rather than attenuated this practice of selective filtering; more than ever before media users can choose media content that is in line with their political views and, to a great extent, abstain from exposing themselves to counter-views – the so-called 'silo' effect. In short, however extensive the systemic changes in terms of the variety in supply, and whatever measures French policy-makers may implement to create the conditions for a pluralistic marketplace of ideas, there is no practicable, sure-fire way of ensuring pluralism in terms of usage of different outlets and reception of diverse content by audiences.

### **2. Sectoral ownership**

There are three main reasons for examining the configuration of ownership *within* different sectors as well as across them. First, even in the 'hybrid media' age of interdependence between old and new media, it remains the case that some companies still focus their activity mainly or wholly in one specific sector. Second, a sector-specific approach recognises that traditional boundaries between media still retain their importance for some audiences, who in accessing content do not simply substitute one medium for another. Finally, in France ownership regulations continue to be applied within media sectors as well as across them.

With regard to the press sector, there are two distinct newspaper markets in France: national and regional, with the latter being much more important in terms of circulation figures – the total circulation of national daily titles is under two million, while that of regional dailies is over six million. There is little shared ownership across the two sectors. Among national

dailies ownership is diverse, in that there is no significant concentration of titles in the hands of any single press group. The main national titles – *Le Monde*, *Le Figaro*, *Libération*, *La Croix*, *Les Échos* and *Aujourd'hui en France* – are all under separate ownership. Moreover, even when the criterion of circulation is introduced into the equation, the level of ownership concentration in the national daily newspaper market is modest.

Potentially, the main ownership concentration issue in the French newspaper industry is at the regional level. In the early 2000s there was a notable increase in ownership concentration in the regional newspaper market, with the result that six main regional press groups – *Est Bourgogne Rhône-Alpes*, *Centre-France*, *Hersant Média*, *Rossel*, *Sipa-Ouest-France* and *Sud-Ouest* – now dominate the market across provincial France. For the consumer, however, it is not ownership concentration of regional titles across the country as a whole that is of concern, but rather possible concentration within their particular region. In this respect the restructuring of the regional newspaper sector further consolidated the pre-existing practice whereby in any particular French region a single daily newspaper title frequently enjoys a de facto monopoly position and is usually well able to protect its territorial fiefdom against potential competitors.<sup>5</sup> In short, while concentration of the regional newspaper market across France as a whole may well be only moderately high, in any particular region it is likely to be very high indeed.

In the broadcasting sector there is reasonable diversity of ownership at both national and sub-national levels. In addition to the public company, Radio France, there are four main commercial groups in radio – RTL, NRJ, Lagardère (owners of Europe 1) and Next (owners of Radio Monte Carlo) – as well as several small-scale independent and community radio stations. In television the dominant players are the private channels TF1 (part of the TF1 group controlled by the communications and construction company, Bouygues), Canal+ (owned by Vivendi) and M6 (owned by the RTL group), and the state-owned public service channels, France 2 and France 3, organised in a single company France Télévisions. The significant expansion of the sector as a result of the roll-out of digital free-to-air terrestrial television in the early 2000s has had little impact on the configuration of ownership, since several of the new channels are owned by the existing major groups, such as TF1 and Canal+.

### **3. Cross-media ownership**

For most media companies in France cross-media diversification has proved to be a chimera. Attempts by newspaper groups to extend their business interests out of their core market into the broadcasting sector have generally been a failure. The financial weakness of national newspaper companies in France has largely prevented them from being successful major players in other domestic media sectors, especially national television; indeed, the lack of significant cross-media diversification by national newspaper groups remains striking. There has been even less movement in the opposite direction: the newspaper sector has been insufficiently attractive for broadcasting groups to wish to move across to take an ownership stake in the press. In comparison with the media markets of other major EU states, therefore, France has no equivalent of a company on the scale of Murdoch's News Corporation in the UK, Bertelsmann in Germany or Berlusconi's Mediaset in Italy, all of which have extensive cross-media press/broadcasting interests within their respective national markets.

Several media companies are part of large industrial/commercial conglomerates. Indeed, it is common in France for a media company to be part of a much larger economic entity. For example, the main private television company, TF1, is part of the Bouygues group that has interests in public construction and telecommunications. The main element of cross-media

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<sup>5</sup> Martin, M. (2002) *La presse régionale*, Paris: Fayard.

ownership in contemporary France involves links between telecommunication, internet service providers and media companies, with various players attempting to have an ownership stake in both platforms and content. Bouygues, traditionally one of the major mobile phone providers although now facing problems in this market, is the main shareholder in the TF1 group that manages the most important commercial terrestrial television channel, TF1. Xavier Niel, owner of the Iliad/Free telecommunications company, is also co-owner of *Le Monde* group that includes the national newspaper, *Le Monde*, among its media outlets. Patrick Drahi, is the main shareholder in the telecommunications company SFR that recently took over the cable television company Numericable. Drahi also has major stakeholdings in the weekly news magazine, *L'Express*, the daily newspaper, *Libération*, the rolling news channel, BFMTV, and a major radio station, Radio Monte Carlo.

#### **4. Online media**

The development of online media had a significant impact on the configuration of ownership and the plurality of media supply, but in practice only to a limited extent. This is largely because of the continuation of ingrained practices of content consumption among audiences. Since significant resources are required to manage a website, in general the established mainstream media have an in-built competitive advantage in maintaining a strong internet presence because of their existing expertise in content production and distribution. For instance, the dominant websites for political information in France are those of the legacy media, especially those in the print sector, such as *Le Monde*, *Le Figaro*, *L'Express*, *Le Point* and *L'Obs*. These websites are not just comparatively well resourced, but also enjoy the benefit of brand recognition among the public – they are trusted sources of news, information and comment.

New competition has come from independent news websites in recent years. The best known of these is Mediapart, which under the direction of former *Le Monde* journalist, Edwy Plenel, has broken several major political stories and whose output has had a significant influence on the political content of mainstream news media. While Mediapart has managed to retain its ownership independence, other online news websites have ownership links to legacy media, including the French version of the *Huffington Post* (in which *Le Monde* group has an ownership share) and *Rue 89* (owned by the news magazine *L'Obs*, in which *Le Monde* group has a controlling share).

#### **5. Media ownership and the political sphere**

There are different modes of interlinkage between media ownership and the political sphere. First, several media companies have close links with the state through participation in public procurement. For example, Bouygues is involved in the procurement of public contracts in the construction industry, while Dassault, the owner of the national daily newspaper *Le Figaro*, is a major player in France's defence industry.

Second, some of these economic actors are directly linked to political power through holding an elected political post. For example, Serge Dassault, head of the Dassault group, has for many years been an elected politician for the mainstream right, although he has not held a government post. Other media owners have strong indirect links to political power, for example through close personal ties with elected politicians; former President Nicolas Sarkozy had very close ties with Martin Bouygues, head of the Bouygues group, and Arnaud Lagardere, head of the Lagardere group. These links are generally known to the public. The links between media owners and political actors tend to be informal. Political organisations, such as parties, do not directly own media outlets. There used to be party-owned

newspapers, but this practice no longer exists. Political entities are not allowed by law to own radio stations or television channels. At the national level these links are more evident under presidents/governments of the right than of the left and were a particular feature of the Sarkozy presidency, from 2007–12.

## **6. Media ownership and the business sphere**

Under conditions in which much of the private sector media in France are owned by companies with wider industrial and business interests, media ownership is an important issue because of the possibility of conflict between the profit maximisation of the company's non-media activities on the one hand and the capacity of its media outlet(s) to report on those activities freely and without bias on the other. For example, it is difficult for TF1 news staff to cover in a wholly dispassionate manner the investment decisions and business performance of the Bouygues group in the telecommunications and construction sectors. Bias may have an impact on the news agenda, with stories about the Bouygues group's activities being given more (or less) coverage than merited by the normal application of the channel's news values. It may also influence the framing of such stories, so that the activities of the Bouygues group are reported sympathetically rather than neutrally or even critically. At worst, news coverage may amount to little more than a publicity puff for the parent company. This was said by some critics to have happened in 2009, when TF1 news gave highly positive coverage of the Bouygues group's project to construct a huge skyscraper, the *Tour Signal*, in the business sector of La Défense on the western outskirts of Paris (the project was later abandoned because of the financial crisis).<sup>6</sup>

This type of media bias does not require overt and explicit proprietorial (or even managerial/editorial) interference. Instead, socialisation processes within the newsroom, whereby staff internalise the values and culture of the media organisation, have an impact on journalists' behaviour that often translates into a willingness to conform. It is likely that a culture of self-censorship will exist in newsrooms when it comes to coverage of the business or industrial activities of the media company's parent group. For instance, one of the fears of journalists working for the daily financial newspaper *Les Echos* was that after its takeover by Bernard Arnault in 2007 it would be difficult for them to cover impartially the activities of Arnault's luxury goods group, LVMH (Louis Vuitton and Moët Hennessy). Similarly, it has been argued that *Le Figaro* cannot be relied on to cover in a balanced fashion the activities of the Dassault group with regard to the market for military aircraft sales because of the group's involvement as a constructor of the Rafale fighter plane.<sup>7</sup>

## **7. Media ownership rules**

Structural rules on media ownership both within and across different media sectors have been in place for many years in France in an attempt to secure an acceptable level of pluralism. Key technical questions for policy-makers to address have included how to define relevant markets, what are the optimal means to measure the market dominance of a company within and across different media sectors (for example, by advertising share, financial turnover or audience figures) and whether there is a need for sector-specific structural limits on media ownership in addition to general competition rules. A more fundamental political concern is how to balance economic/industrial considerations, which

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<sup>6</sup> Mamère, N. and P. Farbiaz (2009) *Petits arrangements entre amis*, Paris: Jean-Claude Gawsewitch.

<sup>7</sup> Acrimed (2014) 'Le Figaro se pâme devant le Rafale' <http://www.acrimed.org/article4247.html> (last accessed 3 January 2015).

may favour media concentration, against the pursuit of the democratic goals of pluralism and diversity, which may be best promoted by anti-concentration measures. French policy-makers have thus sought to address three objectives in the formulation and implementation of regulatory policy on media ownership: first, to maintain and promote competition in national media markets; second, to ensure adequate levels of external plurality of supply; and third, to provide conditions for the emergence and sustainability of domestic companies capable of competing in transnational markets. Since these objectives are not necessarily mutually compatible, there are inevitably cross-cutting tensions at the heart of policy-making in this field.

As well as being subject to general competition rules the French media are the object of specific structural regulations in terms of ownership. These were included in the 1986 communications statute and have been updated on several occasions since. Their application falls within the remit of the CSA, which monitors mergers and issues concerning cross-media ownership. However, the CSA has no remit to intervene if changes of ownership, even major ones, take place within the rules.

The details of the structural ownership rules are as follows. First, in the television sector in particular there are limits on the percentage share of a media company that an individual person (or company) may own. For instance, in the case of a national television service (i.e. one covering an area of more than 10 million inhabitants) the upper limit is 49% if the average annual audience of the service exceeds 8.0% of the total television audience. If a person/company owns more than 15% in one national television service, then they may not own more than 15% in a second one; if they have more than 5% in two such services, then they may not own more than 5% in a third. In addition, foreign (i.e. non-EU) interests are limited to a maximum 20% share in a terrestrial radio or television service and in newspapers. Governments of both right and left have been keen to ensure that significant sections of the national media remain in French hands wherever possible.

There are also upper limits applied to the market share allowed companies in distinct media sectors. In the press sector a company is not allowed to have more than 30% of total newspaper circulation. There are no such limits for magazines. In the broadcasting sector the limits placed on ownership are measured by both the number of franchises and audience share. In national television a company may not own more than one analogue franchise or seven digital franchises. In radio the maximum aggregate audience is 150 million for analogue services and 20% of the potential total audience for digital services. Finally, cross-media ownership rules are based on a 'two out of three' formula, applied in both local/regional and national markets. For example, at the national level a company may not exceed two of the following: holding a franchise for terrestrial television services reaching more than four million viewers; holding a franchise for one or more radio services reaching more than 30 million listeners; publishing or controlling one or several daily newspapers with a total circulation share of over 20%.

## **8. State subsidies to the media**

A second policy instrument designed to help secure external pluralism in media supply consists of a system of state aid to the media.

State aid to the press takes the form of both direct financial support and indirect subsidies (such as preferential postage rates), with the latter historically the more important of the

two.<sup>8</sup> Although it is difficult to make exact calculations, it has been estimated that prior to the reforms made by President Sarkozy state aid accounted for around 10% of the total turnover of the French press<sup>9</sup> and higher in the case of some daily newspapers. During Sarkozy's presidency (2007–12) this system of state aid was reinforced. Further state intervention was supported on the grounds that newspaper groups were finding it difficult to monetise content in the online environment, sales of newsprint newspapers were in steep decline and Google was draining away increasing amounts of advertising revenue from the French press. A large proportion of the additional subsidy was allocated to improving distribution networks – with a significant planned increase in household delivery and the freezing of postal tariffs – as well as additional assistance to modernise printing works.

Against this background, it is reasonable to ask how effective and desirable the longstanding system of state aid to the press has been in practice. In the past, criticisms of state aid have focused both on the principle and the practicalities of its operation. The objection on principle is that such aid has unjustifiably distorted the mechanisms of the free market, making newspapers less likely to take risks, to be dynamic and entrepreneurial, and to respond to changing social and economic circumstances. In general, this objection has not been very strongly held among French policy stakeholders. Criticism has been more commonly directed at the way in which the system has functioned in practice. In this context, the key question has been: has state aid helped newspapers with a weak financial base but a significant information function? The answer, according to critics, was that it had not, or at least not well enough.<sup>10</sup> To avoid possible charges of political bias and at the same time not alienate powerful press groups that benefited from the arrangements in place, the system of aid has been politically neutral. It is managed by the Ministry of Culture and Communication and is widely accepted as a defensible element of public subsidy to the media to ensure plurality of supply – an element of contrast with the United Kingdom where traditionally newspapers have been opposed to state intervention on the grounds that this would be an infringement of the 'free press'.

It has been argued that this concern with neutrality and formal equity, however understandable it may be, has thrown state aid off course.<sup>11</sup> By appearing to help all, state aid to the press has been too indiscriminate, not differentiating between the needy and the already well off. Indeed, the system may even have been perverse, with unintended consequences that run counter to the principles that underpinned its operation: it may actually have helped the better-off newspapers. For example, the mechanism of postal aid helped only those papers with a big postal distribution; these tended to be the papers that were already commercially successful. A paper may have been receiving 80% of its income in advertising and still be eligible for state assistance. This means that state aid was available and of great benefit to newspapers that were already prospering in the market place. At the same time, the system was limited in scope. For example, there was no state aid, either in the form of subsidy or preferential loans, to help in the foundation of new newspapers. Overall, therefore, the system tended to favour the status quo rather than encourage new initiatives.

By the standards of other advanced democracies, this policy response of the French government to the problems of the newspaper industry was both wide-ranging and financially

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<sup>8</sup> Ministry of Culture and Communication (2015a) <http://www.culturecommunication.gouv.fr/Ressources/Documentation-administrative/Les-200-titres-de-presse-les-plus-aides-en-2014> (last accessed on 4 June 2016).

<sup>9</sup> Albert, P. (2008) *La presse française*, Paris: La documentation française. 59.

<sup>10</sup> Charon, J.-M. (2013, 3<sup>rd</sup> edition) *La presse quotidienne*, Paris: La Découverte.

<sup>11</sup> Eveno, P. (2008) *La presse quotidienne nationale: fin de partie ou renouveau?*, Paris: Vuibert.

generous. This does not necessarily mean that the response is properly focused or guaranteed to succeed, however. First, some aspects of the old post-war model in publishing and distribution, including chronic overstaffing, have not been satisfactorily addressed for fear of the industrial unrest that might ensue. Second, some of the policy responses, such as improvements in the home delivery system, look anachronistic in an age when many citizens, especially the young, are accustomed to accessing their news and information online. Indeed, in financial terms the vast bulk of state expenditure is being used to address problems in the newspaper sector such as printing and distribution that preceded the transition to the digital age, rather than preparing the industry for the current and future 'shock of the internet'.<sup>12</sup> Finally, as newspapers haemorrhage revenue, even the large amounts of state aid will not necessarily guarantee the vitality of the press as a whole, or the survival of any particular title. In short, despite the huge amount of public money being mobilised, the state's restructuring policy may prove to be limited in scope, ill-directed and ineffective. More still needs to be done in policy terms on how to save professional journalism (a particular information function) rather than simply protect the newspaper industry (a particular set of structures and practices). Yet it is not clear how the policy process, dominated by established newspaper professionals with an attachment to traditional organisational modes of behaviour, can easily achieve this.

There is also a so-called strategic fund for the press that includes online outlets.<sup>13</sup> This fund is relatively new and was reformed and simplified in 2014. Finally, state funding is available to support local community radio stations.<sup>14</sup>

## 9. Protection of journalists and their sources

With regard to the protection of journalists, there is a professional ethical charter for journalists, the most recent version of which dates from 2011.<sup>15</sup> This concerns the guarding of professional secrets and the protection of sources. The text also covers the issues of calumny, accusations without evidence, the deformation of facts and lying – all of which are considered to be serious professional errors. Other activities incompatible with journalistic activity, such as receiving payment from a public body or private company that might compromise journalistic independence, are also included in the charter.

Employment practices for journalists vary. Many journalists have fixed-term contracts that offer them little protection in terms of employment security. Those on '*permanent contracts*' have significant protection, including generous redundancy terms.

There are different journalists' unions that provide financial and legal support. The leading professional body is the *Syndicat National des Journalistes* (SNJ), which is independent. Other journalist unions are affiliated to the main trade union confederations.

With regard to the protection of journalistic sources, in principle the law of 4 January 2010 protects journalistic sources. However, there are exceptions, including a "preponderant imperative in the public interest" and this allowed judicial investigators to examine the

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<sup>12</sup> Plenel, E. (ed.) (2010) *N'oubliez pas! Faits et gestes de la présidence Sarkozy*, Paris: Don Quichotte. 87-88.

<sup>13</sup> Ministry of Culture and Communication (2015b) <http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Presse/Aides-a-la-presse/Le-fonds-strategique-pour-le-developpement-de-la-presse-aides-directes/1.-Presentation-du-Fonds-strategique-pour-le-developpement-de-la-presse2> (last accessed on 4 June 2016).

<sup>14</sup> Ministry of Culture and Communication (2015c) <http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Audiovisuel/Fonds-de-soutien-a-l-expression-radiophonique> (last accessed on 4 June 2016).

<sup>15</sup> SNJ (2011) <http://www.snj.fr/content/charte-d%E2%80%99%C3%A9thique-professionnelle-des-journalistes> (last accessed 8 June 2016).

telephone records of journalists at *Le Monde* in order to identify their sources. Protection of journalistic sources has been an issue of political debate in recent years, notably against the backdrop of terrorist attacks. The Minister of Culture proposed in March 2016 that protection of journalistic sources could be dispensed with in cases where the prevention or repression of a crime was involved. This text is still being debated in the French parliament.

## II. Impact of international legislation

International legislation, including EU directives and decisions of the ECJ and ECHR, has had a formative effect on French media law and practices. By contrast, there is no substantial evidence that soft law instruments have had a significant impact on French media policy and regulation.

For instance, section III (Articles 36 to 70) of *Loi n° 2009-258 du 5 mars 2009 relative à la communication audiovisuelle et au nouveau service public de la télévision* is devoted to the transposition into French law of the Audiovisual Media Services Directive (AMSD).

The CSA, whose sphere of responsibility is thus extended to include the Internet, is tasked with ensuring the regulation of audiovisual media services on demand (mainly catch-up TV and video on demand). The Act makes provision for a single legal framework for linear services on demand, although with special rules, to be laid down subsequently by decree, for audiovisual services on demand, which will allow more flexibility in the obligations that will be imposed on them. The Act nevertheless requires the actual promotion of European and original French-language audiovisual and cinematographic works (Article 55). The Act authorises private channels to introduce a second commercial break during films, television films and magazine programmes corresponding to the criteria of audiovisual works. As part of the transposition of the AMSD, the Act also lays down provisions concerning the accessibility of programmes for the blind and partially sighted, and a stronger guarantee of the right to information about events of any kind that are of a major interest to the general public.<sup>16</sup>

### Article 13 of the AMSD

is transposed by Article 12 of the French *Décret relatif aux services de médias audiovisuels à la demande*, which stipulates that providers reserve 60 percent for European works and 40 percent for French works from the total number of programmes included in the catalogue. ... French works are considered European works for the purpose of the quotas. If one were to deduct the support for French works (assuming that all providers meet the target for French works and do not go beyond the threshold set for European works) from the overall goals, the support for European works appears rather insignificant or at least weak in comparison to the protection afforded to the national film industry.<sup>17</sup>

With regard to the E-commerce Directive, in March 2014 Law 2014-344 (Loi Hamon) on consumer rights was passed. One of the key aspects of this legislation was the implementation under French law of the E-commerce Directive.<sup>18</sup> French media regulation

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<sup>16</sup> Blocman, A. (2009) <http://merlin.obs.coe.int/iris/2009/4/article14.en.html> (last accessed on 2 June 2016).

<sup>17</sup> Metzdorf, J. (2016) <http://www.jipitec.eu/issues/jipitec-5-2-2014/3998> (last accessed on 2 June 2016).

<sup>18</sup> Lemperiere, M. (2014) [http://www.e-comlaw.com/e-commerce-law-and-policy/article\\_template.asp?Contents=Yes&from=eclp&ID=2219](http://www.e-comlaw.com/e-commerce-law-and-policy/article_template.asp?Contents=Yes&from=eclp&ID=2219) (last accessed on 1 June 2016).

has also taken account of decisions of the ECJ such as the Play Media case<sup>19</sup> and of the ECHR in *Radio France v France*.<sup>20</sup>

### III. Internet

#### 1. Market concentration

There are no legal rules regarding the concentration of Internet Service Providers (ISP) in terms of fixed structural limits on market share. There are general competition rules to prevent uncompetitive behaviour among ISPs and these are enforced by the relevant regulatory body, ARCEP (*Autorité de régulation des communications électroniques et des postes*) and the competition authority (*Autorité de la Concurrence*).

Ownership of ISPs is transparent and final owners are identifiable, with information on ISP ownership available on different official, commercial and media websites. There are several ISPs available, with the main providers in terms of consumer usage being Orange, Iliad/Free, Bouygues Telecom, Numericable and SFR. Consumers in towns, cities and some rural areas have a large choice of service providers; in some rural areas, however, competition is limited, with Orange usually the main provider. Diversity of supply in urban and some non-urban areas is therefore satisfactory with regard to consumer choice; by contrast, diversity of supply in some rural areas is patchy. In early 2015 Orange served 39.8% of French households, SFR 24.9% and Iliad/Free 22.7%.<sup>21</sup> In practice, therefore, there is a significant level of concentration with a few companies dominating the marketplace. The leading ISPs are telecommunication companies that specialise in selling integrated packages (so-called triple or quadruple play) that combine internet, telephony (landline and mobile) and television services. There is significant cross-ownership concentration between the leading ISPs and telecommunication companies, such as Orange and Bouygues.

#### 2. Regulation of internet content

The three biggest online news providers in terms of audience share are *Le Figaro*, *Le Monde* and *20 Minutes*. All three have a daily newspaper presence in offline media.

The regulatory authority for broadcasting, the CSA, has no power to ban domestic online content or to block foreign online content. Nor does it have power over online journals. There are no specific regulations governing online content providers that provide platform for user-generated content, including blogs and social network.

There are specific rules and court decisions on the rights and obligations of search engines/ISPs as gatekeepers, concerning the issues of terrorism and child pornography, for example. President François Hollande's Socialist government introduced legislation that compelled ISPs to block terrorist content or child pornography content within 24 hours, or face potential fines.<sup>22</sup>

On the issue of internal pluralism, websites are under no obligation to provide equity and diversity of voice. Instead, they are free to disseminate politically partisan opinions, to be as

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<sup>19</sup> CJEU, C-348/13, *BestWater*, 21 October 2014.

<sup>20</sup> ECtHR, *Radio France v. France*, Application no. 53984/00, 30 March 2004.

<sup>21</sup> Journaldunet (2016) <http://www.journaldunet.com/ebusiness/telecoms-fai/1124340-parts-de-marche-du-haut-et-tres-haut-debit-en-france/> (last accessed on 30 May 2016).

<sup>22</sup> Curry, D. (2015) <http://www.itproportal.com/2015/02/09/french-government-pushes-internet-censorship-law/> (last accessed on 30 May 2016).

one-sided as they like in their content and to support whichever political parties and candidates they choose to in election campaigns.

### 3. Broadband penetration and media usage

In 2015 83% of French households had broadband access (over 90% below the age of 40); 58% owned a smartphone (over 80% smartphone ownership below the age of 40); and 35% owned a tablet (over 40% below the age of 40).

The average length of daily television viewing was 3 hours 44 minutes: 4–14 years old: 1 hour 56 minutes; 15–34: 2 hours 21 minutes; 35–49: 3 hours 2 minutes; 50+: 5 hours 7 minutes. Terrestrial was the most used means of television access: terrestrial 57.7% of households; satellite 24%; and cable 8.7%.<sup>23</sup>

Most French citizens obtain information about national and international events, including politics, from television, notably the main channels such as TF1 (private), France 2 (public), France 3 (public) and M6 (private). Among young French citizens the internet comes second to television as a source of political information.<sup>24</sup>

None of the television channels has a political affiliation in any strong sense of this term (i.e. ownership by a political party, editorial policy clearly and consistently in line with the views of a political party). The allocation of time between mainstream political forces is regulated and monitored, with the result that 'stopwatch balance' across mainstream political forces of left and right is now embedded in the broadcasting system.

The democratic relevance of online media has until now been largely confined to a small proportion of the population who use the internet for the purposes of political information: mainly men, well-educated and interested in politics.

The online media sources used for the purposes of political information tend to be those of already established traditional media. It is only recently that France Télévisions has committed itself to a strategy in which its online services, including news, will be given prominence. There is as yet no major public service equivalent in France of the online BBC news service in the UK. Some online independent news websites, such as Mediapart, are important because they break stories that are then taken up by mainstream media, creating a ripple effect that can be very significant, as in revelations of financial and sexual scandals (Cahuzac affair, Baupin affair).<sup>25</sup>

## IV. Public service broadcasting

Public service broadcasting is organised in the separate companies Radio France (for public service radio) and France Télévisions (for public service television). These two companies manage a variety of local and national radio stations and a range of television channels respectively.

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<sup>23</sup> CSA (2016) *Guide des chaînes numériques, 14e édition* <http://www.csa.fr/Etudes-et-publications/Le-guide-des-chaines-numeriques> (last accessed 19 July 2016).

<sup>24</sup> TNS Sofres (2015) *Baromètre de confiance dans les media* <http://www.tns-sofres.com/sites/default/files/2015.01.29-baromedias.pdf> (last accessed 17 July 2016).

<sup>25</sup> Arfi, F. (2013) *L'affaire Cahuzac: en bloc et en détail*. Paris: DonQuichotte.

Le Point (2016) *L'affaire Denis Baupin* <http://www.lepoint.fr/dossiers/politiqueaffaire-denis-baupin/> (last accessed 19 July 2016).

In the historical context it is somewhat ironic that the public broadcaster has emerged as a major contributor to the securing of pluralism in the contemporary national media. During the years of state monopoly, which ended with the passing of the 1982 broadcasting reform, the political output of public television was frequently regarded as being supportive of the government of the day, most notably during the period of de Gaulle's presidency when the public broadcasting corporation was effectively an arm of the Gaullist government. Despite some attempts at reform under governments of the right, the liberalisation of public television's political coverage did not really take effect until the arrival of the left in power, in 1981. Since then, the establishment of a regulatory authority for broadcasting, successive alternations in power between governments of left and right and less ideologically fuelled political competition between the mainstream parties have combined to attenuate the links between the public broadcaster and the party in power. As a result, whereas in the 1960s the political output of state television was tantamount to government propaganda, contemporary public television in France makes a significant contribution to plurality in the supply of political information to its audiences.

The definition of the public service remit is clear and precise and is formally entrusted to the broadcasters. The fulfilment of this remit is supervised by the regulatory authority, the CSA, which is independent from radio and television management, and also via parliamentary scrutiny. The CSA has the power to ensure the respect of public service obligations, for example, with regard to pluralism in political coverage. The monitoring of public service broadcasting is transparent. The CSA publishes an annual report. There are also reports of parliamentary commissions prior to the annual finance law. In practice, the political executive has a significant input into the content of the public service remit and it is to the political executive (president, prime minister, minister of culture and communication) that public service broadcasting management are de facto responsible.

The financial management of the public service broadcasters (radio and television) is not particularly transparent. There is scope in the reporting of the accounts for figures to be fudged. Nor is the financial management effective. Contracts are not always put out to competitive tender, with the result that there have been cases of financial mismanagement and alleged corruption at both Radio France and France Télévisions in recent years. Day-to-day financial control is initially assured by the management of the public service broadcasters. There is a regular post-hoc 'control' of the use of public funding by the ministry of finances, but its effectiveness is open to question. With regard to the EU Commission Communication 2009 on state aid to public service broadcasting, the Commission has approved the long-term funding mechanism for France Télévisions, which is deemed to comply with the European Union's state aid rules.

The main new public broadcasting service, scheduled to start in September 2016, is a rolling news channel, France Info, managed by Radio France and France Télévisions. This public channel will compete with three established privately managed rolling news channels in France: LCI, BFMTV and i-Télé. The transition to the digital environment in terms of news provision has been slow at France Télévisions, which is way behind the BBC in respect of the supply of online news and information.

There is a major national news agency in France, Agence France-Presse (AFP). Although historically the agency had close links with the national government, its activity is not defined as a public service and the agency is now run on commercial lines, albeit with political intervention.

## MEDIA PLURALISM IN GREECE

### Report by Petros Iosifidis<sup>26</sup>

#### Summary

In relation to media market concentration, it should be noted that levels of media market concentration in Greece have risen since the 1980s and 1990s as newspaper publishers diversified to television in order to increase profits in a largely unregulated and hardly transparent media market ecology.<sup>27</sup> Private TV grew and expanded rapidly, but it has struggled to adjust to a pluralistic profile in a highly politicised and commercialised environment, driven by a growing populism. In line with its constitutional recognition, freedom of expression through the media and the right to information are generally accepted media policy principles. Yet, in practice, they have not been at the core of the formulation of media policy objectives or in regulatory implementation in Greece. Thus, although the Greek Constitution affirms the importance of ensuring transparency and pluralism in information across the media and in the workings of the media industry, the imposition of transparency requirements (for example with regards to media ownership or the media's types of funding) is not linked to media education, thereby undermining the ability of citizens to make informed choices about the media services they choose and consume.<sup>28</sup>

In terms of state aid and advertising, the overt and covert use of public money to support preferred media outlets is a widespread practice in Greece, similar to some other south-eastern European countries. The intertwining of political elites and the media has resulted in highly centralised state policy.<sup>29</sup> In effect, this has led to a journalistic culture that has historically been cautious about reporting independent news. The media sector has witnessed the entry of industrialists, ship-owners and people from the construction industry, all of whom were trying to influence public opinion and exert pressure on politicians to the benefit of their business interests.<sup>30</sup> The ongoing fiscal crisis has affected newspapers: entrepreneurs in public construction projects who were also active in the press could no longer cross-subsidise their media assets with revenues generated from public orders and this has brought major losses of advertising revenue for media outlets.<sup>31</sup> Meanwhile, state subsidies for the press, which greatly supported the press, have ceased due to the financial crisis.

Greek media policy has intended to fight against '*diaploki*', a term coined to describe the clientelistic relationship between politicians and media entrepreneurs, alongside ensuring the transparency of the media. But in reality the political will to realise these goals was missing, due to fear that such a move would threaten political interests<sup>32</sup>.

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<sup>27</sup> Iosifidis, P. (ed.) (2010) *Reinventing Public Service Communication: European Broadcasters and Beyond*, London: Palgrave Macmillan.

<sup>28</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011) 'Does Media Policy Promote Media Freedom and Independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>29</sup> Papathanassopoulos, S. (2014) 'Greece: Press Subsidies in Turmoil' in P.C. Murschetz (ed.) *State Aid for Newspapers, Media Business and Innovation: Theories, Cases, Actions*, New York: Springer, pp. 237-521.

<sup>30</sup> Iosifidis, P. (2007) *Public Television in the Digital Era: Technological Challenges and New Strategies for Europe*, London: Palgrave Macmillan.

<sup>31</sup> Papathanassopoulos, S. (2014), op. cit.

<sup>32</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011), op. cit.

The internet and online services have become increasingly prominent in the Greek media landscape especially among youngsters using mobile devices, offering the potential for greater pluralism and independence, yet these services have also been implicated in low-quality output, gossip, copy-and-paste news, and dependence on big firm advertisements.<sup>33</sup> In spite of its limitations, the internet is beginning to host alternative voices and watchdog-type journalism and thus it has the potential to strengthen pluralism and transparency.

Lastly, the re-establishment of the Greek public service broadcaster, ERT SA, in 2015, after a two-year closure, is a positive step, as the broadcaster contributes to pluralism and the independent transmission of news and information.<sup>34</sup> ERT's TV and radio programmes and the content of online services are governed by the principles of objectivity, completeness and pluralism. However, ERT SA needs to invest more in new digital and online technologies as it only recently started embarking upon online activities with the launch of digital channels and its own web site.<sup>35</sup> This way it will engage with the Greek citizens by providing a virtual space for critical political discussion.

## **I. Media ownership concentration in Greece**

In Greece, the levels of concentration of media ownership and cross-media concentration are high.<sup>36</sup> This is because newspaper groups have diversified into electronic media, enabled by a weak and inconsistent regulatory framework. More specifically, the three largest press groups – Lambrakis Press SA (DOL), Tegopoulos Publishing, and Pegasus SA (Bobolas family) – are also shareholders in the main terrestrial channel MEGA, while the other main terrestrial channel ANT1 is owned by entrepreneur M. Kyriakou. Press Institution SA has shares in terrestrial channel STAR, and the Alafouzou family owns terrestrial channel SKAI and several radio stations. The rise of the internet has added an extra dimension as the highest-visited websites include those of the mainstream publishing groups like DOL, Pegasus and also MEGA channel.

Concerning the regulation of media concentration, Law 2328/1995 did not prevent high levels of concentration, despite its strict rules, whereas the more recent Law 3592/2007, titled New Act on Concentration and Licensing of Media Undertakings, provided more opportunities for deregulation and market liberalisation by abolishing older regulations, which had been contravened in practice anyway. A recent amendment to the above Law (1688/135, passed in 2014) further relaxes ownership and cross-media ownership restrictions by allowing partnerships between electronic media businesses (information or otherwise) of the same type (television, online, or radio), if they result in a reduction of operating costs (for example, through economies of scale or joint utilization of financial resources). The evolution of the legal framework indicates the government's clear intention to create large media conglomerates, for economic viability.

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<sup>33</sup> Iosifidis, P. and D. Boucas (2014) Media Policy and Independent Journalism in Greece. London: Open Society Foundations (OSF) at: <http://openaccess.city.ac.uk/6034/1/OSF%20Greece%20Media%20and%20Journalism%20Report%20DRAFT%2020jan2015.pdf>.

<sup>34</sup> Iosifidis, P. and I. Katsirea (2014) 'Public Service Broadcasting in Greece in the Era of Austerity', European University Institute Working Papers, at: [http://cadmus.eui.eu/bitstream/handle/1814/31872/RSCAS\\_2014\\_42.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/31872/RSCAS_2014_42.pdf?sequence=1).

<sup>35</sup> Iosifidis, P. (2014) 'Greece: Pluralism and Public Service Media' pp. 51-54 in Public Value Report 2013/14 TEXTE, at <http://zukunft.orf.at/rte/upload/texte/2014/14r0002.pdf>.

<sup>36</sup> See Iosifidis, P. (ed.) (2010) *Reinventing Public Service Communication: European Broadcasters and Beyond*, London: Palgrave Macmillan.

## II. Ownership transparency and access to information

The Greek Constitution of 1975 guarantees freedom of expression. Article 14 states that every person may express their thoughts orally, in writing, and through the press in compliance with the laws of the state. Article 14 also states that the press is free; censorship, as well as the seizure of newspapers and other publications before or after publication, is prohibited. In addition, Article 14 of the Constitution guarantees the right to reply to errors, published in the press or broadcast.

In line with their constitutional recognition, the freedom of expression through the media and the right to information are generally accepted media policy principles in Greece. Yet, in practice, they have not been at the core of the formulation of media policy objectives or in regulatory implementation. References to the freedom of expression and the right to information have been almost absent from media policy documents and elite discourse. What does prevail, instead, in Greek policy debates, is the declared intent to render the media free and independent from the multiple political and economic pressures that have shaped it. In the name of democracy, successive governments have since the early 1990s – the time when the liberalisation of the broadcasting market occurred – repeatedly expressed their commitment to combating the interweaving of interests between the political and powerful media interests. What has dominated the political agenda and discourse as the overarching objectives of the Greek media policy has been the fight against '*diaploki*', a term coined to describe the clientelistic relationship between politicians and media entrepreneurs, alongside ensuring the transparency of the media. But, in reality, media policy conduct has continued to be driven by instrumentalist considerations and by a lack of political will to combat powerful business and media interests, in fear that these interests would turn against their policies.<sup>37</sup>

Thus, although Article 14 (9) of the Greek Constitution affirms the importance of ensuring transparency and pluralism in information across the media and in the workings of the media industry, the imposition of transparency requirements (for example with regard to media ownership or the media's types of funding) is not linked to media education, thereby undermining the ability of consumer-citizens to make informed choices about the media services they choose and consume. In the past few years, a number of measures have been adopted to increase transparency in the operation of the media. The *Secretariat General of Mass Media* keeps a record of the allocation of state subsidies and other support tools aimed at the media, including the amount of public sector advertising that is channelled to specific outlets and the amount of total press distribution and telecommunications subsidies, which are published on its website.<sup>38</sup> Such information, however, is neither always presented in a comprehensive manner nor is it regularly updated.<sup>39</sup> Concerning the electronic media, the regulatory agency NCRTV publishes, on its website<sup>40</sup>, all licensed radio and TV outlets, mentioning the company name, contact details and the scope of the outlet's territorial coverage (national, regional/local). The regulatory agency is also charged with keeping records and shareholder information on media and media-related enterprises (including press undertakings, advertising and media research companies).<sup>41</sup>

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<sup>37</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011), 'Does Media Policy Promote Media Freedom and Independence? The case of Greece' Athens: Hellenic Foundation for European and Foreign Policy (ELIAMEP).

<sup>38</sup> See [http://www.minpress.gr/minpress/index/currevents/draseis\\_diafaneia.htm](http://www.minpress.gr/minpress/index/currevents/draseis_diafaneia.htm).

<sup>39</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011), op. cit.

<sup>40</sup> See <http://www.esr.gr>.

<sup>41</sup> See Article 10a Presidential decree (PD) 213/1995 (FEK A' 112/1995) and Article 10 Law 3310/2005 (FEK A' 30/2005) as amended by Law 3414/2005 (FEK A' 279/2005).

While this information is accessible to the public through the authority's website, there is no data on the degree to which people are actually aware of it, or the percentage of the population actually accessing it. Article 6 of Presidential decree 109/2010<sup>42</sup> also contains rules that cater for increased transparency in the audiovisual media sector by mandating audiovisual media service providers to make their company name, address and contact details available through their website or teletext service. Press undertakings are required to list the name(s) of their owner (a physical or legal person), their publisher and the manager in their publications.<sup>43</sup>

Under the principles of transparency, the *Secretariat General of Communication and Information* publish, on their official website:

- Approved programmes and management accounts of the advertising expenditure of public bodies
- Procurement of all services related to the supply of goods and services, according to Pat. 4851 / 22.02.2008 Circular of the Ministry of Interior
- All information concerning government grants to the press
- All information relating to the movement of the Postal Press
- Names of staff at the General Secretariat of Communication and Information together with those of the Directorates and Departments they are serving

Finally, the principle of transparency in all areas of public life, including media, is expected to be enhanced given that there is now in place an Action Plan Promoting Open Government (Greek Action Plan 2014-16). Technical and institutional changes have been adopted to enhance the principle of transparency and these should lead to the enhancement of the functionality of the DIAVGEIA project, the publication of public procurements and open, transparent and secure exchange of public documents.

In the present action plan, the major challenges in the effort to enhance transparency focus on the institutional and technological upgrading of the DIAVGEIA Program, the publication of all open invitations for filling posts in the public sector and the publication of public administration organisational charts. The Action Plan also aspires to achieve improved coordination and monitoring of Open Government Policy, the reorganization of inspectorate bodies and the development of a strategic alliance against corruption.

### **III. State Funding of Media**

The Greek press has undergone a process of modernisation since the fall of the military junta in 1974, enabled by the introduction of new printing technologies, the entry of private investors, and fierce competition with television. The sector has witnessed the entry of industrialists, ship owners and people from the construction industry, all of whom were trying to influence public opinion and exert pressure on politicians to the benefit of their business interests.<sup>44</sup> However, the ongoing fiscal crisis has accelerated the decline in circulation and brought major losses of advertising revenue. This has affected newspapers, as entrepreneurs in public construction projects who were also active in the press could no longer cross-

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<sup>42</sup> Presidential decree 109/2010 transposed the AVMS Directive.

<sup>43</sup> See Article 3 Law 1178/81, FEK A' 187/1981.

<sup>44</sup> Leandros, N. (2010) 'Media Concentration and Systemic Failures in Greece', *International Journal of Communication*, 4, pp. 886-905.

subsidise their media assets with revenues generated from public orders. Meanwhile, state subsidies for the press, which greatly supported the press, have ceased due to the financial crisis.

More specifically, state aid for newspapers in Greece was established as an economic intervention with strong political repercussions on both politics and the press. Whereas press subsidies do not necessarily result in government control of newspaper output,<sup>45</sup> government intervention in the press in Greece has the following characteristics. First, press subsidies have not been governed by a clear and transparent regulatory framework; rather, they have been practiced under a paternalistic and clientelistic political culture that has tied together the state and the press in a network of mutual benefits. The state largely defined the extent of autonomy it was willing to grant to the press and it used press subsidies to make individual press enterprises dependent, as the latter could not afford the production and distribution costs. Second, there has been no transparent and regular financial press subsidy scheme and most newspapers have become dependent on irregular direct government financial support as well as on bank loans. Third, indirect subsidies such as government advertising and reduced tariffs on telephone and air transport have been either abolished since July 2011 or drastically cut (see table below).<sup>46</sup> This is likely to result in the bankruptcy of most of the current titles, both at a national and a regional level.

**Table A1: Public Aid to the Greek Press 2009-2012 (€)**

Year	Postage	Telephones	Air transport in Greece	Air transport outside Greece
2009	32,707,293.69	767,864.56	5,482,337.92	616,890.00
2010	27,872,214.26	650,809.79	5,953,442.32	467,649.37
2011	16,986,978.89	309,687.53	1,795,914.65	164,250.88
2012	5,653,990.05 (estimation)	Abolished	Abolished	Abolished

Source: Papathanassopoulos, 2014.

#### IV. Journalists' protection from undue influence

Relevant to the issue as to whether journalists can resist political or economic pressure is the Code of Conduct of Greek Journalists, decreed by the regulatory body, the National Council for Radio and Television (NCRTV) and published in 1990 as part of a collective contract signed by the Union of Journalists of Daily Newspapers of Athens (ESIEA) and the management of the Greek Public Broadcaster ERT. The rules in the code apply both to public and private broadcasting channels. The provisions of the Code related to journalists are described below.

- Journalism is a function.
- Truth and its presentation constitute the main concern of the journalist.
- The journalist defends everywhere and always the freedom of the press, the free and undisturbed propagation of ideas and news, as well as the right to opposition.

<sup>45</sup> Sparks, C. (1992) 'The Press, the Market and Democracy', *Journal of Communication*, 42(1), pp. 36–51.

<sup>46</sup> Papathanassopoulos, op. cit.

- The religious convictions, the institutions, the manners and customs of nations, peoples and races, as well as citizens' private and family life are respected and inviolable.
- The primary task of the journalist is the protection of people's liberties and democracy, as well as the advancement of social and state institutions.
- Respect for national and popular values and the protection of people's interests should inspire journalists in the practice of their function.
- Journalists while practicing their function reject any intervention aimed at concealing or distorting the truth.
- Access to sources of news is free and undisturbed for the journalist, who is not obliged to reveal his/her information sources.
- The function of journalism may not be practised for self-seeking purposes.
- Journalists do not accept any advantage, benefit or promise of benefit offered in exchange for the restriction of the independence of their opinion while practicing their function.<sup>47</sup>

The above Code of Conduct for the Greek Journalistic Profession, which has been unanimously approved by the Journalists Unions (see below), applies to the members of all journalists' unions, irrespective of the type of media they work for. In short, the Code proclaims the duty of journalists to denounce state authoritarianism and abuses on the part of media owners, to defend journalistic independence and to refuse to carry out assignments that contradict journalistic ethics (Article 3). The disciplinary councils of the unions are responsible for investigating alleged breaches on the basis of specific complaints or *ex officio*. It should be noted, however, that since the unions' remit applies only to members, the effectiveness of the mechanism of journalistic self-regulation is, in practice, limited. Moreover, the current self-regulatory system has been structured without including the media industries within its purview, and it therefore lacks the power to ensure the full commitment of media owners to the professional standards and principles of independence prescribed in the Code. The apparent lack of effective self-regulatory safeguards presents a challenge for the autonomy of editorial activity.

Regarding the security of labour law, on average journalists are officially employed with a long-term contract, which provides them with benefits such as paid holiday, sick leave, maternity leave, etc. However, some recent studies<sup>48</sup> found that the lack of effective self-regulatory safeguards poses problems for the autonomy of editorial activity, allows for potential influence, and consequently impacts on journalists' working conditions as they are forced to sign short-term contracts with unfavourable conditions.

## **V. Adequate protection of journalistic sources**

The representation and promotion of the professional interests of journalists employed in newspapers and the electronic media is ensured through the establishment of four regionally organised unions, two of which are the most prominent: *Union of Journalists of Daily Newspapers of Athens (ESIEA)* and the *Union of Journalists of Daily Newspapers of*

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<sup>47</sup> See <http://www.esiea.gr>

<sup>48</sup> See Iosifidis, P. (2016) 'Greek Media and Independent Journalism Under Austerity' in Open Democracy, at: <https://www.opendemocracy.net/uk/austerity-media/petros-iosifidis/greek-media-and-independent-journalism-under-austerity>;

Also, Iosifidis, P. and D. Boucas (2014) Media Policy and Independent Journalism in Greece. London: Open Society Foundations at: <http://openaccess.city.ac.uk/6034/1/OSF%20Greece%20Media%20and%20Journalism%20Report%20DRAFT%2020jan2015.pdf>.

*Macedonia-Thrace (ESIEMTH)*. The *Periodical and Electronic Press Union (ESPIT)* represents journalists who work for magazines and the online media. Grouped under the *Pan-Hellenic Federation of Journalists' Unions (POESY)*, the unions' principal aim is to negotiate labour contracts, wages, employment conditions and social security benefits with the state and the employers. The unions are also tasked with supervising journalists' ethical performance, self-regulating journalists' professional behaviour, and protecting the principles of journalistic autonomy and editorial independence.

The aforementioned disciplinary councils of the unions investigate alleged breaches of the code mainly on the basis of specific complaints, but also *ex officio*, and have the power to impose penalties (i.e. reprimands, suspension of membership or expulsion) on journalists found guilty of breaches, such as defamation, distortion of facts or anti-collegial behaviour. It should be noted that it is not mandatory for a journalist to be a member of a professional union, and there are a number of requirements that must be fulfilled before qualifying for entry, such as a minimum of three years of employment as a journalist. As the code and the imposition of penalties apply only to members, self-regulation through the code is limited.<sup>49</sup>

Courts both at the national and the European levels play a crucial role in shaping the law affecting the media, through statutory interpretation. Individuals who have had their right to respect for their personality, reputation, private/family life, etc. violated by the media can make a case to the courts. The Greek Constitution does not prioritise *in abstracto* any one right over another.

Instead, competing rights claims must be balanced vis-à-vis one another ad hoc and in relation to the context of each case at hand. Domestic courts have emerged as increasingly important norm setters in areas that are directly linked to freedom of expression and freedom of imparting and receiving information through the media. While they are the central fora where conflicts concerning journalistic freedom are resolved, nonetheless, political decision-makers rarely invoke their decisions when they formulate laws and policies.<sup>50</sup>

## **VI. Impact of European and International Legislation**

The ECtHR constitutes an alternative platform for journalists and individuals to seek redress for the infringement of their rights. Strasbourg jurisprudence has challenged domestic courts' case law on a number of occasions. However, the ECtHR's rulings have not contributed to domestic legal reforms, as far as prevention of new violations of Article 10 of the ECHR on freedom of expression and freedom of information is concerned. Similarly, the EU Charter of Fundamental Rights and in particular its provisions on the freedom of expression and media freedom have impacted on domestic media policy.<sup>51</sup>

In general, the EU regulatory framework for media services has been enforced in Greek law. Presidential Decree 100/2000 transposed the TWFD into Greek law and more recently Presidential Decree 109/2010 transposed the AVMS Directive into Greek law. In addition, Presidential Decree 131/2003 for 'electronic commerce' (Official gazette 116/A/16.05.2003) transposed into Greek law the EC Directive on electronic commerce (2000/31/EC).

In terms of national laws relating to the mentioned EU directives, apart from the Presidential Decree 100/2000, Presidential Decree 109/2010 and Presidential Decree 131/2003, those that are applicable are *Law 2328/1995* (covering terrestrial commercial broadcasting), *Law*

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<sup>49</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011), *op. cit.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

2644/1998 (covering pay-TV services, analogue and digital), and *Law 3592/2007* (covering licensing procedures for analogue broadcasting, digital television via terrestrial, cable, satellite or IPTV means, and media concentration).

## **VII. Legal rules on concentration of internet service providers**

Law 3592/2007<sup>52</sup> provided for a number of issues, among them media concentration, including ISP market concentration. There are five main ISPs in the country<sup>53</sup> and consumers have the option to choose between these in their own geographical location, though most are based in the capital, Athens. The 5 main ISPs have nearly equal market share. International search engines such as Google are the most used, at the expense of national search engines. As in many other European countries, Google has a dominant position (with a market share of 90%) when it comes to online search engines.

In terms of specific rules on the rights and obligations of search engines – or internet service providers – as gatekeepers, the rules are initiated and implemented by the Hellenic Telecommunications and Post Committee (HTPC), an independent administrative authority that regulates, supervises, and monitors the electronic communications and postal services market in Greece. According to Article 12 of Law 3431/2006, the HTPC regulates: the definition of relevant markets, products, or electronic communications services; and the assignment and obligations of operators with significant market power in the above-mentioned markets in accordance with national and EU legislation. Moreover, the HTPC is responsible for applying Law 703/1977 on the control of monopolies and oligopolies and the protection of free competition. This law was amended by Law 3373/2005 to incorporate the European Commission (EC) rules on the pre-notification of mergers. It also incorporates former Articles 81 and 82 of the EC Treaty in accordance with Council Regulation 1/2003, in relation to the activities of electronic communication undertakings. The HTPC has sanctioning powers over the ISPs, but there is no evidence that ISPs engage in online content in an arbitrary manner.

Presidential Decree 131/2003 (which transposed the EU Directive on electronic commerce and implemented EU provisions concerning the liability of Internet intermediaries) provides an indirect form of content regulation entailing effects on the exercise of the freedom of expression and the freedom of information in the online environment. ISPs are exempted from any liability regarding the information they transmit or store. No general obligation to actively seek acts or circumstances indicating illegal activity is imposed on them. However, the Presidential Decree also stipulates that, notwithstanding the protection of secrecy and of personal data, ISPs are obliged to inform promptly the competent domestic authorities of any alleged illegal activities. One considerable exemption to the non-liability rule that the Presidential Decree introduces is the field of data protection.<sup>54</sup> Article 20(1)(b) stipulates that data protection rules are exempted from the scope of application of the Presidential Decree.

## **VIII. Public service broadcasting and definition of the public service remit**

Alongside constitutional safeguards for the “objective and on equal terms transmission of information and news reports” by broadcast media (Article 15(2) of the Constitution), the

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<sup>52</sup> Law 3592/2007, titled ‘New Act on Concentration and Licensing of Media Undertakings’ was passed by the Greek Parliament in late 2007.

<sup>53</sup> These are FORTHNET, COSMOTE, VODAFONE GREECE, WIND HELLAS and CYPTA HELLAS.

<sup>54</sup> Psychogiopoulou, E., D. Anagnostou, and A. Kandyla (2011), *op. cit.*

Greek public service broadcaster, ERT SA, is bound by its founding Law (Law 4324/2015) to contribute to pluralism and the independent transmission of news and information. ERT's TV and radio programmes and the content of online services shall be governed by the principles of objectivity, completeness and pluralism (Article 3(3) of Law 4324/2015). ERT SA is further mandated to cater for the presentation of the activities of the Hellenic Parliament, the European Parliament, political parties, regional administrations, civil society and the productive classes with respect to the principle of proportional equality (Article 3(5) of Law 4324/2015). Moreover, pursuant to the provisions of Presidential Decree 77/2003, ERT's news programmes should be objective and accurate and should respect different viewpoints (Articles 3 and 14).

The supervision of ERT's content lies with ERT's Managing Director (Article 9(a) of Law 4173/2013, added by means of Article 8 of Law 4324/2015), while the monitoring of compliance with programme obligations and principles is under the responsibility of regulatory body National Council for Radio and Television (NCRTV).

It must be noted that ERT SA was abruptly shut down in June 2013 and was replaced by a new public service broadcasting company called NERIT.<sup>55</sup> ERT SA was re-established in the spring 2015 by means of Law 4324/2015. During ERT's short life as the 'new' public service broadcaster, the laws guaranteeing the proportional representation of political parties in ERT's programmes and services are fully respected. Similarly, ERT's news and other journalistic and political programmes respect different viewpoints.

As mentioned above, the supervision of ERT's content lies with ERT's Managing Director, while the monitoring of compliance with programme obligations and principles is under the responsibility of the NCRTV. Note that, since 2009, the NCRTV has been conducting research on political pluralism and publishes political diversity reports. The content analysis, performed by the NCRTV, includes a sample of news programmes, journalistic programmes and political analysis programmes in both the public and private TV channels, indicating the percentage of time allotted to each political party and party leader.

In terms of the financial management of the public service broadcaster, ERT is mainly funded by a licence fee, paid in the household electricity bill (along with other applicable taxes). The fee represents the vast majority of the resources of the public group. The fee was 4.74 euros per month in 2013 (one of the lowest in Europe), and yet it was reduced further to 3 euros per month upon the launch of NERIT. It is not connected to actual ownership of a TV set.

In terms of engaging with digital and online activities, it has to be said that the Greek public broadcaster only recently started embarking upon online activities, with the launch of digital channels and its own web site.<sup>56</sup> As such there is no separate editorial board for the online public service content.

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<sup>55</sup> Iosifidis, P. and I. Katsirea (2014) 'Public Service Broadcasting in Greece in the Era of Austerity', European University Institute Working Papers, at: [http://cadmus.eui.eu/bitstream/handle/1814/31872/RSCAS\\_2014\\_42.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/31872/RSCAS_2014_42.pdf?sequence=1).

<sup>56</sup> Iosifidis, P. (2007) *Public Television in the Digital Era: Technological Challenges and New Strategies for Europe*, London: Palgrave Macmillan.

## **MEDIA PLURALISM IN HUNGARY**

### **Report by Judit Bayer<sup>1</sup>**

#### **Summary**

Restrictions on ownership concentration were relaxed in the media reform of 2010, but the Media Council still has strong powers in deciding about mergers in both the print and the electronic markets.<sup>2</sup> The names of the direct majority owners are accessible online but their ownership ratios and deeper levels of ownership are not accessible to the public.<sup>3</sup> Those who stand behind the direct owners or those who benefit from ownership cannot be known from official sources.

Almost all major media outlets are owned by domestic oligarchs who have informal links to the political and economic sector, except for the big international owners – who are gradually moving out of the market.<sup>4</sup>

After 1990, the Hungarian media scene was characterised by constant political infighting to dominate the public service media. And after 1998, it was also strongly shaped by Viktor Orbán's<sup>5</sup> strategy to create private media outlets that are owned and staffed by his own political allies.

Ownership relations in the Hungarian media scene have changed significantly in the past two years, mainly because of the fight between Prime Minister Orbán and Lajos Simicska (the foremost national oligarch), former business and political allies who became enemies.<sup>6</sup> Simicska had a large media empire (a television channel, two radio channels, two newspapers, television programme production companies and several companies in other business sectors, for example the construction industry, among others). The split was a conscious step by Orbán, who started to build a new media empire with new players: Magyar Idők (in charge of a newspaper), 888.hu (an online news portal), TV2 (a national TV channel), Lokál (a free paper distributed on public transport), in addition, new thematic channels of the public broadcaster were launched. The split between Simicska and Orbán shows clearly that media success in Hungary depends upon good governmental relations. The exact nature of the relationship between political parties or persons holding political power and owners of media amounts to protected (concealed) information. "Publicly it is only known that there are certain ties: former roommates, neighbours, friends, and relatives are among the main players.

The level of political bias is quite diverse, depending on the medium, but the biased mainstream media account for well over 50% of the total. Although the law prohibits indirect or second-level surrogate ownership, the affiliations are informal; they cannot therefore be tackled through law enforcement.

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<sup>1</sup> Professor, University of Miskolc.

<sup>2</sup> Article 171 Mttv. , Article 68 Mttv., Article 69 Mttv., Article 38 Mttv.

<sup>3</sup> See [http://mediatanacs.hu/tart/index/1569/Linearis\\_audiovizualis\\_mediaszolgalatasok](http://mediatanacs.hu/tart/index/1569/Linearis_audiovizualis_mediaszolgalatasok)

<sup>4</sup> Freedom House: "Nations in Transit 2014-Hungary." (2014). See also: Mérték Médiaelemző Műhely Bevált Módszerek, Új Haverok. Lány cenzúra a magyar médiában – 2015.

<sup>5</sup> Prime Minister of Hungary from 1998-2002 and from 2010 until today.

<sup>6</sup> <http://mertek.hvg.hu/2016/01/05/a-g-nap-es-a-nagy-partraszallas>. G stands for a four-letter word that Simicska used towards Orbán.

Several media outlets are sustained to a large extent by state advertisements or advertisements placed by state-owned companies. These have an influential formative effect on the media market. Private sector advertising follows the direction of government ads, which is particularly distortive to the market. The establishment of the National Communication Authority (NKH) in October 2015<sup>7</sup> signals that state advertising is treated as a strategic weapon to form (distort) the market. NKH coordinates the distribution of state advertisements through three PR agencies, which were selected in public procurement for long-term. It disposes of over 25-40 billion HUF (€80-130 million) per year, and two of the three PR agencies have obvious close ties to the government.<sup>8</sup>

Membership in journalistic associations is voluntary and the various associations are competitive rather than cooperative. Therefore, ethical procedures have a limited effect. Political parallelism has been traditional across all media.

The protection of journalistic sources, after it was featured in the international spotlight and following a Constitutional Court decision, could now be a model for best practice in regulation. However, in practice, secret surveillance is used to observe and intimidate independent journalists.

The Media Council has rights over online journals and ISPs as well: it may ban or block illegal content and impose a fine to both online journals and ISPs for violations.<sup>9</sup> Online media's popularity and democratic importance are steeply increasing for the younger generation. The share of advertising expenditure on the internet was greater than that for television in 2015.<sup>10</sup>

The public service broadcaster is operated by MTVA, whose head is appointed by the President of the Media Council, who also supervises and handles its finances and management.<sup>11</sup> The legal control mechanisms apply to 'empty shell companies', whereas MTVA is not accountable to anyone. The public value test, introduced in 2015, was not applied in practice when the public media service provider launched three new television – and one new radio channel. The new sports channel M4 is distributed free-of-charge by Antenna Hungaria, the state-owned multiplex, while it transferred the other sports channels into another, more expensive programme package. Advertising time is sold through a sales house (Atmedia), which sells public media advertising time in a package with other media outlets, most importantly that of TV2, causing a significant increase in the share of advertising sold in the context of cooperation between private and public broadcasters.<sup>12</sup>

## **I. Classic issues of pluralism**

### **1. Ownership concentration**

The ownership structure of the Hungarian media market has significantly changed in the past two decades. The dominance of foreign investors in the 1990s ceased in the first decade of the new millennium. Hungarian ownership became more significant, and cross-media ownership also occurred.

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<sup>7</sup> <http://nkoh.kormany.hu>; [http://hvg.hu/itthon/20151028\\_Volt\\_MTVs\\_musorvezeto\\_oszthatja\\_az\\_allam](http://hvg.hu/itthon/20151028_Volt_MTVs_musorvezeto_oszthatja_az_allam)

<sup>8</sup> <http://444.hu/2015/08/07/ok-harman-osztoznak-az-allami-cegek-25-milliardjan/>

<sup>9</sup> Article 189 (3) bf) Mttv. Article 188 (2), Article 189 (3)-(7) Mttv.

<sup>10</sup> <http://mrsz.hu/kutatas/reklamkoltes/reklamkoltes-2015>

<sup>11</sup> Article 136 Sections (6), (10), (11), (14), (16) Mttv.

<sup>12</sup> Submission to the European Commission 09/05/2016, RN. 2016/045446.

The Act on Mass Communication and Media Services (Mttv.),<sup>13</sup> introduced in 2010, is more liberal in allowing ownership concentration than the previous one; among other things, it does not regulate cross-ownership.

Mttv.'s new rules on the prevention of media monopolies have created two different categories of influential media service providers with a special audience share. As a basic, pragmatic rule: a linear media service provider that has at least 35% of the audience share in either the television or the radio market, or 40% on both markets cannot acquire a new media service, and is obliged to take measures in order to increase market diversity. The prohibition extends to their owners and to persons who have an influential share in any of their owners' businesses (a third level of ownership).<sup>14</sup>

The second specific category that contributes to achieving pluralism is "Significant Influencing Power" (SIP). Media service providers with SIP fall under stricter rules both in content regulation and in ownership control.<sup>15</sup>

A media service provider is regarded as having SIP if it has at least 15% yearly average audience share, provided that at least one of its services goes beyond 3%. The position is established yearly by the Media Council in an official procedure, or it can conclude a contract with the media service provider in question and define individual obligations.

The Media Council acts as an expert authority (szakhatóság) in procedures at the Competition Authority, if any of the merging parties have editorial liability, and if their primary object is to transmit media content through a telecommunication network or by a press product.<sup>16</sup> Interestingly, while cross-ownership between media service providers and press product owners is not regulated by law, the Media Council may interfere in market processes (mergers and acquisitions) not only between these actors, but also between press product owners, as happened in the Axel Springer-Ringier case in 2011.<sup>17</sup> The Media Council prohibited the merger of the print publishers Axel Springer and Ringier, proceeding in its role as expert authority, and delivering its opinion to the Competition Authority. In 2014, both Ringier and Axel Springer sold parts of their portfolios to an Austrian enterprise called Vienna Capital Partners (VCP), and asked again for merger permission, which was approved this time.<sup>18</sup> VCP bought Népszabadság, Világgazdaság, Nemzeti Sport, and eight regional daily papers. Axel Springer and Ringier fused after this with the remainder of their media portfolios: mainly entertainment magazines. VCP then – through two companies – established a new company called Mediaworks, which is owned by an Austrian businessman Pecina (charged in a criminal procedure for a financial crime in Austria).<sup>19</sup> In 2016, Mediaworks owned more than 60 media brands, dozens of the most successful print dailies, weeklies and women's magazines. The huge portfolio owned by various dependent companies was unified under the name Mediaworks during May 2016.<sup>20</sup> It is suspected that the whole portfolio may get sold in one

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<sup>13</sup> Act CLXXXV. of 2010. on Mass Communication and Media Services.

<sup>14</sup> Article 68 Mttv.

<sup>15</sup> Articles 69 and 38 Mttv.

<sup>16</sup> Article 171 Mttv.

<sup>17</sup> Gálik Mihály – Vogl Artemon: Az új médiakoncentráció-szabályozás első vizsgálója: az Axel Springer és a Ringier kiadói csoport megíúsult összeolvadása a magyar piacon. Médiakutató Vol. 2001/3. [http://www.mediakutato.hu/cikk/2011\\_03\\_osz/06\\_mediakoncentracio\\_szabalyozas](http://www.mediakutato.hu/cikk/2011_03_osz/06_mediakoncentracio_szabalyozas)

<sup>18</sup> [http://hvg.hu/kkv/20140723\\_Ujabb\\_sajtopiaci\\_osszeolvadasra\\_mondott\\_a](http://hvg.hu/kkv/20140723_Ujabb_sajtopiaci_osszeolvadasra_mondott_a)

<sup>19</sup> [http://hvg.hu/kkv/20141001\\_Oriasi\\_mediabiroldalom](http://hvg.hu/kkv/20141001_Oriasi_mediabiroldalom)

<sup>20</sup> <http://24.hu/media/2016/05/03/osszeolvadtak-a-mediaworks-cegei>

package, as there may be new ties between Mediaworks and government-friendly investors (according to an investigative online journal).<sup>21</sup>

## 2. Ownership transparency

The names of the media service providers' owners are publicised at the website of the Media Authority, but the ratios, or the indirect owners are not accessible to the public.<sup>22</sup> The data are easily accessible, but they do not provide enough information. They are in pdf files divided into categories, containing the name and domicile of the service provider, the name and category/website of the media service. The Company Register's online database does not provide the owners or shareholders of the company, only domicile, taxation number and company register number. There is no specific online database, and this information is not generally accessible on the sites of the media outlets. Those who stand behind the direct owners or those who benefit from the ownership cannot be known from official sources.

The ownership ratios of linear service providers are known to the Media Authority, but they are not made public. Under the Mttv, all linear media service providers must report to the Media Authority whether the applicant, or the person having an influential share in the applicant company, has a direct or indirect ownership stake in any media service provider, or in a company applying to be a media service provider on Hungarian territory, and if so, the percentage of that ownership. This applies to media service providers, if they just register to provide cable services, and if they apply for an analogue frequency (radios).<sup>23</sup> Media-service providers that use terrestrial frequencies must report to the Media Council within five days if there is any change in their ownership ratio.<sup>24</sup>

As for links to the political elite, almost all major media outlets are owned by domestic oligarchs who have informal links to the political and economic sectors, except for big international owners like Bertelsmann, Ringier, and RTL.<sup>25</sup> A recent study identified eight oligarchs within the Fidesz business networks. The most well known are Lajos Simicska, Zsolt Nyerges and István Töröcskei.<sup>26</sup>

According to the OSCE, "[w]hile Hungary has numerous electronic and print media outlets, many of them are owned or controlled by persons associated, directly or indirectly, with Fidesz. In addition, the allocation of state advertising predominantly to government-friendly outlets undermines media pluralism".<sup>27</sup>

Fidesz has been consciously building a right-wing media "empire" since 2008, from its first governing period. Before that, in the period after the political changes of 1989, journalists were primarily liberal intellectuals, and left-wing political opinion was overrepresented in the media, without ownership influence. The dominant ownership type was international, although an influential share in *Népszabadság* (the biggest Hungarian daily and the successor

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<sup>21</sup> <https://blog.atlatszo.hu/2016/06/pecina-vitezy-biznisz-mediaworks-jelzaloq-a-helyi-tema-vedjegyein/>

<sup>22</sup> [http://mediatanacs.hu/tart/index/1569/Linearis\\_audiovizualis\\_mediaszolgalatasok](http://mediatanacs.hu/tart/index/1569/Linearis_audiovizualis_mediaszolgalatasok)

<sup>23</sup> Article 42 (1) e), Article 56 c) Mttv.

<sup>24</sup> Article 63 (14) Mttv.

<sup>25</sup> Freedom House: "Nations in Transit 2014-Hungary." (2014). See also: Mérték Médiaelemző Műhely Bevált Módszerek, Új Haverok. Lány cenzúra a magyar médiában – 2015.

<sup>26</sup> <https://freedomhouse.org/report/freedom-world/2016/hungary>; Csik, Dávid, László Gulyás, and George Kampis. "Business networks. An analysis of influential businessmen within the network of the FIDESZ party in Hungary." *Procedia Computer Science* 66 (2015): 247-256.

<sup>27</sup> <https://cpj.org/blog/2014/07/hungarys-independent-media-struggle-against-econom.php>

of the Communist Party's journal) was owned partly by the foundation of the Hungarian Socialist Party until recently.<sup>28</sup> This led Viktor Orbán to launch his own media policy to create a "media balance", interfering with the media market already in 1998. After losing in the elections, Fidesz aimed at going back to government and creating the conditions to stay in power as long as possible, including by creating a favourable media environment.

Ownership relations in the Hungarian media scene have changed significantly over the past two years, mainly because of the fight between Lajos Simicska and Viktor Orbán (Prime Minister of Hungary), former business and political allies who became enemies. Lajos Simicska used to be one of the most important financial supporters of Fidesz, until his friendship with Viktor Orbán came to an abrupt end – with loud media publicity in 2014 (the day the split became obvious to the general public is called G-Day, "G" referring to a four letter word Simicska used in the media to denote Orbán).<sup>29</sup> The split was a conscious step by Orbán who started to build a new media empire with new – even more loyal – people, and enticed key figures of Simicska's media outlets join. Simicska had a media empire (a television channel, two radio channels, two newspapers: Magyar Nemzet, Heti Válasz, HírTV, Class FM, Lánchí and Rádió.) Magyar Nemzet was the most prominent conservative daily, which was Orbán's "favourite" newspaper until G-day. Simicska owns television programme production companies and several companies in other business sectors, for example in the construction industry.

Chief editor of Magyar Nemzet used to be Gábor Liskay who left on the G-day and joined Orbán's new media system: he bought another daily paper, Napi Gazdaság, which started a new era under the new title Magyar Idők, and a new radio station Karc FM. On the first day of Magyar Idők's publication, Viktor Orbán published a picture on his Facebook page reading Magyar Idők – thereby giving the message, that Magyar Nemzet was no longer his favourite newspaper; instead Magyar Idők was now the "officially Fidesz-friendly" newspaper. This was a message to the whole Hungarian economy, especially advertisers.

The new beneficiary after Simicska's decline was Árpád Habony: in March 2015 the Modern Media Group (MMG) was founded by Árpád Habony and Tibor Győri: both were personal consultants of the Prime Minister's office, and Habony was without official employment.<sup>30</sup> MMG's new, freely distributed paper Lokál would now replace Metropol, Simicska's paper, which used to be distributed at the public transport vehicles for free. The public transport company contracted with Lokál without a tender, Metropol's was terminated.<sup>31</sup> State-owned companies placed advertisements to the value of HUF 1 billion (€3.2 million) in Lokál during its first year of operation.<sup>32</sup> Habony's new website (888.hu) is also heavily and almost exclusively financed by state-owned enterprises.

Simicska sold his radio station Class FM, apparently because Gábor Liskay had started a new commercial channel Karc FM (the similar sound of the two names might imply that Karc

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<sup>28</sup> Leftist media is the printed Népszabadság, Népszava online, 168 ora, Klubradio, ATV.

<sup>29</sup> <http://mertek.hvg.hu/2016/01/05/a-g-nap-es-a-nagy-partraszallas>

<sup>30</sup> In 2005, Orbán said that there was no official relationship between him or the government and Habony. Since 2003, however, he has been PR adviser to Fidesz. <http://nepszava.hu/cikk/1055004-orban-letagadta-habonyt>. [http://nol.hu/belfold/20101009-a\\_spindoktor\\_spindoktora-840751](http://nol.hu/belfold/20101009-a_spindoktor_spindoktora-840751).

<sup>31</sup> <http://444.hu/tag/modern-media-group/>

<sup>32</sup> <http://444.hu/2016/03/02/1-milliardert-hirdetett-az-allam-habony-arpad-lapjaban>

FM would like to attract the listeners of Class FM). Simicska had good reason to assume that Class FM's frequency licence would not be renewed anyway by the Media Council.<sup>33</sup>

The owners' other companies are often beneficiaries of public procurement procedures. The Simicska story perfectly illustrates that being "lucky" is conditional on having good relationships with Orbán: after the split, Simicska's construction company was excluded from public procurements for three years (even though he gave the cheapest offer). This was objected to by the European Commission and the decision had to be reversed.<sup>34</sup> This did not however change the outcome of the public procurement procedure which was won by the mayor of Felcsút, Viktor Orbán's home village, who has also become an oligarch in the past few years.

Since the end of their friendship, Simicska turned his media outlets against Fidesz, both Magyar Nemzet and Hírtv, a national news channel. Orbán reacted by buying channel TV2 through Andy Vajna, cabinet minister (kormánybiztos), and by creating a thematic news channel in the public service media. TV2's purchase was not without political turmoil: the channel was owned by Pro7Sat1 until 2014 when it was sold to the two managing directors, Yvonne Dederick and László Simon. Simicska had a secret 'right of option' contract signed by Dederick and Simon, which allowed him to buy the channel with a one-sided declaration and he claimed he had done so before Vajna concluded the purchase contract.<sup>35</sup> Vajna bought TV2 with a loan received from state-owned Eximbank.<sup>36</sup>

#### Transparency

The exact nature of the relationship between political parties or persons holding political power and owners of media are protected (concealed) information. What is known publicly is only that there are certain ties: for example Orbán and Simicska used to be roommates at university; Habony is an unofficial personal consultant of the Prime Minister, who has only elementary education and has no contract with the Prime Ministers' office – yet his expenditures are spectacular, and he appears to be involved in all important decisions. The cabinet minister Rogán's neighbour has been contracted to publish state advertisements to the value of billions of HUF.<sup>37</sup>

The information used here appeared in independent online press like Átlátszó, 444.hu, HVG online, and in professional papers like Kreatív or Mérték, which are read only by interested intellectuals and media professionals. The relations are rather complicated to see through (see Figure A1). The oligarchs mentioned control the mainstream press and obviously control the information spread about them and their businesses, as well as their ties with politicians.

According to a Freedom House report from 2015, "[t]he close ties between political and economic elites remain a major source of corruption. The government and the legislature in 2014 continued to use their power to serve the business interests of friends and clients and to manipulate public procurement."<sup>38</sup>

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<sup>33</sup> <http://444.hu/2016/01/07/simicska-embereire-palyazik-az-uj-kormanyparti-radio>; <http://24.hu/media/2016/02/22/kicsinalhatja-simicska-radiojat-a-fidesz/>; <http://nol.hu/belfold/simicskat-nem-lehet-torvenyesen-elhallgattatni-de-a-fideszt-ez-nem-gatolja-1602669>; <https://www.mediapiac.com/mediapiac/Schlecht-Csaba-Persze-Lajos/112685/>

<sup>34</sup> <http://24.hu/fn/gazdasag/2016/06/01/brusszel-fennakadt-a-kozqep-kizarasan-simicska-melle-alltak/>

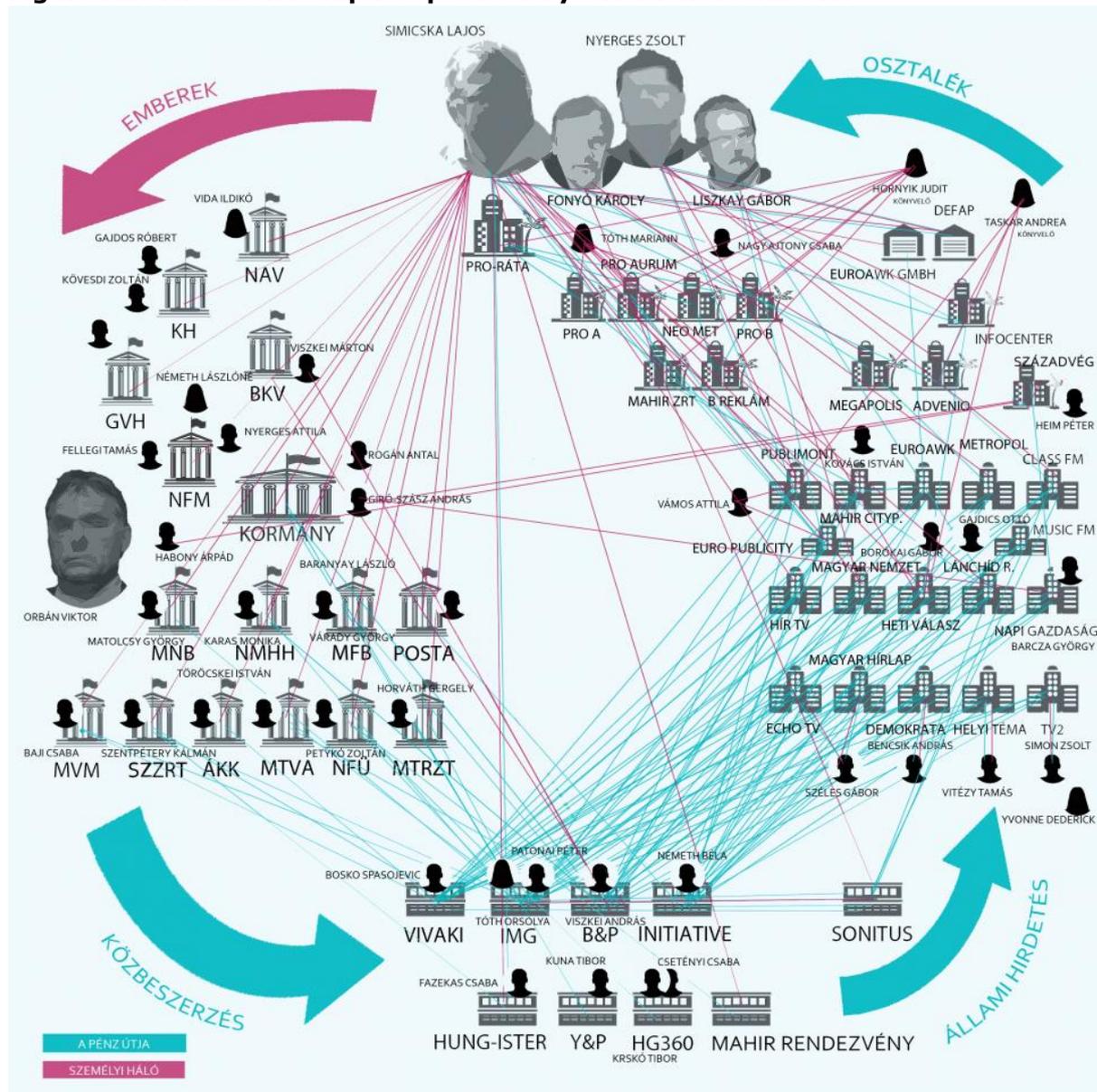
<sup>35</sup> [http://bbj.hu/business/simicskas-partner-claims-he-bought-tv2-before-vajna-could\\_105697](http://bbj.hu/business/simicskas-partner-claims-he-bought-tv2-before-vajna-could_105697)

<sup>36</sup> <https://budapestbeacon.com/news-in-brief/did-andy-vajna-use-public-funds-to-purchase-tv2/29492>

<sup>37</sup> <http://24.hu/media/2016/03/08/a-nepszabadsagert-is-felelos-igazgato-rogan-szomszedjához-igazolt/>

<sup>38</sup> <https://freedomhouse.org/report/nations-transit/2015/hungary>

**Figure A1: The media empire operated by Orbán and Simicska**



**Notes:** Blue arrow designates the money route and the red arrow, personal connections.

**Source:** [http://www.kreativ.hu/cikk/hogyan\\_mukodott\\_orban\\_es\\_simicska\\_mediabirodalma](http://www.kreativ.hu/cikk/hogyan_mukodott_orban_es_simicska_mediabirodalma)

### Political bias

The level of political bias is very diverse, depending on the medium. Many outlets try to maintain the illusion of objectivity, like Magyar Nemzet, Heti Válasz, HírTV, but their news reports are usually presented from the perspective of political interests, and often the relevant unpleasant news is omitted. However, the falsification of news is committed only by more extreme, lower quality outlets like Echo Tv, Lánchíd Rádió,<sup>39</sup> recently 888.hu, and unfortunately by public service television. Klubrádió is an openly partisan left-liberal radio

<sup>39</sup> In a recent interview, a close friend of Simicska alleged that before the split, every week there was an “instruction meeting” with the representative of the government. <https://www.mediapiac.com/mediapiac/Schlecht-Csaba-Persze-Lajos/112685/>

station, but this is reflected rather in its talk- and phone-in shows, and less in its news reporting, which is reliable.

The total audience share of the media outlets with a political affiliation is well above 50%, especially if only mainstream media are considered. However, the audience share of those that are extremely biased, is lower. The public service television's news programme has constantly around 2.5%.<sup>40</sup>

A correlation between non-transparent ownership, political affiliation, and political bias clearly exists. "The government simply realised that they can much more effectively achieve their goals of monopolising the media market by business pressure and economic means".<sup>41</sup> But even if it were transparent, without other measures, there would be no change. Although the law prohibits both direct and indirect (second-level) ownership by political actors, the affiliations and ties are more informal, and therefore they cannot be tackled through law enforcement. Corruption in public procurements could be prosecuted for, but the system has built in "protection" against such charges. Criminal procedures against politically unpleasant cases are either never initiated or suspended. During all Orbán governments, the Public Prosecutor has been Péter Polt, a Fidesz candidate during the 1994 elections, and former Deputy Ombudsman, whom Fidesz supported for the position and who never caused any disappointment to the prime minister.

### 3. Funding

There are no press funds in Hungary, although the idea has been repeatedly raised by journalistic associations, by various media experts, and recently in 2015 by a state secretary responsible for cultural investments. The Media Services Subsidising and Property Managing Fund (MTVA) has a subsidising programme for movies and musical works.

Several media outlets are sustained to a large extent by state advertisements or advertisements by state-owned companies. There was always a political parallelism (in the past 20 years) in distributing advertising among the media outlets, but since 2010 the leftist media outlets have received practically no advertisements at all.

State advertisements have an influential formative effect on the media market. First, state advertising is one of the main revenues for the printed press, especially after 2008, and advertisement spending has continuously and radically dropped.<sup>42</sup> Second, it has an effect on private advertising, too: the placement of state advertisements traditionally sent a message to all other companies on where they "should" place their advertisements. By placing state ads, the government sends a signal to the market, indicating which are the "friendly" media in which they should advertise, if they want to become "friends", too. Private sector advertising follows the lead of government ads, which is particularly distorting to the market. The weight of state advertising – together with that of the private enterprises that follow governmental guidance – is symbolised by the fate of the two national radio stations that gained national frequencies in 2009. Radio station NEO FM was ruined by not receiving any advertising (public or commercial), while its competitor, Class FM flourished – to a great extent due to state advertising. Neo FM actually went bankrupt and disappeared.

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<sup>40</sup> <http://mtva.hu/en/mtva-sajtoszoba/sajtokozlemenyek/vallalati-sajtokozlemenyek/a-koezmedia-nezettsegenek-valtozasa>

<sup>41</sup> By Urbán Ágnes, Mérték, cited at <https://cpj.org/blog/2014/07/hungarys-independent-media-struggle-against-econom.php>.

<sup>42</sup> <http://mertek.hvg.hu/2013/04/17/egyre-kisebb-a-torta/>

Following the bankruptcy of Neo FM, the Media Council assigned its set of frequencies to public-service media providers.

The establishment of the National Communication Authority (NKH) in October 2015<sup>43</sup> signals that state advertising is being treated as a strategic weapon to shape (distort) the market. Previously, state advertisements were distributed through advertising agencies, typically those working for Simicska's companies. NKH was created at the same time as Orbán split with Simicska as part of the new strategy. NKH coordinates the distribution of state advertisements through three PR agencies, which were selected through public procurement for long-term contracts. It has above 25-40 billion HUF (€80-130 million) per year at its disposal. The three PR agencies happen to 1) be owned by the neighbour of Antal Rogán, supervisor of NKH; 2) belong to the interest group of Peter Szijjártó, Minister of External Relationships and 3) belong to Mindshare, an advertising, marketing and public relations agency under foreign ownership, which is independent and regarded as left wing.<sup>44</sup>

Magyar Nemzet – a leading conservative daily, Orbán's ex-favourite newspaper owned by Simicska – used to get 46% of its advertising revenues from the state. This made up altogether one third of its net revenue. After Simicska and Orbán "unfriended", Simicska's papers and television station immediately lost their lucrative state advertisements which were redirected to the new favourites: Új Idők, Lokál, Karc FM.<sup>45</sup> In 2014, state advertising was 20% of the whole advertising market.<sup>46</sup>

Magyar Idők, Orbán's new favourite newspaper, started after the Simicska-scandal, has 80% of its advertising revenues coming in from state advertisements.<sup>47</sup> Kossuth Rádió (public service) receives about 29%, Ringier Axel Springer Online 30%, Magyar Hírlap 36%, Napi Gazdaság 53%, Sportfogadás (lottery) 100% from advertising revenues.<sup>48</sup>

Independent, oppositional and left-wing papers do not get state advertisements. There is no credible database of state advertising, only sporadic evidence is known and investigative journalism is left to uncover the facts.<sup>49</sup>

Typical state advertisers are the Electricity Company, the Budapest Transport Company and the National Lottery. The latter has financed television programme production, where the producing companies used to be owned by Simicska and still are owned by offshore companies, among others. The Budapest Transport Company regularly finances daily papers that are close to the government. All are companies with no competitors, and provide services that are not substitutable; therefore their advertising hardly has any business rationale (with the exception of the national lottery).

In a recent interview, a close friend and business partner of Simicska made several statements that support what has already been concluded from the facts.<sup>50</sup>

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<sup>43</sup> <http://nkoh.kormany.hu>; [http://hvg.hu/itthon/20151028\\_Volt\\_MTVs\\_musorvezeto\\_oszthatja\\_az\\_allam](http://hvg.hu/itthon/20151028_Volt_MTVs_musorvezeto_oszthatja_az_allam)

<sup>44</sup> <http://444.hu/2015/08/07/ok-harman-osztoznak-az-allami-cegek-25-milliardjan/>

<sup>45</sup> <http://nol.hu/gazdasag/elszankozo-hirdetesek-1525483>; See also [https://www.ecoi.net/file\\_upload/1226\\_1421659549\\_com-instranet.pdf](https://www.ecoi.net/file_upload/1226_1421659549_com-instranet.pdf). Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014.

<sup>46</sup> <http://www.digitalhungary.hu/marketing/Evolution-2016-novekedett-a-reklamkoltes-elenkul-a-piac/2596/>

<sup>47</sup> <http://mertek.hvg.hu/2016/05/03/bevalt-modszerek-uj-haverok-lagy-cenzura-a-magyar-mediaban-2015/>

<sup>48</sup> Bevált módszerek, új haverok, at 18.

<sup>49</sup> <http://mertek.hvg.hu/2016/05/03/bevalt-modszerek-uj-haverok-lagy-cenzura-a-magyar-mediaban-2015/>

<sup>50</sup> <https://www.mediapiac.com/mediapiac/Schlecht-Csaba-Persze-Lajos/112685/>

1. *Influencing the advertising market makes certain companies profitable, a fact that was validated in 1994 by Simicska when he acquired the Hungarian Advertising Company Mahir through privatisation.*

By “influencing”, we can understand both using state advertising as financing methods and as a signal to push commercial enterprises to spend their advertising budget at the “right” media outlets. The statement supports the assumption that this process is a consciously planned strategy.

2. *The other companies under Simicska are used to subsidise his media enterprises.*

This supports the assumption that the oligarchs close to the government operate these media outlets not for the business profit, but for their communicative power, to influence public opinion.

#### Transparency

Information on the placement, the target media and the amounts of state funding or state advertising is accessible to the public only through a commercial information aggregator e.g. KantarMedia, which provides information for free to journalists, but otherwise this information is their commercial product.<sup>51</sup> This is usually not easily accessible for the average person.

Media outlets do not have to account for the public money received. All state funded media are relatively biased, with the exception of some thematic weekly journals, for example those for children.<sup>52</sup>

There is a clear correlation between non-transparent state aid, political affiliation, and political bias, which is, however, rooted in the system.

This phenomenon is particularly a cause for concern in the local media, which are mostly financed by the local governments and lack independence. County-printed press have usually long-term contracts with the county government. In the regional daily paper market there are some independent and lucrative newspapers, such as Kisalföld and Bors (online). Audience shares are not measured. The quality of the journalism is very low, local news is mainly issued by the mayor or the local government. The same applies to audiovisual media.

The Internet is relatively free, and independent media are mainly accessible online. There is only one moderately conservative online political journal, mandiner.hu. It has published its state advertisement revenues. The figures show that since 2011 (the first time they received state advertising) it grew every year by up to HUF 5 million (€16,000).<sup>53</sup> The internet has been seen as the realm of independent or left-wing media outlets, with the exception of kuruc.info which is a right-extremist radical, racist portal. However, the governing party recently decided to establish an online journal, which is of very low quality. It is mainly sustained by advertising state-owned companies. (www.888.hu).

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<sup>51</sup> [www.kantarmedia.com/hu](http://www.kantarmedia.com/hu)

<sup>52</sup> ‘Buci Maci’, for example.

<sup>53</sup> [http://media.mandiner.hu/cikk/20160425\\_allami\\_hirdetesek\\_a\\_mandineren\\_2015](http://media.mandiner.hu/cikk/20160425_allami_hirdetesek_a_mandineren_2015)

## State aid to audiovisual media

TV2, one of the two national commercial television stations receives plenty of state advertisements after having been acquired by Andy Vajna, cabinet minister. Buying the channel was made possible through credit from a state-owned bank.<sup>54</sup>

TV2 was already the beneficiary of state advertising (received 18% of all state advertising in television in 2015) in the two years before RTL became oppositional. Allegedly, the government made an unsuccessful attempt to buy the channel. As it was not sold, the government invented the advertising tax, which was tailored in a way that RTL was the only media outlet that fell into the high category, paying 40% of its advertising revenues.<sup>55</sup> The European Commission started an in-depth investigation and has applied a suspension injunction until it is finished.<sup>56</sup> Two months later, the government amended the advertising tax: if the tax base did not reach HUF 100 million (€319,000) the rate was 0%, beyond that 5.3%.<sup>57</sup>

The government often publishes political advertisements in television channels, which should not be aired outside election campaign time according to the Mttv. Upon repeated claims of wrongdoing by the think-tank Mérték, the Media Council found that the video clips which popularise governmental measurements and policies are not political advertisements but "social purpose advertisements".<sup>58</sup> (While, on the other hand, when Klubrádió published an announcement to call for a demonstration, it was fined for illegally broadcasting political advertising<sup>59</sup>). At this moment, the prosecution is also examining the case – but there is no reason to think an objection would be raised, as the prosecution is very loyal to the government (see above).<sup>60</sup>

Public media also receive a variety of forms of state aid: besides the budgetary contribution, which is decided in a law year-by-year, a wide variety of tax relief measures are granted. According to the Mttv., the MTVA is exempt from paying fees for using public roads; the public service media service provider (now called Duna Médiaszolgáltató Zrt since 2015) is exempt from duties and corporate taxes; under the terms of the Act on Value Added Tax,<sup>61</sup> the MTVA and Duna Médiaszolgáltató Zrt. are subject to favourable VAT rules.<sup>62</sup>

In 2015, 13.8% of state advertising was placed with public service media outlets. Looking at expenditures for the media sector overall, 20.9% of the state funds spent in the television market went to public-service channels. In the radio market, 41.9% of state advertising went to public service stations. 29.1% of the total advertising revenue received by Kossuth Rádió was from state advertising, while in the case of Petőfi Rádió this ratio was 20.8%. At the same time, Klubrádió did not receive any state advertising. There are no transparent

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<sup>54</sup> <http://mertek.hvg.hu/2016/03/11/kereskedelmi-teve-allami-segitseggel/>

<sup>55</sup> Originally, no tax was to be paid below HUF 500 million (€1.6 million) advertising revenues, 1% below 5 billion (€16 million), 10% below 10 billion, 20% below 15 billion, 30% below 20 billion, and above HUF 20 billion (€64 million) 40%.

<sup>56</sup> [http://europa.eu/rapid/press-release\\_IP-15-4598\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4598_en.htm)

<sup>57</sup> This amendment may have been one of the causes leading to the split between Simicska and Orbán: Simicska fiercely criticised the advertisement tax after his companies were also subjected to it. <http://444.hu/2015/02/05/simicska-johet-a-totalis-mediahaboru/>

<sup>58</sup> <http://mertek.hvg.hu/2016/02/17/politikai-celu-tarsadalmi-reklam/>

<sup>59</sup> <http://mediatanacs.hu/dokumentum/165407/m108620141111.pdf>

<sup>60</sup> <http://mertek.hvg.hu/2016/05/27/vizsgalja-az-ugyeszseg-a-kormanypropagandat/>

<sup>61</sup> Act CXXVII. of 2007. on Value Added Tax.

<sup>62</sup> Submission to the European Commission 09/05/2016, RN. 2016/045446. Based on the data of Kantar Media.

principles governing the distribution of state advertising, neither in law nor in any other binding legal instrument.<sup>63</sup>

#### 4. Journalists' protection from undue influence

Article 7 of Smtv<sup>64</sup> ensures the right to protection for journalists against pressure from the owner, the advertiser or sponsor. However, there is no control over or sanction for breaking this rule, and the instances of pressure are rarely publicised.

There are several journalists' associations, established according to religion and along political lines. They represent journalists' material interests, but they do not have the rights of a chamber or trade union – they are mere civil organisations. Their power is moderate, at most. The biggest organisation – the successor of the previously monopolistic association, today regarded as socialist-liberal is the Hungarian Journalists' Association (MÚOSZ). Membership of the journalistic associations is voluntary and the various associations compete with each other. Therefore, ethical procedures have a limited effect. However, MUOSZ regularly has ethical announcements, which are said to be followed by the editorial rooms.

In its preamble, the MÚOSZ ethical code states: <sup>65</sup>

- I. the four principles of ethical journalistic behaviour are: fairness, independence, credibility and sensitivity.
- 2.2. The journalist cannot be obliged to prepare a work contradicting his or her opinion or conscience.
- 2.3. The employer, editor, owner cannot restrict the journalist's freedom to form opinion, freedom of expression and freedom of consciousness. The owner, or editor performs an ethical misdemeanour if, when preparing the press product, subsumes freedom of the press and publicity to the consumption nature of the press product.

The following Codes of the journalistic and media associations are in existence:

- Ethical Code of the Association of Hungarian Journalists (MÚOSZ)<sup>66</sup>
- Ethical Code of the Association of Hungarian Catholic Journalists (MAKUSZ)<sup>67</sup>
- Code of Protection of the Interests of Journalists in Hungarian Journalism Organisations (a magyar újságíró-szervezetek Érdekvédelmi Kódexe)<sup>68</sup>
- Ethical Code of the Community of Hungarian Journalists (MÚK)<sup>69</sup>
- Ethical Code of Advertising<sup>70</sup> and
- Ethical Code of Providing Content of the Hungarian Content Providers' Association.<sup>71</sup>

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<sup>63</sup> Ibid.

<sup>64</sup> Act CIV. of 2010. on press freedom and basic rules of media content.

<sup>65</sup> <https://muosz.hu/kodex.php?page=etikai&sub=etikaikk02>

<sup>66</sup> Újságírói Etikai Kódex, Hungarian National Association of Journalists, <http://www.muosz.hu/kodex.php?page=etikai>

<sup>67</sup> Etikai Kódex, Association of Hungarian Catholic Journalists, <http://makusz.hu/etikai-kodex>

<sup>68</sup> A magyar újságíró-szervezetek Érdekvédelmi Kódexe és érdekvédelmi szervezetei, Press Trade Union, [http://sajtoszakszervezet.hu/index.php?option=com\\_content&view=article&id=61:a-magyar-ujsgiro-szervezetek-erdekvedelmi-kodexe-es-erdekvedelmi-szervezetei&catid=47:erdekvedelem&Itemid=44](http://sajtoszakszervezet.hu/index.php?option=com_content&view=article&id=61:a-magyar-ujsgiro-szervezetek-erdekvedelmi-kodexe-es-erdekvedelmi-szervezetei&catid=47:erdekvedelem&Itemid=44)

<sup>69</sup> Etikai Kódex, Community of Hungarian Journalists, [http://muk-press.hu/?page\\_id=26](http://muk-press.hu/?page_id=26)

<sup>70</sup> Reklámetikai Kódex, Self-regulatory Association of Advertisers, <http://www.ort.hu/images/letoltes/kodex.pdf>

<sup>71</sup> Tartalomszolgáltatási Kódex, Association of Hungarian Content Providers, <http://www.mte.hu/etikaikodex.html>

In Hungary, several journalists often voluntarily choose to work in a medium that has guidelines that they agree with, and then if it is bought by the political “enemy” or if they are pressurised by the owner, they leave in groups (in the cases of HírTV and both genuine online journals Index and Origo). In many cases, the journalists appear to be happy to serve the interests of the political groups that they support, and the values of objectivity and fairness are fairly shallowly held among many journalists. Some obvious examples can be seen in television interviews and reports where the questions and the reporting are obviously biased. Ethical procedures are not common in the journalistic communities.<sup>72</sup>

It is interesting to examine how the fight between Simicska and Orbán affected those journalists who worked in the Fidesz’s interests at Simicska’s media outlets. Those journalists loyal to Orbán, left HírTV and Magyar Nemzet (some others were dismissed later). Those who remained now take a critical tone against the Orbán government. The new Orbán media empire is said to require even stronger discipline from its journalists.<sup>73</sup>

Journalists are often employed through short-term contracts and lack the protection of labour law. The media reform of 2010 resulted in the dismissal of about 1,000 journalists from public service television. Several transformations happened in past years when whole editorial rooms moved to other media, like in the cases of the Index-scandal, Origo-scandal, or the Simicska-scandal. The positive result of the Index and Origo scandals was the establishment of two independent, investigative online news portals: 444 and Direct36, the latter taking part in the Panama Papers project. Simicska’s activity was therefore regarded with great expectations, but his media outlets may take another direction: helping the far-right Jobbik to get into power.<sup>74</sup>

Free legal representation in lawsuits is provided by TASZ (the Hungarian Civil Liberties Union), but only in free speech cases, rather than labour-law issues.

## 5. Protection of journalistic sources

After the amendment in 2012, the Hungarian provision on the protection of journalistic sources is regarded as a “best practice model”. An investigative independent online journal ‘Átlátszó’ had a case where the police raided its offices and confiscated computers in 2011 (the police finally could not get access to the files for technical reasons). They pressured the journalist to reveal his confidential source, upon which he turned to the Constitutional Court, which decided that the protection of journalists’ sources was not sufficiently guaranteed by the Smtv., and acknowledged that Átlátszó’s claim was right. The Constitutional Court prevented the police from forcing journalists to reveal their sources. A few months later, the Hungarian parliament approved an amendment to the Smtv,<sup>75</sup> which provides higher protection for journalists’ sources.<sup>76</sup>

However, in May 2016, it was accidentally revealed that a journalist’s mobile phone had been secretly wiretapped in order to reveal the identity of her source. The wiretapping went on for months without court approval, and it is unclear how her subscription number was known

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<sup>72</sup> For example, the journalist who kicked running refugees (and a running man who was holding a child in his arms fell down) was “condemned” by the Hungarian Journalists’ Association (MUOSZ). The International Federation of Journalists also condemned the action. <https://muosz.hu/archive/cikk.php?page=mozaik&id=5648&fo=2&iid=0>

<sup>73</sup> <http://mertek.hvg.hu/2016/05/03/bevalt-modszerek-uj-haverok-lagy-cenzura-a-magyar-mediaban-2015/>

<sup>74</sup> <https://www.mediapiac.com/mediapiac/Schlecht-Csaba-Persze-Lajos/112685/>

<sup>75</sup> Act CIV of 2010 on press freedom and media content regulation.

<sup>76</sup> <https://cpj.org/blog/2014/10/in-hungary-an-independent-website-defies-censorshi.php>

(from the fleet of phones owned by the editorial board.) Such secret surveillance would have been lawful only against a person who was suspected to have committed a criminal act, but there was no such allegation against the journalist.<sup>77</sup> Repeated cases of surveillance emerge in Hungary, for example, the director of MTVA and a public policy civil organisation found bugs in their offices, and in general there is a feeling of insecurity which also affects the confidentiality of journalistic sources.<sup>78</sup>

The law explicitly allows refusal of testimony with reference to the confidentiality of sources in both criminal and civil procedures (after the amendment in 2012). Courts may oblige the journalist to reveal the source in narrowly-defined cases, but the decision can be appealed by the journalist. The cases involve circumstances in which:

- there is a crime that is intentionally committed, resulting in at least three years imprisonment;
- it is inevitable that the identity of the protected source will be disclosed; and
- the evidence cannot be substituted with something else (Article 82(6) of Criminal Procedures Act).

## II. Impact of international legislation

AVMSD was implemented, but there were some discrepancies within the Mttv. in 2010. These provisions were later amended, following pressure from the European Commission.<sup>79</sup> A few differences have remained despite the efforts of the Hungarian government to fulfil the request.<sup>80</sup> The amendments to Mttv. were important details (for example, no prior, only subsequent registration was required from printed and online journals), but they did not touch upon the law's core strategic power, which came primarily from the superpowers granted to the Media Council and the chilling effect of the potentially- applicable sanctions.

The European Commission exercised repeated pressure on the Hungarian government to amend other parts of the media law.<sup>81</sup> This did not extend beyond diplomatic correspondence. Infringement procedures were started in other areas, but these could add to the diplomatic pressure.<sup>82</sup>

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<sup>77</sup> [http://hvg.hu/itthon/20160513\\_Lehallgatta\\_a\\_rendorseg\\_a\\_Blikk\\_ujsagirojat](http://hvg.hu/itthon/20160513_Lehallgatta_a_rendorseg_a_Blikk_ujsagirojat)

<sup>78</sup> <http://444.hu/2016/05/25/lazar-titkosszolgalati-jelentesek-bizonytjak-hogy-soros-gyorgy-szervezi-a-menekultvalsagot>; <http://www.atv.hu/belfold/20160609-majtenyi-laszlo-eb>;

<sup>79</sup>

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/6&format=HTML&aged=0&language=EN&uiLanguage=en>

<sup>80</sup> Bayer, Judit: Media Law in Hungary. Kluwer, 2012. at paragraph 511.

<sup>81</sup> Commission Vice-President Kroes Welcomes Amendments to Hungarian Media Law, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/89> (16 Feb. 2011); Neelie Kroes: Letter to Tibor Navracsics, Deputy Prime Minister of Hungary, <http://www.kormany.hu/download/8/01/10000/kroes.pdf>, 23 Dec. 2010; And another letter from Kroes to Navracsics [http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC\\_lettertoHungary\\_2011Jan21.pdf](http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf), 21 Jan. 2010.

<sup>82</sup> European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24> (17 Jan. 2012). Hungary – infringements: Commission takes further legal steps on measures affecting the judiciary and the independence of the data protection authority, notes some progress on central bank independence, but further evidence and clarification needed, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/165> (7 Mar. 2012); Commission continues accelerated infringement procedure on independence of the data protection supervisor and measures affecting the judiciary and asks additional information on central bank's independence, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/222> (7 Mar. 2012).

The Hungarian government defied the enforcement of the ECtHR decision in *Vajnai v. Hungary* in 2012. It started new criminal procedures on the same legal basis (see *Fratanoló v. Hungary*), and once that case was again lost at Strasbourg, the government, using its parliamentary majority, declared in a Parliamentary resolution its commitment to the prohibition of wearing the red star.<sup>83</sup>

The government also appealed against the decision in the pension case.<sup>84</sup> Orbán and other leading politicians regularly publicly disapprove of the judgments of the ECtHR, for example the one on the illegality of the life sentence, and the decision on prison conditions. However, the Constitutional Court had often used ECtHR judgements as references in its jurisprudence during the past decades. Ordinary courts do not appear to pay attention at all to ECtHR practice and never refer to them in decisions.

ECJ judgments are received without such political turmoil: the government calmly acknowledges the decisions.<sup>85</sup> The Casino Act, which was the subject of the latest decision in March 2016, is yet another perfect example of oligarchic networks: in 2013, casino concessions were put out to tender and five of eight were taken by Andy Vajna, who is now cabinet minister and owner of the national channel TV2 (he was then the governmental commissioner responsible for movie financing).

Other soft law instruments did not have a measurable effect.

### III. Internet

#### 1. ISP concentration

There are no legal rules on the concentration of ISPs. The Media and Telecommunications Authority keeps the register on the owners of ISPs, but only the direct owners are published, with their service areas. This information is not easily accessible; because it requires several careful steps to get the list of service providers, selection and filtering is not available.

There are 390 ISPs in Hungary. Consumers might have an option in bigger cities, but typically they do not, because it would not be profitable. The three biggest ISPS are: T-com - 36%, UPC - 22%, Digi - 15%, Invitel - 9%, the rest - 18%. The diversity level of ISPs seems to be average. Google is the main search engine generally used by Hungarians.

Cross-ownership is generally non-existent (or not known), with the exception of Origo, which was owned by T-Com, but was sold in 2016 to New Wave Media which also owns VS.hu.<sup>86</sup> New Wave Media received HUF 600 million (€1.9 million) from the foundations of the Hungarian National Bank.<sup>87</sup> The owner of New Wave Media is concealed through international

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<sup>83</sup> Bárd, Petra: The non-enforcement of Strasbourg decisions and its consequences. In: Lachmayer Konrad, Busch, Jürgen, Kelleher, Jennifer, Turcanu, Geanina (eds.) *International constitutional law in legal education: proceedings of the Erasmus Intensive Programme NICLAS 2007-2012*. Vienna: Facultas Verlags- und Buchhandels AG, 2014. 221-234. For a detailed analysis see Bárd, Petra: *Strasbourg kontra Magyarország avagy az Európai Emberi Jogi Egyezmény esete a magyar jogrenddel a Fratanoló ügy kapcsán*, *Kriminológiai Közlemények* 71, 145-204 (2012).

<sup>84</sup> <https://szakszervezetek.hu/hirek/4944-nem-akar-fizetni-a-nyugdijasoknak-a-kormany>

<sup>85</sup> [http://www.portfolio.hu/gazdasag/cafeteria\\_reagalt\\_a\\_magyar\\_kormany\\_az\\_eu\\_dontesere.227614.html](http://www.portfolio.hu/gazdasag/cafeteria_reagalt_a_magyar_kormany_az_eu_dontesere.227614.html)  
<http://444.hu/2016/03/29/elkaszaltak-brusszelben-a-kaszinotorvenyt>

<sup>86</sup> <http://444.hu/2016/05/27/szaraz-istvan-bejelentette-hogy-valojaban-az-ove-az-origo-es-a-vs>

<sup>87</sup> The National Bank later tried to argue that by transferring its money into the foundations, they lost their "public character". <http://444.hu/tag/kozpenz-jelleget-elvesztette>

anonymised company ownership techniques, but rumour has it that he is the cousin of the President of the National Bank.<sup>88</sup>

## 2. Regulation of internet content

The five biggest professional online content providers in Hungary in terms of audience share are: Origo; Index; 24.hu; hvg.hu; and hirado.hu. The first four are independent news sites, and the fifth is the public-service media's aggregated site from which all public service television and radio content can be reached. Origo and Index were the first online journals in Hungary, without offline predecessors or even sister companies. HVG is a traditional, high quality, independent weekly economic magazine, published offline and also online. HVG also has arrangements with some other independent (quality) blogs, which puts it on the list of investigative journals, too.

The Media Council has the power to supervise online journals, if they qualify as press products under the Mttv.<sup>89</sup> However, because of loud criticism, supervision of press products had been outsourced by the Media Council to co-regulatory bodies and its competences are practically not exercised.<sup>90</sup> Nevertheless, it is entitled to take any case back if it is not satisfied with how the designated civil association deals with it.

The Media Council also has the right to ban or block illegal audiovisual or radio content even if it is on-demand or online press product.<sup>91</sup> This happens by issuing a decision and obliging the ISP to remove or to block the site.<sup>92</sup> The Media Council may impose a fine up to HUF 3 million (€9,600) on ISPs for not abiding by this decision.<sup>93</sup>

There is no specific regulation for platform providers. Platform providers have been made liable for third-party content repeatedly, because the E-commerce Directive was declared to be non-applicable in these cases. Even the Constitutional Court passed a decision with this outcome. However, one of the cases reached the ECtHR, which decided in favour of the applicant in February 2016.<sup>94</sup>

## 3. Statistics on the electronic media

In Hungary, 60% of the population have broadband access. An average of 48% owns a smartphone, but the numbers are very different depending on the age group. At the age of 15, 90% of the population owns a smartphone. After a steep decline, the number drops to 70% in the age group of 25, and it remains stable until age 35. Beyond age 35, it steeply declines again to zero at age 80 (see Figure A2).

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<sup>88</sup> <http://444.hu/2015/12/16/a-vs-kiadoja-veszi-meg-az-origot>; <http://444.hu/2015/12/17/a-telekom-eladta-az-origot-a-vs-t-kiado-new-wave-medianak>  
[http://hvg.hu/itthon/20160518\\_vs\\_tulajdonos\\_szemerey\\_tamas\\_matolcsy\\_gyorgy\\_bloff](http://hvg.hu/itthon/20160518_vs_tulajdonos_szemerey_tamas_matolcsy_gyorgy_bloff);  
<http://nol.hu/belfold/egy-homalyba-burkolozo-magyar-ceg-kototte-az-evtized-uzletet-1580747>.

<sup>89</sup> Articles 203, 42, 43, 60 (Definitions) Mttv.

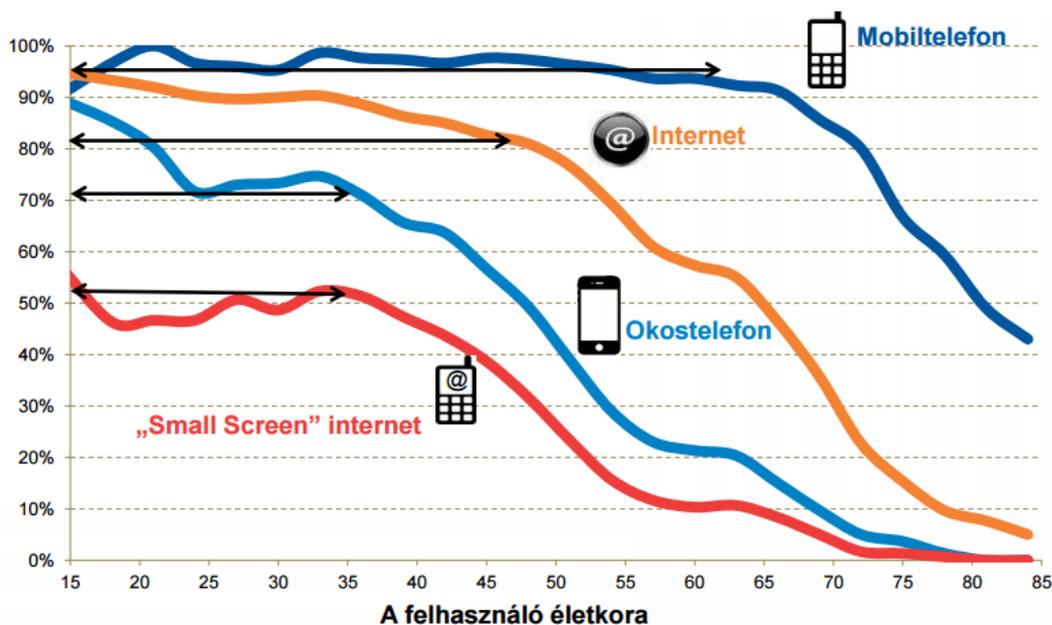
<sup>90</sup> Article 190 Mttv.

<sup>91</sup> Article 189 (3) bf) Mttv.

<sup>92</sup> Article 188 (2), 189 (3)-(7) Mttv.

<sup>93</sup> Article 187 (3) bh) Mttv.

<sup>94</sup> MTE and Index v. Hungary, Application no. 22947/13.

**Figure A2: Smartphone penetration, by age (light blue line)**

Source: [http://nmhh.hu/dokumentum/169926/lakossagi\\_tavkozles\\_2015\\_piackutatasi\\_jelentes.pdf](http://nmhh.hu/dokumentum/169926/lakossagi_tavkozles_2015_piackutatasi_jelentes.pdf)

The average time spent watching TV daily is five hours (2014, Q4).<sup>95</sup> Children above four years of age watch 3.5 hours, people in the age group 18-49 watch 4 hours and 11 minutes and persons aged 50 and older watch 6.5 hours of television. Young people prefer the internet for news consumption, and TV is used as a background and entertainment medium. In the elderly age group, TV has priority but internet is also used several hours a day.

Terrestrial frequencies are used by 17% of the population. From all pay-TV types, digital cable or IPTV is at 40%, analogue cable at 28%, and digital satellite is at 32%.<sup>96</sup>

Digital literacy is supposed to be part of the educational programme in schools, for example through the "SULINET" programme.<sup>97</sup> It focuses on using the internet and digital equipment in education, and much less on the informational education of the students, if at all. Media literacy is also part of education in several schools. The Media Authority also has created a centre for media literacy, which organises workshops.<sup>98</sup>

The online media's popularity and its democratic importance are steeply increasing among groups of the younger generation. Their share of advertising expenditure on the internet was bigger than on television in 2015.<sup>99</sup> Because of the low circulation of the daily newspaper market and the political pressure in editorial rooms in both paper and broadcasting, the independent online journals have become islands of freedom and of investigative journalism.

<sup>95</sup> <http://www.mediainfo.hu/hirek/article.php?id=35194> . The data is very similar in other periods and years. <http://brandtrend.hu/kutatas/2015/04/23/tv-placi-korkep-2015-i-negyvedev>.

<sup>96</sup> [http://nmhh.hu/cikk/169486/Decemberben\\_405\\_szazalekra\\_emelkedett\\_a\\_digitalis\\_kabeltevere\\_vagy\\_IPTVre\\_e\\_lofizetok\\_aranya](http://nmhh.hu/cikk/169486/Decemberben_405_szazalekra_emelkedett_a_digitalis_kabeltevere_vagy_IPTVre_e_lofizetok_aranya)

<sup>97</sup> [www.sulinet.hu](http://www.sulinet.hu)

<sup>98</sup> [www.buvosvolgy.hu](http://www.buvosvolgy.hu)

<sup>99</sup> <http://mrsz.hu/kutatas/reklamkoltes/reklamkoltes-2015>

## **IV. Public service broadcasting**

### **1. Organisation**

The definition of the public service remit is defined by the Mttv. in detail.<sup>100</sup> The Mttv. can be viewed as a formal entrustment with public service duties. The addressee of the entrustment is not entirely clear, however. Public broadcasters existed in the form of three companies plus one for the national news agency, each owned by one public foundation. In 2010, all staff, rights and property were transferred to the Property Management and Support Fund (MTVA). Decisions are taken by MTVA and contracts – both labour and production and others – are concluded by MTVA. Still, the whole legal supervisory mechanism controls the ‘shell companies’, whereas MTVA is not accountable to anyone.

MTVA’s head is appointed by and is responsible to the President of the Media Council, who is appointed by the Prime Minister; therefore, public broadcasting cannot be regarded as independent from the government. The Media Council also supervises and handles the finances and management of MTVA.<sup>101</sup>

In 2016, the Mttv. was amended to have just one ‘shell company’ and one public foundation instead of four, but this is only a technical modification, which was practical before launching the new channels. The public foundation includes all media service providers (radio and television channels) and the national news agency.<sup>102</sup>

Management of MTVA is not supervised by an external body, not even the Media Council is appointed to do such a duty. No regular independent supervision of financial matters exists. The realisation of the public service remit is theoretically supervised by the Curatorship of the Public Foundation.

Although the budget of MTVA and of the shell companies are available online, but it is not sufficiently detailed; therefore it is not known whether its operation is effective, and it cannot be called transparent, either. The amount of funding grows year by year, in 2015, it was HUF 69,86 billion (€223 million), to which the state added HUF 47,1491 billion (€151 million) in the form of debt transfer, without any consideration. The national media takes more and more state advertising as well.

The CEOs of the shell companies are obliged to report to two bodies: the Public Service Corporation and the Public Service Board.<sup>103</sup> The Public Service Board receives reports on financial management, and by approving the reports the Board simultaneously approves the companies’ financial balance and revenue statement. The law fails to specify what happens when the Board fails to approve the report, and the reports are not available on the websites of either the Board or individual public service media providers.

The MTVA, which uses public funds to conduct its operations, is not subject to the Board's or other body’s oversight, and its CEO has no reporting obligations towards the latter.

MTVA's management authority is the Media Council. However, pursuant to the law it is the Media Council that decides whether the prevailing system of public media services will be expanded by new channels and/or new services and, moreover, the president of the Media

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<sup>100</sup> Article 83 and Article 95 Mttv.

<sup>101</sup> Article 136 Sections (6), (10), (11), (14), (16) Mttv.

<sup>102</sup> Article 84 Mttv.

<sup>103</sup> Article 108 Mttv.

Council appoints the MTVA's CEO, while he/she also nominates the CEO of public service media provider.<sup>104</sup>

## 2. Transparency of funding

The law also regulates how the funds available are distributed between individual public service media providers and various public service functions. This is the responsibility of the Public Service Fiscal Council.<sup>105</sup> Indeed, the media service provider's interests always prevail, for a potential objecting vote by the delegate of the State Audit Office will always be in the minority.

Following two freedom-of-information requests to access the Public Service Fiscal Council's agenda, it emerged that the Council's documents did not contain information on the methods and basis of the programme cost calculations or on the aspects of programming. There was no information on the activity of the news agency and on the online services. It also emerged from the documents that the delegates of the State Audit Office repeatedly criticised the deficient information, but they also voted for the acceptance of the resolution.<sup>106</sup>

The accounts of public service and non-public service activities are not separated. It is not clear whether MTVA performs non-public service activities. Cost-accounting principles have not been published and therefore it is not known whether they are applied.

Neither the Mttv. nor other publicly accessible documents contain any regulations concerning overcompensation.

## 3. Launching new services

The selection of public service channels is continuously expanding with new radio and television channels. With one exception of m3, these are all 'must-carry' channels that have to broadcast for free; moreover, the law provides that they must be ranked first in the channel sequence.

Although the Mttv. was amended to contain a chapter on the "Strategic Plan of the Public Service Media and the Measurement of Public Service Value", the provisions only require the assessment of existing services, and no consequences are attached to the outcome of such an appraisal. Pursuant to the Act, the public service media provider is obliged to examine and review the public service nature and value of its services as well as their impact on the diversity of the media market.

After the amendments in 2015, Mttv. extended the notion of public service to "media content that is accessible online", their functions and further legal conditions are still unclear. The Media Council's annual decisions on supervision of the public media-service provider mention neither on-demand media services, nor other online or "new media" services.<sup>107</sup>

Hungarian national television started several significant new channels in the past year. Without public consultation, it launched a thematic news channel (after HírTV of Simicska was not "reliable" anymore), a youth channel, and a thematic sports channel that

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<sup>104</sup> Article 102 Mttv.

<sup>105</sup> Article 108 (2) Mttv.

<sup>106</sup> Submission to the European Commission 09/05/2016, RN. 2016/045446.

<sup>107</sup> Ibid.

disadvantaged certain other thematic sports channels whose viewership rates have fallen measurably. No analysis of an economic or programming nature was done or is accessible. The Mttv. provides that the Media Council decides about launching new channels. The Media Council has refused a freedom of information request on the documentation of the assessments of technological, economic, financial, and media policy considerations. The law, since its amendment in 2015, provides for a Public Value Test, but no information about such a procedure could be acquired.<sup>108</sup>

The news channel gives even more possibility for the spread of manipulated messages in support of the government. Several cases prove the clear censorship in the public service media: the silencing of various news items and opinions, and falsification of news.<sup>109</sup> The new sports channel M4 is distributed free of charge by Antenna Hungaria, the state-owned multiplex, while it transferred the other sports channels into another, more expensive programme package. The very low viewership of public television is slowly growing, thanks to many more channels: from 16.5% to 18% in 2015.

Advertising time is sold through a sales house (Atmedia), which sells public media advertising time in a package with other media outlets, most importantly that of TV2. TV2 is a leading commercial channel, bought by cabinet minister Andy Vajna in 2015 (see above). This linkage raises the prices. The market players involved in the sales house will be at an advantage over their competitors in terms of selling their own advertising airtime because several channels with a greater joint share of the audience can offer advertisers better value and can reach certain target groups more effectively. Data published on Atmedia's own homepage show that there has been a significant increase in the share of advertisements sold in the context of cooperation between private and public broadcasters.<sup>110</sup>

The national news agency, MTI, was subsumed under the public media conglomerate MTVA in 2010, and consolidated under the same public foundation in the 2015 amendment. Its activity is defined as public service activity. Public service media are obliged (by law) to buy news exclusively from MTI. MTI news is distributed for free online, and therefore this news has a dumping effect in the wholesale news market, pushing all other independent news services out of the market, including international services. MTI's news service has proved to be false and has been censored several times. Its financing is managed by MTVA, which is supervised by the Media Council (see above).

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<sup>108</sup> Article 100/A Mttv. (added by amending Act CVII of 2014, effective since 1 January 2015.)

<sup>109</sup> <http://mertek.hvg.hu/2016/05/03/bevalt-modszerek-uj-haverok-lagy-cenzura-a-magyar-mediaban-2015/>

<sup>110</sup> Submission to the European Commission 09/05/2016, RN. 2016/045446.

## **MEDIA PLURALISM IN ITALY**

**Report by Serena Sileoni and Giulio Enea Vigevani<sup>1</sup>**

### **SUMMARY**

The media system in Italy is devoted to the public service principle on the one hand and to pluralism on the other. The public service principle and the duties that originate from it are formally defined both in the TUSMAR (Testo unico dei servizi di media audiovisivi e radiofonici) and in the Service Contract that the Italian state, represented by the Ministry of Economic Development, uses to grant a licence to RAI — Radiotelevisione italiana S.p.A., Italy's national public broadcasting company, owned by the Ministry of Economy and Finance – to operate as a public service broadcaster. Digitalisation has increased the number of channels provided by RAI, as well as the supply of private companies. RAI's supply was completed with thematic channels dedicated to various themes, e.g. art, theatre and children's programming. At the same time, the duopoly of RAI and Mediaset (the largest private media company in Italy) has been replicated in the digital TV market, resulting in diminished pluralism, although La7, a third national television channel owned by Cairo Communication has been continuously growing in popularity since 2011. The digital media sector is growing, however, leading to the emergence of new players besides RAI, Mediaset and Sky, although growth is slow, with low revenues.

Despite a material concentration of media enterprises (both public and private), the role of public authorities – such as the Independent Authority for Communications and the Independent Authority for Regulation of the Italian Financial Market – together with Italy's legal provisions on ownership, public financing and freedom of speech, promote a pluralistic approach to information in the country. Legislation provides for the transparency of all assets belonging to a company, thereby establishing a wide disclosure of ownership. The traditional press shows a pluralistic structure even locally, with a strong tradition of local newspapers, but it is experiencing a dramatic crisis of declining sales and revenues.

As for the media ownership, there have been important changes recently with respect to the most popular national newspaper, *Corriere della Sera*, which was acquired by RCS MediaGroup S.p.A, a publisher that was already active in the TV sector. At the same time, the second- and third-largest newspapers (*Repubblica* and *La Stampa*) now belong to the same group. It is too early, however, to give an opinion and in particular to see if the process of concentration will enhance the quality of the press or not.

Nevertheless, both formal and informal links exist between owners and various other members of the economy, as economic agents are the traditional owners of press and media companies.

Regarding the ties with politics, Mediaset, Italy's main private media company, is still under the control of the Berlusconi family, leader of the right-wing party Forza Italia, while RAI is still suffering from ancestral and never-ending political interference, even if in a less intense way.<sup>2</sup>

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<sup>2</sup> See the debate on the last round of board's appointments: <http://www.ilsole24ore.com/art/notizie/2016-08-04/rai-cda-approva-maggioranza-nomine-direttori-tg-152922.shtml?uuid=AD7pC51>

The Italian state has historically sustained the printed press and media with direct and indirect funds, based on objective legal requirements since 1981.<sup>3</sup> More than €250 million have been distributed to political parties' newspapers over the past 10 years, almost 80% of which have now closed down after the funding was substantially cut. By 2016, public funding had decreased significantly: from €150 million in 2010 to €30 million.

In sum, resources are gradually decreased and Parliament is planning to pass new legislation: Bill no. 3317/2015 would create a *Fund for Pluralism of Information and Innovation*, designed to allocate resources on a yearly basis through a Prime Minister's (or his competent deputy's) Decree. The bill is supported by the associations of publishers and journalists, because it is expected to introduce fairer criteria in the distribution of funds to newspapers and local television channels.

Article 21 of the Constitution and Article 2 of the Law on the Journalist Profession<sup>4</sup> expressly provide that the press cannot be subject to any censorship. The law obliges professional journalists to respect the right to information, freedom of expression and criticism, and also empowers the National Journalists' Council (of which membership is compulsory for all practicing journalists) to provide for the ethical code of journalists (*Codice deontologico dei giornalisti*) and to monitor its enforcement, including the power to impose disciplinary sanctions ranging from a mere warning to the expulsion from the national register.<sup>5</sup>

All journalists are under a legal obligation to respect the confidentiality of their sources. A breach constitutes a criminal offense pursuant to Article 622 of the Italian Criminal Code, if the journalist does so without a just cause or for his or her own economic advantage.

Blocking and filtering have been pursued by the Italian authorities only in relation to online unauthorised gambling, child pornography, terrorism and copyright issues. Judges may occasionally still issue rulings that impose responsibilities on intermediaries to regulate UGC (user-generated content), although the courts have repeatedly affirmed that intermediaries should not be liable for the content posted by users.

Overall, despite cross-ownership between the media sector and various other business sectors, including as well the political sphere, the authors of this study find that media freedom in Italy is more threatened by the economic weakness of the sector than by political interference, especially after Berlusconi's influence has declined in the political arena.

## **I. Classic issues of pluralism**

### **1. Concentration of ownership**

There are major problems in the field of ownership concentration in Italy with regard to the linear audiovisual services. These problems arise in part because television is still a very popular medium compared to the printed press, and in part because of the peculiar conflicts of interests between politics and audiovisual media.

Even before the birth of the Italian Republic in 1946, radio broadcasting was already an exclusive service of a public company, which, in 1994, became the Radiotelevisione italiana S.p.A (Rai). In 1954, after television broadcasting was launched, the precursor to Rai extended its monopoly to this new media. In the 1980s and 1990s, a series of judgements by the Constitutional Court anticipated the end of the monopoly that was introduced in 1990,

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<sup>3</sup> Law no. 461/1981.

<sup>4</sup> Law no. 69/1963.

<sup>5</sup> Law no. 69/1963, Title III (Disciplinary measures for the members).

by the so-called «legge Mammì», which reformed the governance of public and private broadcasting. Since then, the Italian broadcasting sector has been dominated by two major players: RAI, which continued to guarantee the radio and television public service, and Fininvest, which broadcast over three other major TV channels. In 1994, a Constitutional Court judgement stated that Article 15 of the 1990 law was unconstitutional, because it legalised a dominant position in the media sector, (case n. 420/1994). The Court demanded Fininvest to divest itself of at least one of its broadcasting channels, emphasising that pluralism must be safeguarded. Fininvest sold 20% of its stocks but none of its channels.<sup>6</sup> Besides that, there was a peculiar situation when the owner of Fininvest, Silvio Berlusconi, became Prime Minister. Even if it was not a formal ownership concentration, there was a large political debate on the conflict of interest because Berlusconi controlled Rai as Prime Minister and the three major private stations as his own property.

In 2004, the Parliament approved the reform of the Italian radio-television system, introducing the concept of an integrated system of communication (television, radio, press, publishing, internet, advertising, movies) and setting a limit of 20% of total revenues per owner. Despite its declared purposes, the law was considered too weak in avoiding concentration and conflict of interests.

The duopoly of audiovisual media services has been more effectively challenged by the opening of the terrestrial television system between 2008 and 2012, than by the law on conflict of interest.

Even if the terrestrial television services repeat a concentration of ownership among Fininvest, Rai and, as newcomer, Sky, it is worth noting that such a system is more adequate to the principle of pluralism.

Another innovation that has helped to increase pluralism of the media is Internet, which is becoming the fundamental way to get information, even if the digital divide is still high.

Regarding other media, especially the printed press, the two largest media groups in Italy are L'Espresso and RCS Editori. They operate in the publishing sector in its broad meaning, but unlike other publishing groups that operate especially in the market of books, they own the major national newspapers.

In March 2016, the Italian Antitrust Authority authorised with some limits and conditions the acquisition of RCS books by Mondadori, the main publishing house in Italy controlled by the Fininvest group. This is the latest case of ownership concentration in the media, at the time of completing this contribution.

## **2. Ownership: How transparent is ownership of media enterprises?**

In order to access the information about the ownership structure of media enterprises, it is necessary to differentiate whether a company is 1) public or 2) private.

1) Public media companies have a regulatory safeguard that requires a full disclosure of their ownership structure to AGCOM (the Italian authority for communications guarantees),<sup>7</sup> and the CONSOB, which is the public authority responsible for regulating the Italian financial markets. The CONSOB also establishes the terms and conditions for disclosing relevant information about publicly listed companies, for example in daily newspapers. Such

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<sup>6</sup> Alison Harcourt: *The European Union and the Regulation of Media Markets*. 2005. Manchester University Press.

<sup>7</sup> See *Reg. Consob no. 11971 Disciplina Emittenti e AGCOM Allegato A alla delibera n. 658/15/CONS e Allegato A alla delibera n. 555/10*.

information may include the disclosure of: all persons who hold more than a certain percentage of the capital of a listed issuer, cross-holding structures, including securities not traded on a regulated market, and shareholders agreements in whatever format they may be stipulated.<sup>8</sup>

2) Private media companies do not have a duty to disclose this kind of information to the public; the only way for a citizen to find out about a company's structure is to request the company's certificate from the local Chamber of Commerce where the company has its seat. Nonetheless, all the companies, both private and public, that operate in media and communications need to notify AGCOM of all agreements, capital structures and any mergers and acquisitions.<sup>9</sup>

The ratio of the above-mentioned safeguard lies in the Integrated Communications System (ICS), which keeps track of the most relevant media concentration as set out in the TUSMAR Code prohibiting a certain company from holding a dominant position in the ICS market and constituent submarkets.<sup>10</sup> TUSMAR thereof provides that none of the economic players that are part of the ICS market may either directly or through controlled companies achieve revenues in excess of 20% of the total ICS revenues; hence the monitoring power granted to AGCOM to request the disclosure of the aforementioned information.

All the information on public listed company in the media and communication sector is readily available on the CONSOB website, although it is possible to assert that this information is not available to the average citizen. Some of the media outlets at the bottom of the webpage indicates the name of the company that holds the control, although this information is not adequate for understanding the real beneficiary of the controlling position. The major national newspapers and televisions usually indicate the name of the holding group in control and the webpage redirects one to the holding group's webpage. Since the holding group is normally a listed company, it is possible to find the ownership structure and the details about the companies held.

All the capital structures and simplified balance sheets of privately held companies are available at the Chamber of Commerce where the company resides. A document with the information thereof can be issued by the Chamber of Commerce to whoever files a formal request, but the service is available not for free. The price of the service usually range from €10-15 to €25-30, depending on the type of information requested. The AGCOM publishes every year a document that gives a precise assessment on the ICS market whereby a full list of all the relevant media outlets is given, together with the holding groups that hold the control thereof.<sup>11</sup>

Legislation provides for the transparency of the asset companies, establishing a wide disclosure of the ownership. Nevertheless, both formal and informal links exist between owners and various other members of the economic landscape, as economic agents are the traditional owners of press and media companies. Formally, there were some minor newspapers and radio channels and the main private TV broadcast which are directly controlled by political parties or a political leader (in the case of Mediaset TV company, by Silvio Berlusconi, the former Italian Prime Minister). These actors can benefit from public resources (as explained below), but not in the form of public procurement. They are not formally linked to political power, even if a dialogue between politics and media should be

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<sup>8</sup> *Reg. Consob no. 11971 Disciplina Emittenti*, Artt. 120-121-122.

<sup>9</sup> *Testo unico dei servizi di media audiovisivi e radiofonici*, hereinafter TUSMAR, Article 43 para (1.)

<sup>10</sup> ICS is the abbreviation for Integrated Communications System, that is, the market relevant for the application of the law on anti-concentration thresholds.

<sup>11</sup> *AGCOM Allegato A alla delibera n. 658/15/CONS e Allegato A alla delibera n. 555/10.*

considered as material and do not necessarily imply political support. Such ties are generally and widely known to the public, although, being informal, they are not publicised by the press.

The total audience share of those media outlets with a political affiliation is below 25% for press and radio, and between 25-50% for TV. We discern no political bias in the news coverage provided by those media outlets whose political affiliation is known, and no correlation was found between non-transparent ownership, political affiliation and political bias.

### **3. Funding: How transparent is the allocation of public money in the media landscape?**

The Italian State has historically sustained the printed press and local audiovisual media through two types of funds: 1) "indirect funds" and 2) "direct funds".

1) The first category included mainly tax relief in the form of a specific tax regime discount of 4% on 1/5 of the printed copies and special discounts on shipping and various printing materials. Any newspapers could apply for indirect funds, which would be allocated not to the newspapers themselves, but rather to the publisher.

2) Direct funds for the press are mainly limited to three types of subjects: a) political parties; b) journalists' cooperatives and c) publishers of newspapers/periodicals. The latter can be further sub-divided into the following three qualifications: c1) distributed in Italian language abroad; c2) distributed in foreign language in Italy (French, Ladin, Slovenian or German) and c3) publishers whose ownership is held by non-profit foundations or moral entities (religious, for example).

The requirements in order to obtain funds, which technically are "refunds", included the following:<sup>12</sup>

- a minimum percentage of sales: that is, at least 35% of the copies distributed for national newspapers; at least 25% for local newspapers;
- specific requirements of employment that distinguishes: (b1) journalists' cooperatives, where the majority of employees must be given a permanent contract; other publishers, where the employees must number at least 5 (or 3 in the case of periodicals), with permanent contracts and in majority journalists; and
- a ban on distributing the profits to the owners.<sup>13</sup>

The applications for direct funds must be sent electronically (with digital signature) during the month of January of each year. The resources are allocated within a specific budget's chapter of the Italian Presidency of the Council of Ministers: in case of lack of funds, the available resources will be proportionately distributed among the beneficiaries.

The calculation of direct funds is based on the sum of two parts: a) "fixed part", which can be up to 50% of the living expenses, such as the costs of printing, distribution, employees' salaries. The amount in no case can exceed the sum of €2,500,000 (national newspaper) or €1,500,000 (local newspapers) and b) "flexible part", which is based on the number of copies sold: up to €0.25 per copy (national newspapers), up to €0.20 (local newspapers), up to €0.40 (periodicals). Furthermore a refund of €0.10 can be claimed for each digital copy of

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<sup>12</sup> See Law no. 103/2012, Article 2.

<sup>13</sup> See Law no. 250/1990, Article 3.

both newspapers and periodicals. The amount in no case can exceed the sum of €3,500,000 (newspapers) or €200,000 (periodicals).

The Department of Information and Publishing (Presidency of the Council of Ministers) is in charge of the general coordination of the entire process of funding. Within this body, a Technical Advisory Committee on Publishing, in which the stakeholders are also represented, has been established in order to evaluate the applications received.<sup>14</sup> This Department should ensure inquiries and investigations on the documentation submitted by the requesting parties, including through the use of the *Guardia di Finanza*, are appropriately conducted.

The Italian legislator has been dealing with the public funding of the press for 35 years. The first organic law is dated 1981 (Law no. 461/1981) and the most recent one is currently under debate in Parliament. Indeed, Bill no. 3317/2015 would create a *Fund for Pluralism of Information and Innovation*, designed to allocate resources on a yearly basis through a Prime Minister's (or his/her competent deputy's) Decree. The proposal actually entrusts a more articulated redefinition of the funding rules (together with the reorganisation of the *Ordine dei Giornalisti* itself) to subsequent Government decrees. Nevertheless a number of provisions provide some immediate changes, among them: no more public funds can be given to political parties or trade union's newspapers; no more distinction will be drawn between national and local newspapers; public funding will no longer exceed 50% of the enterprise's revenues; and new deadlines for the payments have been also fixed, allowing the newspapers to obtain in advance 1/3 of the funds received in the previous years. There are also other legislative initiatives on the table aimed at clarifying the whole system of public funding for the press, e.g. Bill no. 1990/2014. Nevertheless, the above-cited Bill no. 3317/2015 seems to have more chances and was approved by the Chamber of Deputies in March 2016.

Regarding the share of the public funding in the current scenario, there are no such big numbers: around €30 million in 2016, within a media market of €2.3 billion (of which around €800 million comes from the press sector). Nevertheless, the broader picture can be fully understood only from an historical point of view.

a) Between 2008 and 2012,<sup>15</sup> the amount of "indirect funds" has totalled €40 million, with a progressive decrease: from €18 million and 64 beneficiaries in 2008, to €470,000 and 7 beneficiaries in 2012. No more indirect funds have been distributed since then. The big publishing groups arguably took advantage of these types of funds: L'Espresso Gruppo Editoriale spa earned €2.6 million over this period (2008-2012), Mondadori Printing spa €2.2 million, RCS Quotidiani €1.6 million. Nevertheless, it is rather complex to quantify the amount that these publishing groups have then distributed to their newspapers.<sup>16</sup> Incidentally, even the amount of €2.2 million earned by L'Espresso Gruppo Editoriale spa should be also framed within a company whose annual revenue is about €600 million).

b) From 2010 and 2013,<sup>17</sup> the amount of "direct funds" distributed has been €282 million (involving more than 50 newspapers) and indicates again a very clear decreasing narrative: from €150 million (2010) to €52 million (2013). In addition, in 2013 an *Extraordinary*

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<sup>14</sup> Law no. 416/1981, Article 54.

<sup>15</sup> Presidenza del Consiglio dei Ministri, Dipartimento per l'informazione e l'editoria: [http://presidenza.governo.it/DIE/dossier/contributi\\_editoria\\_index.html](http://presidenza.governo.it/DIE/dossier/contributi_editoria_index.html)

<sup>16</sup> For example, L'Espresso Gruppo Editoriale spa includes national newspapers as *La Repubblica*, but also local ones as *Il Tirreno*, *La Nuova Sardegna*, *Messaggero Veneto* (all of them between 50.000 and 100.000 copies per day); *Il Piccolo*, *La Gazzetta di Mantova*, *Il Mattino di Padova* (between 20.000 and 50.000 copies); *La Tribuna di Treviso*, *La Nuova Venezia*, *La Gazzetta di Reggio* (less than 20.000 copies).

<sup>17</sup> Presidenza del Consiglio dei Ministri, Dipartimento per l'informazione e l'editoria: [http://presidenza.governo.it/DIE/dossier/contributi\\_editoria\\_index.html](http://presidenza.governo.it/DIE/dossier/contributi_editoria_index.html)

*Publishing Fund* has allocated a further €50 million (2014), €40 million (2015) and €30 million (2016). Among the major beneficiaries of 2014 there is *Avvenire*, the newspaper of the Conferenza Episcopale Italiana (€3.8 million), a politically-oriented one such as *L'Unità* (€1.8 million) followed by other secondary newspapers as *Il Manifesto*, *Conquiste del Lavoro*, *Il Cittadino*, *La Padania*, *America Oggi*, *Cronaca Qui.it*, *Il Corriere Mercantile*, *Europa* (all of them received more than €1 million in funding).

It is worth noting that none of these newspapers is listed in the top 10 sellers of the country, while no "big" national newspapers (such as for example *Il Corriere della Sera*, *La Repubblica*, *La Stampa*, *Il Giornale*) obtained direct funding. Indeed, what can be further observed is that consistent (and perhaps "crucial") funds have been earned by newspapers that are expressions of minorities, such as *Die Neue Südtiroler Tageszeitung* and *Primorski Dnevnik*, which in 2014 obtained respectively €500,000 and more than €1 million of public funds. Public financing is for local media an essential source, and there is no way, at the moment, for them to survive without it. Similarly (and even more) crucial are the funds received by newspapers from political parties, which over the last decade totalled around €250 million.

Hence, the public funding of newspapers in Italy has **significantly decreased**: from €150 million (2010), to €30 million (2016). In 2014 the Italian newspaper sector value was €2.3 billion (€14 billion accounted for the entire media sector), of which €50 million came from public funds. Having said that, it cannot be denied that public funds have historically distorted the newspaper sector as clearly epitomised by the narrative of political parties' newspapers.<sup>18</sup> More than €250 million have been used for political parties' newspapers over the last 10 years, although almost 80% of them (the newspapers, but sometimes also the parties) have now closed down due to the above-mentioned decrease in the public funding. This means that public funds have sustained newspapers that would have never survived in the "real" market, while the total audience share of those media outlets that receive public subsidies and are biased is below 25% without clear divergences on the scale of political sides. Today there is a relatively low, but yet palpable political bias of news coverage perceived in subsidised media outlets, but we would not suggest a correlation between non-transparent ownership, political affiliation, and political bias. It is in the end worth noting that the above-mentioned legislative proposal (Bill no. 3317/2015) sets forth the abolition of any public funding by a political party or trade union newspapers.

Since 2012, under Law no. 103/2012, the mechanism of control over newspapers that have applied for public funds, has become more rigid. For example, the details about the numbers of printed copies and their distribution/selling must be certified by a company approved by CONSOB (the public authority responsible for regulating the Italian financial markets). Before 2012, Italian authorities reported a number of violations that led to a withdrawal of more than €60 million in the 1998-2011 period. The related list was published on the website of the Department of Information and Publishing (Presidency of the Council of Ministers).<sup>19</sup> Hence we see that the Italian State has revoked more than €22 million from the newspaper *Avanti*, but also €15 million from *Opinioni Nuove Libero Quotidiano*, €6 million from *Linea* and €5 million from *Il Nuovo Riformista*.

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<sup>18</sup> For example, the newspaper of the Lega Nord party (centre-right), the *La Padania*, has obtained (from 1997 to 2013) more than €60 million of public funds. About the same amount of money that *L'Unità*, a political party newspaper from the opposite side (centre-left), obtained from 2003 and that reached the number of €150 million from 1990.

<sup>19</sup> Presidenza del Consiglio dei Ministri, Dipartimento per l'informazione e l'editoria: [http://presidenza.governo.it/DIE/dossier/contributi\\_editoria\\_index.html](http://presidenza.governo.it/DIE/dossier/contributi_editoria_index.html)

The website of the Department of Information and Publishing (Presidency of the Council of Ministers) offers some information about the funding of the press.<sup>20</sup> Those are tables reporting the names of the beneficiaries (newspapers or publishers) and the amount of funds received; no other supporting documents are attached. It is also worth mentioning that in 2014 for the first time the Government revealed the numbers of the "indirect funds" (covering the period 2008-12). Details concerning "direct funds" (from 2003-14) are also offered on the mentioned websites.

A related issue concerns the State advertisements placed in media outlets. Legislative decree no. 177 of 31 July 2005, specified that each and every state advertisement plan would provide a schedule that regulates the way the advertisement is aired and the budget allocated for every media outlets involved. The allocation of the budget quota is supervised by the AGCOM. Each Ministry Office in its provisional budget plan every year must allocate the following distribution of funds for state advertisement: 50% to the benefit of daily newspapers and national broadcasting radio stations; 15% to the benefit of private local television and local broadcasting radio stations that operate within the EU; and 35% to the benefit of other media outlets. As provided by the Law no. 103/2012, in order to safeguard pluralism, the Presidency of the Council of Ministers sets out the guidelines and principles for the efficient allocation of the resources thereof by the 30th of April of each year on the basis of the reports prepared by the authorities and the state administration offices by January of each year. It is worth noting, however, that these advertisements represent a very minor share of advertising revenues and they do not have a formative effect on the market as a whole.

#### **4. Journalists' protection from undue influences**

Journalist independence is rooted in Article 21 of the Italian Constitution, which expressly provides that the press cannot be subject to any authorisation or censorship. In order to ensure journalists' independence from governmental influence, this provision is repeated by Article 2 of the Law on Journalist Profession.<sup>21</sup>

According to this Law, the National Journalists' Council – i.e. the compulsory association of journalists – provides for the ethical code (*Codice deontologico dei giornalisti*) and monitors its fulfilment, being able to issue disciplinary sanctions.<sup>22</sup> The ethical code is unique for the entire profession, so one cannot measure the correlation between having an ethical code and providing objective content. The role of the Council as a pillar of the journalistic independence has been recognised by the Italian Constitutional Court (*Corte Costituzionale*), although some commentators doubt its ability to effectively maintain the independence and dignity of the category.<sup>23</sup> A particular provision that also safeguards the independence of journalists is the so-called "conscience clause", which allows a journalist to unilaterally terminate his/her employment contract if the newspaper they work for has a significant shift in its political alignment and to retain full economic benefits.<sup>24</sup>

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<sup>20</sup> Presidenza del Consiglio dei Ministri, Dipartimento per l'informazione e l'editoria: [http://presidenza.governo.it/DIE/dossier/contributi\\_editoria\\_index.html](http://presidenza.governo.it/DIE/dossier/contributi_editoria_index.html)

<sup>21</sup> Law no. 69/1963.

<sup>22</sup> Law no. 69/1963, Title III (Disciplinary measures for the members).

<sup>23</sup> Italian Constitutional Court, judgment no. 11/1968 and Mastroianni, R. and A. Arena (2014) *Media Law in Italy*, Kluwer Law International, 45.

<sup>24</sup> *Contratto Collettivo Nazionale Giornalisti*, Article 32.

Broadly speaking, journalism is a highly regulated profession that can be exercised only by journalists that are enrolled in the National Journalists' Council. Exercising the profession without being enrolled in such a register or using the title without having the right to do so is a criminal offense, punishable by imprisonment up to six months.<sup>25</sup> Unregistered journalists' employment contracts are null and void, but the employed unregistered journalist is entitled to remuneration and social security for all the duration of the employment period.<sup>26</sup> In any case, anyone can write articles or exercise the proper function of a journalist even formally without being one.

Journalists can either be employed with a long-term contract or with different forms of temporary work contracts usually used by freelance journalists. The freelance model is becoming more and more popular in media companies in order to employ young people due to their flexibility and reduced social security benefits. The data collected by the INPGI (the body that issues the pensions and provides the social benefits to journalists) clearly show a drastic reduction in the use of long-term contracts by the press employers. But conversely, the number of enrolments in the Italian Journalist Register has been rising constantly, thus suggesting that editors are shifting to short-term employment contracts.

Regional councils can take autonomous decisions when it comes to offering free legal aid. For example the Journalists' Council of Lombardia provided legal aid to those freelance journalists who experienced difficulties in collecting the money owed to them by their employers. The trade union of Lazio, through its association called *Associazione Stampa Romana*, is offering free legal aid in defamation cases to journalists whose income falls below €11,369.21 per year. It is difficult to find comparable initiatives being taken in the other regional councils.

There is a single trade union at the federal level called FNSI (*Federazione Nazionale Stampa Italiana*) to which all the regional and local unions adhere and whose task is to safeguard the press freedom and to sign the national collective agreement (*Contratto collettivo nazionale*). FNSI is also responsible for funding an autonomous insurance fund for journalists, called CASAGIT. It is worth noting that FNSI supported the creation in 2008 of a national observatory called *Ossigeno*, which monitors all the threats suffered by journalists and exposes the news overshadowed by violence. *Ossigeno* also organises workshops that aim at raising awareness among journalists on how to avoid defamation lawsuits that can be used as a powerful tool to discourage a free press.

## 5. Protection of journalistic sources

The law on journalism requires journalists to ensure the secrecy of their sources when it is necessary in order to protect the confidentiality of the news. If a journalist breaches his or her duty of secrecy, he or she can face two different kinds of sanctions:

- the journalist can be subject to a disciplinary measure issued by the National Council; and
- the breach also constitutes a criminal offense pursuant to Article 622 of the Italian Criminal Code, if the journalist does so without a just cause or for his or her own economic advantage. This offence is punished by imprisonment up to one year and a fine up to €516.

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<sup>25</sup> Law n. 69/1963 (*Ordinamento della professione del giornalista*), Article 45.

<sup>26</sup> Italian Constitutional Court, judgment no. 11/1968

Article 200 of the Code on Criminal Procedure expressly provides that a journalist cannot be asked to disclose his/her sources in a criminal trial. This privilege only applies to registered journalists and covers all the relevant information that could lead to source identification. This privilege is forfeited if a disclosure of the source is deemed paramount by the judge to prove the crime being investigated. This power of the court can only be exercised under exceptional circumstances, for example when the informant is the only witness who can prove the innocence of the defendant. According to some scholars, the power of the court cannot be translated outside of the criminal trials, meaning that it cannot be extended to civil courts.<sup>27</sup>

The power of the court to enjoin journalists to disclose their sources is in line with EU case law and recommendations as to this remedy can be only be summoned as an exceptional remedy.<sup>28</sup>

## II. Impact of international legislation

There are three levels that can be considered in order to measure the European impact on the Italian legal rules: 1) directives, 2) relevant decisions of ECJ and ECHR against the Member State and 3) soft law.

### 1. Directives

This section considers two Directives: 1a) Audiovisual Media Services Directive - 2010/13/EU, and 1b) E-commerce Directive - 2000/31/EC.

1a) Legislative Decree no. 44/2010 implemented Directive 2010/13/EU, offering major changes to Legislative Decree no. 177/2005 (Consolidated Text on Audiovisual and radio media services).

A few months after adoption of this Legislative Decree, in March 2011, the European Commission sent to the Italian Government the note EU/PILOT 1890/11/INSO that required a number of clarifications regarding the transposition of Directive 89/552/EU. In 2012, Legislative Decree no. 120/2012 tried to meet some of the observations formulated by the European Commission, modifying and integrating Legislative Decree no. 44/2010. The modifications have mainly targeted three sectors:

- protection of children, (with reference to Article 12 of Directive 2010/13/EU);
- promotion of cinematographic works of Italian original expression; and
- limits on advertising concentration.

The latter has been further implemented in 2015, within Law no. 115/2015 (the "European Law" 2014), with specific reference to the trailers advertisements organisation (Article 6). In 2015, the Italian Constitutional Court issued the decision no. 247/2015, declaring legitimate the rule of legislative decree no. 177, which allowed free channels to have more advertisements than premium channels.<sup>29</sup> A first judgment was issued by the European Court of Justice, that in case C-234/12 stated that the Italian legislation was compatible with the European directive, as long as judges verify that the principle of proportionality is respected.

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<sup>27</sup> Mastroianni, R. and A. Arena (2014) *Media Law in Italy*, Kluwer Law International, 46.

<sup>28</sup> See ECtHR, *Goodwin v. the United Kingdom*, 27 March 1996, para. 37.

<sup>29</sup> Italian Constitutional Court, judgment no. 205/2015.

(1b) Three years after the EU's deadline, Italy implemented Directive 2000/31/EC through Legislative Decree no. 70/2003, which has partially remained rather "faithful" to the mentioned Directive. Recent measures have also been related more or less directly to the fields touched by Directive 2000/31/EU. This is the case of Legislative Decree no. 179/2012 that introduced administrative, working and fiscal benefits for the innovative start-up within the digital sector. The same Legislative Decree instituted a Control Unit (*Cabina di Regia*) for the Italian Digital Agenda, which also created a working group on e-commerce. Furthermore Law no. 190/2014 (*Legge di Stabilità 2015*) marginally addressed the issue, with a -4% reduction of VAT on e-books. Then Law no. 133/2014 has a more general framework for the promotion *Made in Italy*, although the specific reference to e-commerce that was in the text adopted by the Council of Ministers has been subsequently deleted.

Altogether, the European legislation has relatively little influence on the media market in Italy. Obviously it has been implemented, but it did not bring about a change in the previous market equilibrium that existed in the Italian media system.

## **2. Relevant decisions of ECJ and ECHR against the Member State**

An important decision in the field of pluralism is the case *Centro Europa 7 s.r.l. and Di Stefano v. Italy* (application no. 38433/09), where the Grand Chamber of European Court of Human Rights affirmed the importance of media pluralism under Article 10 (and Article 1 of the First Protocol) of the Convention, obliging the Italian state to pay Centro Europa 7 (Mr Francesco Di Stefano) an amount of €10 million in compensation for not having allocated the due broadcasting frequencies.

## **3. Soft law**

Rules on media in Italy are so heavily influenced by political factors and have been at the apex of a political struggle that all soft law resources have been used to demonstrate the distance of the Italian legislation from the EU standards. Nonetheless, it has been a strategic and political use only, as they have not seriously considered changing the law or modifying the media system.

# **III. Internet**

## **1. ISP's market concentration**

In Italy both European and national laws on antitrust concern concentration of ISPs. The latter follow the above-mentioned rules of ordinary companies. In order to access information about the ownership structure of media enterprises, it is necessary to determine whether a company is public or not; therefore the same remarks apply to this category as well.

Access to the internet for private users is offered by 13 different ISPs. Telecom Italia has the largest share of the market (58%),<sup>30</sup> followed by Vodafone, Fastweb and Tiscali. Telecom Italia Mobile (TIM), Vodafone, Wind, and 3 Italia are the major carriers. Consumers can choose their ISP (internet service provider), although in some areas not all of them are available.<sup>31</sup> National search engines do exist, but their market share of usage is dwarfed by Google and Yahoo and the figure is close to 0%. There is cross-ownership concentration between ISPs and content providers, or other economic sectors, but not relevant

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<sup>30</sup> AGCOM Annual Report 2015.

<sup>31</sup> Freedom House (2015), *Freedom on the Net 2015 report*, p. 441.

concentration. Furthermore there are European rules on net neutrality (Reg. No. 2015/2120), which are directly applied by national authorities.

## 2. Regulation of internet content

Only those content providers that operate in the ICS market as described in the TUSMAR have rules on concentration similar to those identified and described earlier in this study. The biggest professional providers in the sense of news content providers are Repubblica.it, Corriere.it and Gazzetta.it. They are the websites of the main national newspapers. Italy does not engage in significant blocking or filtering of internet content. Blocking and filtering have been pursued by the Italian legislation especially with regard to unauthorised online gambling and child pornography. Hosting online gambling is only permitted to those entities holding a state licence; therefore, all the ISPs are required to block access to the unlicensed gambling websites whose names are provided by the Autonomous Administration of State Monopolies in the form of a blacklist.<sup>32</sup>

Together with the above-mentioned areas, the Law-decree on Anti-terrorism no.7/2015 also provides for the blocking and removal of terrorist websites by the district attorney's order, who may request that ISPs prevent access to a blacklist drawn up by the Interior Ministry similar to that used to block child pornography sites. Moreover, according to the Italian Law on Copyright, internet content can be blocked when copyright infringements are detected in the content, including those websites that contain news.<sup>33</sup> On its side, AGCOM has been equipped with enforcement measures of its own that allow the authority to remove a content upon review of an internal panel without the prior judicial approval if and when a gross copyright violation is detected, in order to activate the procedure thereof the right holder has to file a formal request to AGCOM.<sup>34</sup>

Such measures have been deemed as controversial, whereas it gives discretionary power to ISPs to block content of specific websites even those that simply contain links through which it is possible to download content that is copyright protected. In so doing, ISPs would impede users' access to other legal links and content hosted by those web sites.<sup>35</sup> This discretionary power that AGCOM vested itself with has been presumed to be unconstitutional, but the appeal to the Italian Constitutional Court has been declared inadmissible and therefore the Court was not able to issue any ruling that could eventually resolve the dispute.<sup>36</sup>

In an obiter dictum of the judgment, however, the Court managed to express its bias towards the unlawfulness of the power that AGCOM granted itself. At times, the Italian authorities continue to request the removal of specific content. Google provides a useful tool for keeping track of such requests, which can be used as a faithful proxy of the total number since Google is the most-frequently used content provider in Italy. Google's report shows that, as of June 2015, 99 requests to block content have been submitted, of which more than 80% dealt with defamation and 5% with promoting violent behaviour.<sup>37</sup>

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<sup>32</sup> Freedom House (2015), Freedom on the Net 2015 report, p. 442.

<sup>33</sup> Law no. 633/1941.

<sup>34</sup> AGCOM - Delibera N. 680/13/CONS.

<sup>35</sup> Freedom House (2015), Freedom on the Net 2015 report, p. 444.

<sup>36</sup> Italian Constitutional Court, judgment no. 247/2015.

<sup>37</sup> <https://www.google.com/transparencyreport/removals/government/IT?hl=it>

When AGCOM issues a mandatory order to remove a particular content, the target ISP has to comply; otherwise it may be sanctioned with a fine that ranges from a minimum of €10,000 to a maximum of €250,000.<sup>38</sup>

Likewise, at the end of 2011, Italy's Constitutional Court declared that editors of online magazines were not responsible for defamatory comments posted by readers (thus taking into account the difference between the printed and electronic press). Attempts at introducing bills that would require websites to engage in pre-publication censorship have mostly stalled. At times, proposals that raised alarm bells among free expression advocates have been put forward by past governments, but nothing has come out of them.

Furthermore, a recent ruling of the Italian Constitutional Court pointed out that a preventive seizure could not be applied to those online content accused of libel if a definitive sentence is yet to be issued by the Judge and if the website is not registered as a periodical.<sup>39</sup> Judges may occasionally still issue rulings imposing responsibilities on intermediaries to regulate user-generated content, although, judges have repeatedly affirmed that intermediaries should not be liable for the content posted by users. One of the most relevant cases that has been followed by the media due to the fame of the defendant was *Google v. Vividown* before the Italian *Corte di Cassazione*. The Court acquitted three of Google's managers who were sentenced by the Milan Court of First Instance with six months in prison (Judgment no. 1972 of 4 February 2010) for uploading a video where a disabled child was bullied by his classmates and sharing it via the website [www.video.google.it](http://www.video.google.it).<sup>40</sup> The Court specified that host providers do not have a duty to monitor the content uploaded on their platforms. Nevertheless the host provider must comply with the authority's rulings when it is requested to remove contingent unlawful contents.

### 3. Broadband penetration

In 2014, overall broadband coverage and fixed broadband coverage in Italy exceeded the EU average. Despite NGA coverage increasing by 15.5% throughout the year and reaching 36.3% of Italian households, it remained below the EU average. In rural areas, progress was made with regard to fixed broadband coverage, which increased by 2.8% to 90.5%, almost one percentage point above the EU average of 89.6%. In September 2015, Italy had a total of some 14.9 million broadband household contracts, of which 4.2 million users could access the web with a speed greater than 10 Mbps. Following the breakdown of internet users divided by age from 2008 to 2013 ("Strategia per la crescita digitale 2014-2020"), we see the number in Table A1 below.<sup>41</sup>

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<sup>38</sup> Article 8, *Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del Decreto legislativo 9 aprile 2003, n. 70*

<sup>39</sup> Criminal Supreme Court, judgment no. 31022/2015.

<sup>40</sup> Criminal Supreme Court, judgment no. 5107/2014

<sup>41</sup> *Strategia per la crescita digitale 2014-2020*, Presidenza del Consiglio dei Ministri, 3 marzo 2015, p. 12.

**Table A1: Changing composition of internet users in Italy, by gender and age (2008-13)**

Utenti Internet ultimi 12 mesi	2008	2009	2010	2011	2012	2013
<i>Sesso</i>						
Maschi	45.8%	49.8%	54.6%	56.6%	58.3%	60.2%
Femmine	35.0%	39.4%	43.6%	46.7%	47.0%	49.7%
<i>Classe di età</i>						
6-10 anni	22.2%	30.5%	36.7%	38.2%	40.7%	44.9%
11-14 anni	59.3%	69.6%	75.7%	78.0%	76.3%	80.7%
15-17 anni	76.7%	82.1%	87.2%	89.1%	88.3%	89.6%
18-19 anni	77.2%	83.7%	90.4%	88.7%	88.6%	89.9%
20-24 anni	71.0%	77.6%	82.1%	85.5%	85.6%	85.4%
25-34 anni	62.6%	67.9%	73.3%	77.0%	78.9%	80.1%
35-44 anni	53.8%	58.2%	64.6%	69.4%	68.9%	73.4%
45-54 anni	44.0%	48.6%	53.0%	56.0%	58.6%	61.2%
55-59 anni	29.7%	33.1%	41.0%	42.2%	45.2%	48.7%
60-64 anni	18.0%	22.8%	25.2%	28.6%	30.9%	36.4%
65-74 anni	7.2%	8.5%	12.1%	13.8%	16.3%	18.9%
75 anni e più	1.3%	1.5%	2.0%	2.7%	3.3%	3.5%

As of 2015, there were 40 million smartphones and 10 million tablets in Italy, while the statistics on watching TV are available only until 2008: 90% of families has a TV and in Italy there are only terrestrial frequencies.

The current Government launched in 2015 a *Strategia per la crescita digitale 2014-2020* ("Digital strategy 2014-2020") that is focused on the following keys areas: Public Administration, Health, School and Agriculture. The project is the result of a wide public consultation that involved stakeholders and more than 50 position papers. The President of the Council of Ministers coordinates the *Agenda Digitale Italiana*, which is supported by his "Advisor for the Innovation" and by both national and local authorities.<sup>42</sup>

#### IV. Public service broadcasting

The definition of public service and the associated duties are formally specified both in the TUSMAR and in the RAI Service Contract endowed by the Italian State.

In Italy, the supervision tasks of the public service remit are concentrated in AGCOM, the Italian Communication Regulatory Authority, with some functions relative to the public service broadcaster assigned to the Ministry of Economic Development - Department of Communication. AGCOM is an independent authority implying that it should not be accountable to the Government, but the appointment of its members is made by the Italian Prime Minister who appoints the President and by the Parliament, which appoints the eight members of the Council. The Ministry enters into the Service Contract with RAI and sets out, together with AGCOM, the specific guidelines that regulate the service contract prior to its renewal.<sup>43</sup> The Parliamentary Committee for the Direction and Supervision of Public Service Broadcasting is the supervisory body responsible for monitoring the independence and the objective attitude of public service broadcasting in the country.<sup>44</sup>

<sup>42</sup> *Strategia per la crescita digitale 2014-2020*, Presidenza del Consiglio dei Ministri, 3 marzo 2015.

<sup>43</sup> Article 45 TUSMAR.

<sup>44</sup> Law no. 103/1975.

The task overlaps with AGCOM's competence, i.e. its competence to monitor the compliance of the public service operator with its public service remit. Each year, the AGCOM Council must submit a report that summarises AGCOM's activities undertaken throughout the whole year, to the President of the Council of Ministers, which forwards it to the Parliament. As part of its supervision AGCOM holds a broad number of sanctioning remedies of a pecuniary nature either determined within a minimum and maximum amount prefixed by law or calculated as a percentage of the offending company's turnover. Proceedings are laid down in AGCOM decision n. 136/06/CONS.

The financing management of the public service broadcaster is regulated by Article 47 of the TUSMAR, which provides guidelines and rules to assure a transparent and accountable management of the public funding. The company that provides the public service (RAI) keeps in its balance sheet a separate accounting for public funding that is provided partly by the tax named "Canone RAI", a tax on the possession of a television. Therefore, in order to facilitate an effective monitoring of the allocation of such resources, the balance sheet has two separate financial statements and one is dedicated to all the costs and investments that are directly related to the activity of public service. The above-mentioned measures have been introduced by Legislative Decree 333/2003 in order to comply and execute the Directive 2000/52/CE.

Public funding can be allocated only to finance activities and expenses that are strictly correlated with the public service provided by RAI. The financial statement that reports the costs related to the public service is audited by an independent company appointed by the Parliamentary Committee among those auditors enrolled in a special CONSOB registry. Each year the balance sheet is forwarded to the Parliamentary Committee and to the Ministry of Economic Development. The yearly budget of RAI can be easily accessed in a dedicated website that keeps track of every budget since 2003.<sup>45</sup>

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<sup>45</sup> <http://www.rai.it/dl/rai/text/ContentItem-72409a38-ca5a-402e-aca7-4731d1c856f1.html>.

## **MEDIA PLURALISM IN POLAND**

**Report by Dominika Bychawska-Siniarska and Ireneusz C. Kamiński<sup>1</sup>**

### **Summary**

There is no legal obligation on any authority to inform the public about the ownership of the media, which affects transparency. Ownership can be tracked by analysing the National Judicial Register which is available to the public. The general ownership of electronic broadcasters is presented on an annual basis by the National Broadcasting Council (PBC). Press publications about the ownership structure of media are published sporadically, particularly in the context of the debate on the 'repolonisation' of the media.

Media do not benefit from public subsidies and no special schemes are available for the press. The press at the national and local level benefits from public advertisement and announcements. The attribution of advertisements to different media outlets is highly politicised. The law enables the publishing of free-of-charge bulletins by local governments. In practice, local governments publish regular press titles. Some of them even sell commercial advertisements. They gather most of the public advertisements as well as the advertisements of local entrepreneurs, who prefer to choose a "government-friendly" media outlet. Such press titles are not able to serve the basic function of media in a democratic society, namely a public watchdog. Although the phenomenon is well known, no legislative changes are proposed in this respect. Most owners of media groups have a number of other economic activities, such as real estate companies, investment funds, security associations, car rental and travel agencies or media houses.

It is difficult to track direct links between politicians and media owners. However, the analysis of the media content demonstrates the political preferences of the different media outlets. In December 2015, the new parliament amended the Law on Public Broadcasting, enabling the Minister of State Treasury to nominate Management Board- and Supervisory Board- members. In consequence, more than 107 journalists were dismissed from public media. Solidarity among journalists and legal support available to them remains weak due to the substantial polarisation of the journalistic associations.

Currently, the supervision of the fulfilment of the public remit by the sole public broadcaster is conferred to the National Broadcasting Council, a constitutional body whose competences are defined in the Broadcasting Law. The public broadcasting agency is financed via the collection of licence fees and the sale of commercial advertising. The collection of licence fees does not work properly; a substantial number of viewers do not pay the fee. The Inspectorate of Public Spending (NIK) conducts audits and monitors spending in national radio and television. Audits can include all media finances, or particular activities and spending by the media. The monitoring function is not regularly carried out.

Journalists still face criminal defamation charges in Poland, and they may be sentenced to up to one year's imprisonment. The legal background for the protection of journalistic sources seems to be satisfactory and in line with international standards, but the legal order lacks adequate safeguards against intelligence agencies abusing their competences regarding the mass surveillance of communication, including journalists.

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<sup>1</sup> Dominika Bychawska-Siniarska, Director of the Observatory of Media Freedom in Poland of the Helsinki Foundation for Human Rights; Prof. Ireneusz C. Kamiński, Jagiellonian University, Polish Academy of Science, an expert at the Helsinki Foundation for Human Rights.

According to recent data, published in 2015 by the Main Statistical Office (Główny Urząd Statystyczny), in 2015 as many as 75.8% of households had access to the Internet, and 71% to broadband Internet. There are no legal rules on the concentration of Internet content providers, but if a given entity is considered a press item (the definition from the Press Law may apply to radio and television broadcasting as well as to online activities), then the general rules on concentration must be followed. The ISP market is diverse: 1,700 ISPs function on the market in the country. Due to competition, smaller players tend to consolidate into one business entity. Also the bigger players are ready to buy small ISPs to consolidate the market in particular locations. As much as 96.63% of the Polish search engine market belongs to Google (as of 2014), which leaves little space for other players. Legislation does not provide for administrative measures on banning or blocking online content. Such a possibility is only permitted by the draft antiterrorist law currently being prepared. If accepted, it would allow the head of the Internal Security Agency, after receiving permission from the Prosecutor General, to block or request the blocking of a particular item of "tele information content" for 30 days.

## **I. Ownership: How transparent is the ownership of media enterprises?**

### **1. Information about ownership**

Ownership ratios are occasionally reported by specialised publications that deal with media issues. An example was a recent publication demonstrating the audience ratio for different media outlets (TV, radio, press and internet).<sup>2</sup> No official database is available to the public in that respect.

There is no legal obligation on any authority to inform the public about media ownership. Ownership can be tracked by analysing the National Judicial Register (Krajowy Rejestr Sądowy) where all economic operators have the duty to present yearly reports on their activities. It should be noted, however, that some media companies have an extended and complicated structure; therefore it might be complicated to track the initial ownership.

The National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji) publishes a yearly report. An information note is attached to the report in which the ownership structure is described, and it contains graphics.<sup>3</sup> The reports are accessible on the NBC web page and are debated on a yearly basis by the Polish Parliament. Moreover, the information is available online in the National Judicial Register.

The Polish Chamber of Press Publishers (Izba Wydawców Prasy) used to publish a report each year on the relative shares of press ownership. The last analysis available on the web page dates from 2012.<sup>4</sup> There is no regulatory safeguard on the need to publish reports. It should also be noted that many mistakes occur in the media reports as to the presentation of media ownership.

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<sup>2</sup> Information published by a news portal money.pl on 3 January 2016, on audience ratio: <http://www.money.pl/gospodarka/wiadomosci/arttykul/media-w-polsce-do-kogo-nalezy-prasa-138,0,1988746.html>

<sup>3</sup> An example of such a report (for 2013) is available at: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr2013/informacja\\_krrit\\_2013.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr2013/informacja_krrit_2013.pdf)

<sup>4</sup> Analyses, by year, are available at: [http://www.iwp.pl/rynek\\_prasy.php](http://www.iwp.pl/rynek_prasy.php)

Recently, ownership of the media has been used in political battles to discredit “opponent” media outlets (conservative media against liberals and vice versa).<sup>5</sup> The publications with information about the ownership structure of the media are mostly related to the debate in Poland concerning the need to return the ownership of the media to Polish investors.<sup>6</sup> They occur occasionally in different media (printed, electronic).

## 2. Ownership structure

The data available in the media do not specify who is behind the initial acquisition. As far as Polish ownership is concerned, the owners (natural persons) are mostly known and are usually associated with companies. As far as foreign capital is concerned, the information usually only contains the name of the ownership group, e.g. Ringier Axel Springer. The names can be tracked by analysing the data available in the National Judicial Register (Krajowy Rejestr Sądowy).

Most of the owners of the media groups have a number of other economic activities. For example, the holding company of Zygmunt Solorz-Żak (owner of Polsat TV) also owns Polkomtel (the mobile phone company),<sup>7</sup> and the owner of GEMI (the company that publishes the Rzeczpospolita daily newspaper) is also owner of a number of real-estate companies.

Grzegorz Bierecki, the owner of a “para-bank” called Społeczne Kasy Oszczędnościowo-kredytowe (SKOK) is also the owner of investment funds, security associations, leasing companies of cars, travel agencies, media houses (Apella) and a number of newspapers (Tygodnik Podlaski, Gazeta Bankowa).

Another example is Zbigniew Benbenek, owner of the Zjednoczone Przedsiębiorstwo Rozrywkowe, which publishes “Super Express” daily, owns Eska TV, Polo TV, Vox and Eska radios.<sup>8</sup> The company also organises fairs and public events. Before investing in the media field he was (and continues to be) a major investor in the field of the gambling industry, casinos, slot machines. In 2009 Benbenek was heard by a parliamentary committee, because he was a lobbyist on the new gambling law.<sup>9</sup>

## 3. Ownership and political influence

These actors are beneficiaries of public resources, particularly as far as public advertisement is concerned. Those advertisements are published by State institutions, State-owned enterprises and local governments.

No direct relations to those in political power can be tracked. However, in November 2012, the media informed people that Grzegorz Hajdarowicz, the owner of GREMI media and publisher of Rzeczpospolita, had met with Paweł Graś, the spokesperson of the Platforma

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<sup>5</sup> An article published in Gazeta Wyborcza, for example, on 16 May 2016, entitled “Wprost, Do Rzeczy and Putin?”, is available at: <http://wyborcza.pl/1,75968,20080495,wprost-do-rzeczy-i-putin.html>

<sup>6</sup> For example, an article entitled “Do we need to return the media to Polish hands? Analysis of the foreign capital on the media market”, 14 September 2015, is available at: <http://jagiellonski24.pl/2015/09/14/czy-musimy-repolonizowac-media-analiza-zagranicznego-kapitalu-w-polsce/>

<sup>7</sup> Data available in the NBC report: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr2013/informacja\\_krrit\\_2013.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr2013/informacja_krrit_2013.pdf)

<sup>8</sup> The company’s web page: <http://www.grupazpr.pl/>

<sup>9</sup> The law limited the access to gambling machines and their amount.

Obywatelska Government. The meeting took place at night, a couple of hours before Rzeczpospolita published a controversial article on the potential attack on the presidential plane in 2010 (entitled "Trotyl na wraku Tupolewa"). The article constituted a harsh criticism of Government policy towards the catastrophe. The topic of that discussion between the owner of the newspaper and the spokesperson has not been confirmed, but there are speculations that Grzegorz Hajdarowicz warned the Government about the publication, as the publication could have an effect on the stability of the Government.<sup>10</sup>

Information about the ties between media owners and politicians appeared in the independent press, especially after the withdrawal of a large number of announcements by the new government, after October 2015. Occasionally information about the number of formal state advertisements distributed among media is subject to media reports. On 4 December 2013, the Parliamentary Team for Protection of Media Freedom published a report giving information on the distribution of public institutions' announcements among different media outlets.<sup>11</sup> The debate was mostly conducted in "independent", oppositional media, after the number of public announcements importantly diminished at the end of 2015. On 9 May 2015, the news portal wirtualnemedi.pl gave information on the distribution of advertisements by ministries and state-owned enterprises.<sup>12</sup>

Public media are strongly subjected to political influence. After the 2015 parliamentary elections, 107 journalists were dismissed from public media or transferred to posts where they had no more access to the public.<sup>13</sup>

The analysis of media content demonstrates the political preferences of different media outlets. The media content reflects the political sphere and the division between conservative and liberal media. Only well-informed people are aware of the ties.

Public media politicisation is the major issue that is debated. Press information would, for example, concentrate on the fact that PBC ordered a report analysing the content of public and private televisions daily news.<sup>14</sup> As mentioned above, the impact of German ownership and the need to restore control over media by Polish owners was one of the subjects debated at the end of 2015.

Some journalists demonstrate their political affiliation, by actively taking part in anti-governmental or pro-governmental demonstrations, for example. The way in which the news is represented is influenced by political opinion and values. PBC ordered a report analysing the content of public and private televisions daily news – Wiadomości (public broadcaster), Fakty (TVN – private TV) and Wydarzenia (Polsat – private TV). The report mentions that public news mostly concentrates on government activities and actions, and comments on them.<sup>15</sup> Fakty and Wydarzenia were less oriented towards current political developments. However, Fakty tended to present public institutions as non-effective, non-

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<sup>10</sup> See, for an example of an article about the meeting and its impact on freedom of expression: <http://www.polskieradio.pl/5/3/Artykul/721041,Nocne-spotkanie-Gras-Hajdarowicz-PiS-zada-wyjasnienia>

<sup>11</sup> The report is available at: [http://orka.sejm.gov.pl/opinie7.nsf/nazwa/146\\_20131204/\\$file/146\\_20131204.pdf](http://orka.sejm.gov.pl/opinie7.nsf/nazwa/146_20131204/$file/146_20131204.pdf)

<sup>12</sup> Article available at: [http://www.wirtualnemedi.pl/artykul/reklamy-ministerstw-i-spolek-panstwowych-wiecej-we-w-sieci-wprost-i-do-rzeczy-liderem-gazeta-wyborcza-w-dol-newsweek\\_2](http://www.wirtualnemedi.pl/artykul/reklamy-ministerstw-i-spolek-panstwowych-wiecej-we-w-sieci-wprost-i-do-rzeczy-liderem-gazeta-wyborcza-w-dol-newsweek_2)

<sup>13</sup> The list of dismissed journalists is available at the Journalistic Society web page: <http://towarzystwodziennikarskie.org/>

<sup>14</sup> The outcome of the analysis is available at: <http://towarzystwodziennikarskie.org/?s=start;TDX>

<sup>15</sup> The outcome of the analysis available at: <http://www.krrit.gov.pl/krrit/aktualnosci/news,2252,wyniki-monitoringu-audycji-informacyjnych.html>

functioning, unprofessional, giving an anti-government feeling to the public. Wydarzenia seemed to be more neutral in content.

The shares of viewers for major news programs, according to a report presented on 5 May 2016 by Wirtualnemedi.pl,<sup>16</sup> were as follows:

1. Fakty TVN news programme: 24.72%
2. TVP 1 Wiadomości news program (public): 19.84%
3. Wydarzenia on Polsat: 16.41%

According to a report by the Committee of Radio Analysis, the share of listeners was as follows:<sup>17</sup>

1. RMF FM (major stakeholder, Bauer Media Investment): 24.1%
2. Radio Zet (major stakeholder, Lagardere): 13.6%
3. Public Radio – 1st programme: 9.5%
4. Public Radio – 3rd programme: 4.2%

The lack of transparency has an important influence on the politicisation of the debate about the media. The ownership of the media is becoming part of political struggle and conflict.

#### **4. Media concentration**

Media concentration in Poland is considerable. Only seven media owners own the majority of TV, press and radio outlets. Cross-ownership is substantial.<sup>18</sup> No updated and reliable information exists as to the financial shares of media in the market.

According to data provided by the National Broadcasting Council, media concentration is as follows:

1. Bauer Media Group (the biggest owner of printed media – 38 titles, radio broadcaster with the most largest revenues on the market, with RMF stations – 22-26% of the market in 2014, owner of internet platform Interia).
2. Agora (second largest media owner for the printed media market with five titles, 11% of radio market share and eight internet portals).
3. Ringier Axel Springer Polska (third biggest owner of printed media – Fakt and Newsweek and many other specialised, hobby titles, owner of two TV stations, owner of second biggest internet portal, onet.pl).
4. ZPR Media (fourth as to the printed press – Super Express and a number of specialised, hobby press, 7% of radio market – Eska and Wawa stations, sixth position as to internet reach, e.g. se.pl).
5. Presspublika (editor of seven press titles, press distribution, no radio and TV)
6. Niezależne Wydawnictwo Polskie (editor of four press titles, TV Republika and two web portals).
7. Wirtualna Polska Holding (TV owner and three internet platforms, wirtualna.pl, o2.pl and money.pl).

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<sup>16</sup> Information available at: <http://www.wirtualnemedi.pl/artykul/wiadomosci-stracily-750-tys-widzow-a-fakty-zyskaly-120-tys-dziennik-tvn-nowym-liderem>

<sup>17</sup> Report available at: <http://www.badaniaradiowe.pl/wyniki/>

<sup>18</sup> See: <http://monitor.cmpf.eui.eu/mpm2015/results/poland>

## **II. Funding: How transparent is the allocation of public money in the media landscape?**

### **1. Printed press**

There are no special programmes of subsidies for the press. Moreover, there is no special legislative framework that would facilitate the work of the press. Most subsidies programs involve books and the enhancement of book readership. There are no tax (e.g. VAT) special rules for the press, there are no subsidies towards the wide distribution of the press.

A proposal made by the Pact for Culture (Pakt na rzecz kultury), a group of NGOs dealing with culture and acting as public watchdogs, to create a special public fund distributed among broadcasters which would perform a "public mission".<sup>19</sup> This idea has never been developed into a legislative proposal.

The media are beneficiaries of announcements ordered by the national and local governments, as well as by companies owned by the State Treasury. Each change of government triggers a shift of governmental advertisements benefiting the respective media sources.<sup>20</sup>

The public institutions (offices, courts) subscribe to different titles. In November 2015 the press informed that the subscription of "Gazeta Wyborcza", "Polityka" and "Newsweek" (in opposition to the current PIS party) would be terminated.<sup>21</sup>

The distribution of announcements depends very much on the political preferences of a given party. The ministries and local governments would tend to order announcements in the media outlets "favourable" to them. According to the Parliamentary Team for the Protection of Media Freedom (Zespół ds. Obrony Wolności Słowa), the costs of announcements ordered by different ministries is approx. 2,000,000 PLN (€500,000) per year.<sup>22</sup> The publication of the announcements may have a substantial impact on the budget of media outlets. The withdrawal of an announcement due to government change, may, especially at the local level, have an impact on the finances of the media. In this respect, small media outlets are more vulnerable than big companies with access to foreign capital.

In the longer run, the withdrawal of public announcements may have an impact on private advertising and the cooperation of a business with a given title.<sup>23</sup> Advertisers are mainly present in the government-friendly media outlets.

This phenomenon is visible particularly at the local level, where public announcements are published mostly in the media run by local governments. Moreover, those media attract most private advertising. In January 2014, the Regional Audit Office (Regionalna Izba

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<sup>19</sup> The proposal is available at: <http://www.mediapubliczne.org.pl/>

<sup>20</sup> Report on the period 2008-2012 available at: [http://orka.sejm.gov.pl/opinie7.nsf/nazwa/146\\_20131204/\\$file/146\\_20131204.pdf](http://orka.sejm.gov.pl/opinie7.nsf/nazwa/146_20131204/$file/146_20131204.pdf)

<sup>21</sup> See: 'Is the PiS limiting opposition media? Public institutions decline subscriptions with "Gazeta Wyborcza" and "Newsweek"' (PiS odcina się od krytykujących go mediów? Agendy rezygnują z prenumeraty „Gazety Wyborczej” o "Newsweeka"), article available at: <http://natemat.pl/163895,rzad-odcina-sie-od-krytykujacych-go-mediow-agendy-rezygnuja-z-prenumeraty-gazety-wyborczej-i-newsweeka>

<sup>22</sup> Ibid.

<sup>23</sup> D. Bychawska-Siniarska, D. Głowacka, Media lokalne i regionalne – nierozwiązane problemy, nowe wyzwania, Warsaw, 2013, p. 58, publication available at: [http://www.hfhrpol.waw.pl/obserwatorium/index.php?option=com\\_content&view=article&id=4581:praktyczny-przewodnik-po-art-212-kk-broszura-informacyjna&catid=51:publikacjerozne&Itemid=41](http://www.hfhrpol.waw.pl/obserwatorium/index.php?option=com_content&view=article&id=4581:praktyczny-przewodnik-po-art-212-kk-broszura-informacyjna&catid=51:publikacjerozne&Itemid=41)

Obrachunkowa) condemned such a practice, saying that the press run by local governments should not benefit from private advertising, as it is published and edited using public money.<sup>24</sup> The practice remains in place however and there are regions of Poland, like Podhale, where in each municipality there is a title published by the local government.<sup>25</sup>

There are no official statistics publicised demonstrating the amount of announcements in different media. Each city provides quarterly information in the Bulletin of Public Information about the media in which public announcements are made.<sup>26</sup>

It has an important influence on the local market, where public announcements are a substantive share of media budgets. Therefore, being deprived of announcements might cause financial problems. At the national level the lack of announcements has less impact on the companies owned by foreign investors, as they often have alternative sources of financing.<sup>27</sup>

As mentioned above, occasionally the press reports to the public about the advertisements of public entities. The local governments, especially governments of big cities, present a quarterly report in the Public Bulletin of Public Information on the amount of advertisement and promotion in different media outlets.<sup>28</sup> It is unclear whether all the cities regularly submit such reports.

This information is not easily accessible. One has to search the Bulletin of Public Information or on ministries' websites. There is no obligation to report on the amount of public and private advertisements. Accounts are not accessible to the public.

## 2. Local press

The problem mostly concerns local press and here the bias is substantial. Titles published by local governments concentrate on the governments' activities and become a mechanism for political propaganda.

It is difficult to assess the audience share of these outlets, as there are no official data as to the number of titles published by local governments. According to Jolanta Kępa-Mętrak,<sup>29</sup> in the Kielecki region alone there were 31 titles published by local governments in 2001.

Recently, the Association of Local Press (*Stowarzyszenie Gazet Lokalnych*) conducted a survey among publishers.<sup>30</sup> Publishers operating in 16 different cities replied, highlighting that in their city, there was a press title published by the government. In the municipality of Ozimek (in the south of Poland) there is a press title published by the government. The title has 36 pages, of which on average 11 are devoted to advertisements. The circulation

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<sup>24</sup> Information about the decision is available at: <http://samorzad.pap.pl/depesze/rio/133104/Bez-reklamy--W-gminnej-prasie-nie-moza-ukazywac-sie-platne-ogloszenia->

<sup>25</sup> According to Association of Local Press (*Stowarzyszenie Gazet Lokalnych*) survey, which is not published yet.

<sup>26</sup> For example, a report from Kraków city is available here: [https://www.bip.krakow.pl/?dok\\_id=69623](https://www.bip.krakow.pl/?dok_id=69623)

<sup>27</sup> The assessment of Marek Frąckowiak, Secretary of the Polish Publishers Chamber, made during an interview on 6 May 2016.

<sup>28</sup> For example, the report by Kraków in the Bulletin of Public Information, available at: <https://www.bip.krakow.pl/?mmi=10130>

<sup>29</sup> Author of one of the papers presented at a conference organized in Senat in 2004. Its publication after the conference is available at: <http://ww2.senat.pl/k5/agenda/seminar/a/040921.pdf>

<sup>30</sup> The survey is not yet completed. Information on the replies of publishers was given by Alicja Mołęda, the President of SGL in an interview conducted on 10 May 2016.

of local governments' titles is usually similar to the independent titles or a little smaller. Not all governmental titles have advertisements.

The law on communal economy (Ustawa o gospodarce komunalnej) enables the publishing of free-of-charge bulletins by local governments. In practice local governments publish regular press titles. Some of them even sell commercial advertisements. They gather most of the public advertisements as well as the advertisements of local entrepreneurs, who prefer to choose a "government-friendly" media outlet. Such press titles are not able to serve the basic function of media in a democratic society, the function of public watchdog. At the same time they attract local advertisers (affecting fair competition on the local press market) and are often used only to promote the activities of local politicians and attack the independent press that attempts to control them.<sup>31</sup> It has to be noted that the possibility to publish press titles has been challenged by the Regional Control Body (Regionalna Izba Obrachunkowa). No legislative changes are foreseen.

There is no official register of titles published by the local press and no information on how much of the advertising money they collect is official. There is a tight correlation between politicians (in power) and the press published by the local offices. Often the publisher and editor-in-chief is an employee of the local governor's office.

Criminal or civil defamation proceedings are often used by local governments (public administration entities or particular employees, politicians) against the local press.<sup>32</sup>

### **III. Journalists' protection from undue influence**

#### **1. Ethical regulations**

Article 12, par. 2 of the Press Law<sup>33</sup> prohibits journalists from engaging in any hidden marketing or from receiving any financial gratification from an economic entity interested in promotion and advertising. The Press Law does not refer to political pressure. However, it should be noted that the Press Law dates from 1984 and needs amendment, as it no longer reflects reality.

The Polish Chamber of Publishers, in their Code of Good Practice<sup>34</sup> obliges publishers and editors not to influence journalists in order to realize their political or economic interests. Journalists should not engage in any political activities. The Code of Journalistic Ethics of the Polish Association of Journalists (Kodeks Etyki Dziennikarskiej Stowarzyszenia Dziennikarzy Polskich) also stipulates that journalists should not engage in any political activity (Article 21) and should not engage in any non-official marketing activity when publishing (Articles 17-18).

Most media outlets have their own codes of conduct where economic and political independence is stipulated. For example, the code of conduct of Polish Public TV (Zasady etyki dziennikarskiej w Telewizji Polskiej S.A.)<sup>35</sup> stipulates that journalists should remain

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<sup>31</sup> More in Dominika Bychawska-Siniarska and Dorota Głowacka, *Media lokalne i regionalne w Polsce – nierozwiązane problemy, nowe wyzwania*, Warsaw 2014, available at: [http://www.obserwatorium.org/index.php?option=com\\_content&view=article&id=4581:praktyczny-przewodnik-po-art-212-kk-broszura-informacyjna&catid=51:publikacjerozne&Itemid=41](http://www.obserwatorium.org/index.php?option=com_content&view=article&id=4581:praktyczny-przewodnik-po-art-212-kk-broszura-informacyjna&catid=51:publikacjerozne&Itemid=41)

<sup>32</sup> In the case of the civil and criminal defamation cases opened by Eurgeniusz Grzeszczak, Parliament Speaker against Kurier Słupski, for example.

<sup>33</sup> Law of 26 January 1984, Official Journal 1984, Nr 5, Item 24.

<sup>34</sup> Code available at: <http://www.iwp.pl/pliki/KDPWP.pdf>

<sup>35</sup> Document available at: <http://s.tvp.pl/repository/attachment/0/e/e/0eea386c0fa98ad0c49f73f1a9f7c8e71445347977947.pdf>

apolitical in their work and should keep a similar distance from politicians from different parties. Economic influence is only mentioned in the context of product placement and crypto-advertisement (with an obligation to inform the public).

In the last months we saw a number of journalists engaging in political demonstrations. However, this activity did not trigger any reaction. There are no ethical bodies functioning in Poland at the moment. The National Ethical Council (Rada Etyki Mediów), which had control over ethical standards, has basically ceased its activity.

No correlation has been found between media outlets having ethical codes and providing objective content.

## **2. Employment protection**

Many journalists are self-employed or under civil law contracts. They do not benefit from all the guarantees of labour law contracts. They need to pay their own social security payments. However, they do have medical insurance. These types of contract can be terminated instantly, which causes instability. This does not guarantee journalistic independence and as a consequence many journalists leave to work in PR or in public offices.

The world of journalism is highly polarised in Poland, which is a function of political affiliations and personal perceptions of the past. There are five associations at the present time: 1) Stowarzyszenie Dziennikarzy Polskich (the management is oriented towards the right), 2) the relatively new Towarzystwo Dziennikarskie (Journalistic Society, rather liberal, leftist approach), 3) Stowarzyszenie Dziennikarzy RP (Association of Journalists of RP), 4) Stowarzyszenie Wolnego Słowa (Association for Free Speech) and 5) Polish Press Club.

Stowarzyszenie Dziennikarzy Polskich has regional offices in major cities throughout Poland and is the biggest association.

Legal aid for journalists is provided free-of-charge by the Centrum Monitoringu Wolności Prasy (Centre for Monitoring of the Press) which is a sub-organisation of the Stowarzyszenie Dziennikarzy Polskich. Liberal journalists would rather not address their problems to the Centre. The Journalistic Society has recently created a fund to provide support to journalists who are dismissed from public media. This initiative is new and it is too soon to assess how it will function in practice.

Legal aid is also provided by the Helsinki Foundation for Human Rights project "Observatory of Media Freedom in Poland", which has operated since 2008. The Foundation engages with systemic problems and litigates in strategic cases that can lead to a change in practice or law.

## **3. Protection of journalistic sources**

The legal provisions regarding protection of journalistic sources are quite strong in Polish law. First of all, the Polish Constitution grants the right to privacy, secrecy of communication and informational autonomy (Articles 47, 49 and 51), as well as freedom of expression (Article 54). The second relevant document concerning this matter is the Press Law, which in Articles 15 and 16 states that a journalist is obliged to keep confidential: i) any data making it possible to identify the author of material appearing in the press, a letter to the editor or other material of a similar nature, published or released for publication, if such persons demand that such data remain confidential and ii) any information the disclosure of which could prejudice the interests of third parties protected

by law. A journalist may only disclose the identity of his or her source if he or she was explicitly authorised to do so. Furthermore, the journalist shall be exempted from keeping professional secrecy in this respect only if the information concerns one of the most serious crimes enumerated in Article 240 Section (1) of the Criminal Code.

The matter of a journalist's testimony in criminal cases is regulated by Article 180 of the Criminal Procedure Code. It provides a general prohibition on disclosing data enabling identification of the author of a press denunciation, letter to the editor or other material of the same nature, as well as the identification of persons imparting information published or passed on to be published, if these persons reserved the right to keep the data secret. The journalist may be exempted from keeping the journalistic source of information confidential only i) if required to reveal it by court order, ii) when it is necessary for the benefit of the administration of justice, iii) where the facts cannot be established on the basis of other evidence and iv) if the information is needed for the purpose of proceedings concerning one of the most serious crimes enumerated explicitly in Article 240 Section (1) of the Criminal Code (all four conditions have to be met simultaneously).

Although the legal background of the protection of journalistic sources seems to be satisfactory and is in line with international standards concerning that matter, there are certain loopholes. The Polish legal order lacks adequate safeguards against the abuse of powers by intelligence agencies in the mass surveillance of communications, also with respect to journalists.

On 30 July 2014, the Polish Constitutional Tribunal found the data retention regulations incompatible with the constitutional right to privacy, including the violation of information autonomy rights and correspondence secrecy, in particular to the extent that they did not foresee any independent supervision over the use of these data by the enforcement and intelligence agencies (case no. K 23/11). One of the significant spheres touched upon by the Constitutional Tribunal concerned the necessity to destroy materials that contain professional secrets (including journalistic secrecy). According to the Tribunal, the law on surveillance was unconstitutional to the extent that it did not guarantee the immediate removal of such materials where the court had not lifted professional privilege.

In response to this Constitutional Tribunal's judgment, the Polish Parliament adopted a new law in January 2016, which entered into force on 7 February 2016. The law does not provide sufficient safeguards against the arbitrary use of mass surveillance of telecommunications data. Pursuant to the new provisions, police and other agencies carrying out operational surveillance should deliver to the prosecutor all the materials regarded as containing professional secrets. The prosecutor should later on present them to the court, which is to decide on the admissibility of those materials. There are several concerns regarding this procedure. First of all, it is not clear why the materials should be delivered to the prosecutor in the first place and not to the court directly (since the prosecutor does not have any power to destroy materials and what he does is simply handing them to the court). Second, there is no requirement for an ex-post notification on the surveillance conducted, which means there is no possibility to file a complaint about the court's decision.

## **IV. Impact of international legislation**

### **1. European Union law**

The Audiovisual Media Services Directive and the E-commerce Directive seem to have been correctly implemented, although some implementing steps were taken only in 2016 (Polish and European production quotas in television broadcast only in tele-information format).

Generally, the provisions of the Directives were enforced in practice, but some problems were also reported with following monitoring procedures (proportion of commercial per hour, quotas for European productions).

There was no case law referring directly to the directives. Many rules of Directive 2010/13/EU repeat those of Directive 89/552/ECC, and the relevant Polish legislation was adjusted to it already before the accession to the EU in 2004.

## **2. Council of Europe**

There were 36 judgments made by the European Court of Human Rights against Poland concerning Article 10 on freedom of expression, and in 25 of them the Court found violations of the Convention. These violations resulted, generally, from the national courts not giving sufficient attention to: the value of political speech or discussion on matters of public importance, the public watchdog role of the media, the distinction between factual allegations and value statements, and the chilling effect of penal sanctions. As far as the implementation process is concerned, some judgments required amendments to national legislation (the elimination of penal sanctions, the deletion of some rules), whereas others only needed changes in the application of the law by the courts. In some areas implementation was delayed.

Following the cases lost at the Strasbourg Court, the case law on several issues has significantly evolved towards the relevant Convention standards. This new case law is rather abundant. The standards that seem to have been well accommodated into national legal practice concern: the relevance of free discussion on political matters and questions of public interest; the specific situation of politicians; the media's role as public watchdog; the serious effect of criminal sanctions. However, some problems still persist (e.g. national courts are likely to give too much importance to the protection of good name when good reasons exist for free public debate).

ECtHR case law is referred to in national court practice. Compared to the situation some years ago, at the moment the courts are more aware and familiar with Convention standards as defined by Strasbourg case law. The standards seem to have been well accommodated into legal practice (the relevance of free discussion on political matters and questions of public interest, the specific situation of politicians, the media's role as public watchdog and the serious effect of criminal sanctions), although some problems persist.

## **3. Soft law**

The soft law norms are regularly presented by NGOs during discussions on draft laws on public media. However, they are not followed by the legislature. The Polish parliament has a body that checks the conformity of the draft with EU law, but there is no such entity for checking for conformity with the Council of Europe or other international organisations.

Soft law is not influential, but is routinely referenced, for example, in the legislative process and public discourse as if there seem to be no discrepancies between that soft law and Polish legislation. Only recently, following the lodging of three drafts laws essentially changing Polish legislation on public television and radio, NGOs relied on the relevant soft law from the Council of Europe (Recommendation 1641 (2004); Recommendation No. R (96) 10; CM/Rec(2007)2) which was referred to as a justification for strong criticism of the proposed rules.

## **V. Internet**

### **1. Market concentration**

No specific rules exist as to ISP market concentration. Tracking down the final owners is not an easy task, although the basic relevant data on business entities are available to the public online and occasionally in the traditional media.

Around 1,700 ISPs function on the market in the country. Due to competition-related reasons, a tendency is visible for smaller players to consolidate into one business entity. Also, the bigger players are ready to buy small ISPs to consolidate the market in particular locations. As a rule, consumers may choose between different options regarding access to the Internet. It was only in rural areas, over the last few years, that supply was limited but the landscape has changed with mobile Internet becoming an option. The share of local ISPs is estimated at 20% of the entire market.

The biggest ISP in Poland (with stationary and mobile Internet access taken together) is Orange (29.1%, data from 2014; in 2013, 31.8%); in second place is Polkomtel (in 2014, 8.8%; in 2013, 8.3%); and in third place is T-Mobile (in 2014, 8.3%; in 2013, 9.5%). For stationary Internet access (55% of the entire Internet access market) the statistics are as follows: Orange with a 31.5% share of the market (data from 2014; in 2013, 34.9%); followed by UPC in 2<sup>nd</sup> place (in 2014, 13.8%, in 2013, 14%); Netia in 3<sup>rd</sup> place (in 2014, 7.9%, in 2013, 6.2%). As far as the mobile Internet access market is concerned (accounting for 45% of the access market), the biggest player is Orange (26.1%), followed by Polkomtel (19.5%) and T-Mobile (17.9%).<sup>36</sup>

As much as 96.63% of the Polish search engine market belonged to Google (in 2014) which left little space for other players. There are several Polish search engines (e.g. Szukacz) but, as a rule, either they disappeared from the market or specialised in some specific matters. Some search engines operate on several Polish web sites with a general information profile but they are "enhanced by Google".

The market is diverse and there are many options available, especially in bigger cities. Moreover, mobile Internet has become an alternative to home Internet.

There are no examples of cross-ownership between IPS and content providers. However, in 2013 Polkomtel, the second biggest mobile Internet provider (see above) was bought (i.e. 83.8% of the shares were bought) by Digital Polsat (Cyfrowy Polsat), the biggest provider of satellite television. Orange and T-Mobile are key players in the mobile telephone market and the stationary telephone market (in the case of Orange).

There are no specific rules or court decisions on the rights and obligations of search engines or ISPs as gatekeepers.

### **2. Content regulation**

No specific rules exist. However, if a given entity is considered a press item (the definition from the Press Law may be applied to radio and television broadcasting as well as online activities) then general rules on concentration must be followed. As explained in a recent document from the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów), the President of the Office must be notified of any acquisition

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<sup>36</sup> The statistics provided are based on the "Report on the telecommunication market in Poland in 2014 (*Raport o stanie rynku telekomunikacyjnego w Polsce w 2014 r.*), published in June 2014 by the Office for Electronic Communication (Urząd Komunikacji Elektronicznej). Available at: [https://www.uke.gov.pl/files/?id\\_plik=20069](https://www.uke.gov.pl/files/?id_plik=20069)

of a press title if the property purchased generates a turnover in excess of the threshold of 10 million Euro in Poland in at least one of the two financial years preceding the notification of intention to concentrate (i.e. consolidate).<sup>37</sup>

The three big content providers are (according to monthly statistics for February 2016, provided by Gemius Megapanel Audience, as based on data from NetTrack Millward Brown and "Maluchy"): Grupa Wirtualna Polska (15,693,640 real users), Grupa Onet – RASP (15,195,481 real users), Grupa Interia.pl (11,874,382 real users).<sup>38</sup>

Grupa Onet is owned by Ringier Axel Springer Polska which publishes a number of print titles, among them "Fakt", newspaper daily (the tabloid with the highest circulation in the country), Polish "Newsweek" and monthly "Forbes". Ringier Axel Springer Polska also has shares in business entities active in the print-media sector, primarily in INFOR Business (49% participation), which publishes the quality daily newspaper "Dziennik Gazeta Prawna".

Legislation does not provide for administrative measures on banning or blocking online content. Such a possibility is only permitted by the draft antiterrorist law currently being prepared. If accepted, it would allow the head of the Internal Security Agency, with the permission of the Prosecutor General, to block or request the blocking of a particular item of "tele-information content" for 30 days. The head of the Internal Security Agency would also be obliged to ask the Circuit Court (Sąd Okręgowy) in Warsaw to render a decision authorising the blocking. If the Court does not take a decision within five days, the blocking must cease. The maximum period of blocking cannot exceed three months.

At present, only the courts may order, through a judgment, the removal of the contested content, following court proceedings, if they consider such a measure justified and proportionate.

According to the new anti-terror law, the Head of the Security Agency is enabled to block pages that have "terrorist" content or that "incite terrorism". The Head of the Security Agency needs to receive consent from the Prosecutor General. No Court supervision is predicted before the blocking of the web page.

General legal provisions, both penal and civil, apply to ISPs. The Act on the provision of services electronically (Ustawa o świadczeniu usług drogą elektroniczną) obliges all service providers regulated by this Act to make certain information clearly, unambiguously and directly accessible through the computer system, which is used by the recipient (Article 5). That information is the electronic addresses of the service provider and his/her name and surname, place of residence and address or the name or business name, registered office and address. Under Article 23 a fine applies to persons, either natural or legal, that give incomplete or false information.

With respect to the storing of data, Articles 13 and 14 of the Act provide that the service provider is not liable for the content of data delivered by the service receiver if the service provider does not know about the unlawful character of the data or related activities, and in the case of receiving official notification or obtaining reliable information about the unlawful nature of the data or related activities the provider must immediately prevent access to the data or delete them (notice principle).

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<sup>37</sup> Explanation concerning the criteria and procedure of notification of concentration intention to the OCCP; *Wyjaśnienia w sprawie kryteriów i procedury zgłaszania zamiaru koncentracji Prezesowi UOKiK*). Available at: [https://www.uokik.gov.pl/wyjasnienia\\_w\\_sprawie\\_zglaszania\\_koncentracji.php](https://www.uokik.gov.pl/wyjasnienia_w_sprawie_zglaszania_koncentracji.php)

<sup>38</sup> Reports of Gemius Megapanel Audience available at: <https://audience.gemius.com/en/research-results/poland/>

There were some cases on the liability of content providers for third party comments with suggestions instead of specific rules in the Act on the electronic provision of services (Ustawa o świadczeniu usług drogą elektroniczną): first of all, the notice principle and the general rules of liability from the Civil Code should apply. A constitutional complaint was also lodged with the Constitutional Tribunal claiming that the liability rules of the Act on the provision of services electronically contradict the constitutional guarantees of the protection of good name and human dignity. The ECtHR judgment in *Delfi* may increase this trend.

### 3. Internet accessibility

According to recent data published in 2015 by the Main Statistical Office (Główny Urząd Statystyczny), in 2015 as many as 75.8% of households had access to Internet, and 71% to broadband Internet.<sup>39</sup> More elaborate statistical data refer to several variables: whether there are children in a household (95% and 66.5% Internet access when the answer was respectively 'yes' and 'no'); whether a household was located in a big city, a smaller city or a rural area (81.2%, 74.1% and 72% respectively); whether the urbanisation level was high, medium or low (79.4%, 74.1% and 72.8% respectively). The total number of those having access to stationary (desktop) Internet is around 9.5 million people, which is 22.7% of the population (it locates Poland below the EU average which is 30.88%). The number of Internet users (through all channels of access) between the ages 18-69 is 19.74 million, which equals 65% of this age cohort (the EU average is 78%). No specific data divided into age groups are available.

According to a report published in 2014 by IAB Poland (Perspektywy rozwojowe. Mobile online w Polsce; Development prospects. Mobile online in Poland), smartphone users were 58% of Internet users in 2014 (33% and 50% in 2012 and 2013 respectively); tablets claimed 18% of Internet users in 2014 (3% and 8% in 2012 and 2013 respectively).<sup>40</sup> Another report holds that in May 2015 as many as 58% of the population over 15 years of age had smartphones and 21% had tablets (Polska.Jest.Mobi2015).<sup>41</sup> This report also contains more specific data split into the sexes and age groups. 61% of women and 55% of men have smartphones. In the youngest group of 15-19 year old teenagers, as many as 91% have smartphones; the smartphone-penetration ratio for the other groups is as follows: 20-29 years of age – 88%; 30-39 years of age – 79%; 40-49 years of age – 58%; 50-59 years of age – 41%; over 60s – 23%.

Statistically speaking, a Pole spends 4 hours 29 minutes and 14 seconds watching television every day (data from Nielsen Audience Measurement for the period of 1 January-30 June 2015). There are huge differences in particular age groups. Those between 4 and 19 years old watched TV for 02:33:44 (hours:minutes:seconds per day), whereas the other age groups did so as follows: 20-39 years old - 03:15:47; 40-59 years old – 05:22:23; over 60s - 06:28:47.<sup>42</sup>

In an analysis published in 2015 by the National Council for Radio and Television (Krajowa Rada Radiofonii i Telewizji), using Nielsen Audience Measurement data, 15.9 million Poles

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<sup>39</sup> *Spółeczeństwo informacyjne w Polsce w 2015 r.* Information society in Poland in 2015. Available at: <https://www.uke.gov.pl/raport-gus-spoleczenstwo-informacyjne-w-polsce-w-2015-r-16960>

<sup>40</sup> Available at: <http://iab.org.pl/badania-i-publikacje/perspektywy-rozwojowe-mobile-online-w-polsce-2015/>

<sup>41</sup> Available at: [http://www.tnsglobal.pl/coslychac/files/2015/05/POLSKA\\_JEST\\_MOBI\\_2015.pdf](http://www.tnsglobal.pl/coslychac/files/2015/05/POLSKA_JEST_MOBI_2015.pdf)

<sup>42</sup> Reports of Nielsen Audience Measurement available at: <http://www.agbnielsen.pl/>

have access to terrestrial frequencies, whereas 11.5 million have access to cable and satellite television (the last one dominating the market). IP TV is not specifically noted in the statistics. These statistics included the population over four years old (with total numbers as high as 35.7 million).<sup>43</sup>

There are numerous programs that aim to enhance digital literacy. They were designed and administered by the Office for Electronic Communication (Urząd Komunikacji Elektronicznej) and the Ministry of Digitalisation (Ministerstwo Cyfryzacji), previously the Ministry of Administration and Digitalisation (Ministerstwo Administracji i Cyfryzacji). One of the key aims of the programs was to explain the reasons, steps, individual costs and equipment requirements of the television digitalisation process. Specifically addressed information programs were prepared, followed by special websites and special telephone contact numbers (both at the central and regional levels). The transition from analogue to digital TV broadcasting ended on 23 July 2013.

Online media are highly diversified and offer a broad spectrum of views and opinions. They are more pluralistic than the broadcast and print media due to the lower costs of exploitation and dissemination. Even marginal viewpoints are present and accessible online.

## **VI. The public service broadcaster**

### **1. Public remit**

The current Broadcasting Law (from 1992) does not define precisely the public remit of public broadcasting. It stipulates, in Article 21, that public radio and TV are to realise a public mission, working for the "entire society and for some of its parts, differentiated programs and other services in the field of information, opinions, culture, entertainment, education and sport, which should take into account pluralism, independence, non-bias, and innovation; and the quality of the broadcasting should be high".<sup>44</sup>

Currently there is a new draft law pending in the Parliament, which attempts to define its remit in a more detailed manner.

The supervision of the fulfilment of the public broadcasting remit is currently assigned to the National Broadcasting Council. The Council is a constitutional body, with competences defined by the Broadcasting Law. Moreover, there are Management Boards and Supervisory boards from each programme from public TV and radio. A new law, adopted on 31 December 2015, enables the Minister of the State Treasury to appoint management boards and supervisory boards without competition. This law is temporary and will expire at the end of June 2016.

Based on the current binding laws, there are Programme Councils, elected from experts from academic environments, which give regular assessment of the quality of the programmes. Although the members of the programme councils are elected through competitions, the procedures are unclear and the same people remain in the posts for a long time.

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<sup>43</sup> Available at: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/kontrola/program/rynek-telewizyjny-w-i-kw.-2015.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/kontrola/program/rynek-telewizyjny-w-i-kw.-2015.pdf)

<sup>44</sup> Article 21.1. Publiczna radiofonia i telewizja realizuje misję publiczną, oferując, na zasadach określonych w ustawie, całemu społeczeństwu i poszczególnym jego częściom, zróżnicowane programy i inne usługi w zakresie informacji, publicystyki, kultury, rozrywki, edukacji i sportu, cechujące się pluralizmem, bezstronnością, wyważeniem i niezależnością oraz innowacyjnością, wysoką jakością i integralnością przekazu.

## **2. The regulatory body**

In the draft media law pending currently in the Parliament, a new body is being created – the National Media Council (Rada Mediów Narodowych) – to regulate all public media, without providing sufficient guarantees that would minimise the risk that this body would become dependent on political forces. In particular this refers to the way the members of the Council are to be elected as well as to the rules for appointing the Chairman of the Council (all six members are to be elected directly by political organs: the two chambers of the Parliament – the Sejm and the Senate – and the President; only one of the members is to be elected from candidates presented by the political opposition; the Chairman is to be appointed by the Speaker of the Sejm). Such a mechanism does not meet the standard that supervisory bodies in public media should be, in principle, composed of members reflecting different political backgrounds and pluralistic views. The National Media Council will supervise all national media institutions (which will be transformed from commercial law companies into state institutions). The Council also receives competence to manage the National Media Fund (Fundusz Mediów Narodowych), the main source of financing of the media institutions.

The public broadcaster has to present annual reports on planned programs and finances to the Public Broadcasting Council. According to Article 53 of the Public Broadcasting Law, the President of the PBC can impose fines on media that broadcast programs contravening the law (e.g. against moral and socially positive, Christian values, or against minors' welfare). In practice, fines are rarely imposed. Most interventions by the President of the PBS concern private broadcasters.

The President may start procedures on the basis of any notification from the audience (even an anonymous one). The broadcasters are obliged to retain material for 28 days in order to convey it to the PBC, upon its request.

The monitoring is not transparent and effective. The PBC, which is in charge of it, is a politicized body and its political scope will very much determine the character of the interventions towards broadcasters (for example, a right-oriented PBC issues more interventions and fines based on the violation of Christian values).

## **3. Financing of public media**

According to Article 31 of the public broadcasting law, the public broadcaster is financed through licence fee collection and commercial advertising. The collection of the licence fee does not work properly, as a substantial number of viewers do not pay the licence fee. The collection is carried out by the Polish post, but the system does not function well in practice. There is no cultural and public awareness of the importance of regularly paying the licence fee. A number of media campaigns asking the audience to pay the licence fee have not brought any changes to this.

As state-owned companies, public media can also sell rights to particular programmes and benefit from advertisement and sponsored programmes. The fact that public media are beneficiaries of advertisements raises doubts. It also leads to a "commercialisation" of public media and has an impact on the realisation (or rather lack of realisation) of their

public mission. The amount of revenue from advertisement is very high for Polish public broadcasters. In 2011, 55% of the budget of Polish public TV came from advertising.<sup>45</sup>

There is only one account for the entire public television and radio network. There is no division between programmes that implement the public remit and those that do not.

Management boards report to the PBC annually on the spending of public funding. Moreover, they need to present quarterly reports on spending (Article 31b of the public broadcasting law). Spending is controlled by the PBC.

The Inspectorate of Public Spending (Najwyższa Izba Kontroli - NIK) conducts audits and monitors spending for national radio and television. Audits can concern all media finances or particular activities and spending by media (e.g. the outsourcing of the programme production<sup>46</sup>).

The monitoring done by NIK is not regular. It can be undertaken by NIK of its own volition or that of the President, the Prime Minister or the Sejm.<sup>47</sup> It is not conducted yearly. The last audit was in January 2016 and concerned the digitalisation of radio; in July 2015 the audit concerned the outsourcing of programmes on Polish TV. The last in-depth review of TV finances by NIK was conducted in 2012.

The public media companies (they are enterprises owned by the State Treasury) present their yearly financial plan to the PBC for approval. The PBC, before giving its approval, conducts public consultations on the financial plans.<sup>48</sup> All reports from the PBC and NIK are available online, posted on the web pages of the institutions.

The public broadcasters respect market principles and refrain from undercutting competitors on price. The phenomenon of price undercutting is more related to big commercial entities, especially in radio.

#### **4. Public media structure**

Public TV and radio have Internet platforms. Different programmes have their own platforms. There are separate editorial boards for each platform.

The Polish Press Agency (Polska Agencja Prasowa – PAP) operates based on a law from 31 July 1997. It applies to printed news.

There is also a Radio News Agency (Radiowa Agencja Informacyjna - RAI) and a Television news Agency (Telewizyjna Agencja Informacyjna – TAI). Both are part of the structure of the Polish Public Television and Polish Public Radio.

The RAI and TAI are public service broadcasters; therefore they develop the public service as stipulated in the Broadcasting Law.

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<sup>45</sup> See: <http://wiadomosci.onet.pl/kraj/polskie-media-publiczne-jako-jedynie-w-europie-utrzymuja-sie-glownie-z-reklam/x2vx0>

<sup>46</sup> For example, outcomes of the controlling of the public TV outsourcing are available here: <https://www.nik.gov.pl/aktualnosci/nik-o-produkcji-zewnetrznej-w-tvp.html>

<sup>47</sup> Article 6 of the law on NIK.

<sup>48</sup> The announcement on public consultations for 2017 are available at: <http://www.krrit.gov.pl/regulacje-prawne/konsultacje-krrit/news,2266,konsultacje-planow-finansowo-programowych-na-2017-rok-spolek-mediow-publicznych.html>

The Law on the Polish Press Agency stipulates (in Article 1) that the PAP is a public agency and that it is bound to convey independent and diligently-gathered information from the country and from abroad.

As the financing of public media was mostly from the licence fee, until now there was no problem with the principle of providing state aid. The new draft law on national media is creating a Fund for National Media, based on the licence fee, as well as on other incomes (e.g. additional state aid, advertising). The law does not specify the channels that have the must-carry status. The law does not foresee any testing procedure (required by the EU Commission) on the identification of services that are socially useful because they benefit from state funding.<sup>49</sup>

The draft laws could potentially have a distorting effect on the wholesale news market. The Polish PAP would become part of the public media and would therefore benefit from state aid.

## **5. Public media audience**

In 2015 (4<sup>th</sup> quarter of the year), public TV channels (TVP1, TVP2, TVP3, TVP Seriale, TVP Rozrywka, TVP Info) were watched by 31.9% of viewers.<sup>50</sup> According to the same report, 40.58% (919,377) of the viewers were watching public television channels by terrestrial connection. In 2015, radio public broadcasters attracted 23.9% of the viewers.<sup>51</sup>

In 2008, the PBC conducted a research on the number of recipients of public broadcasts via terrestrial means and via satellite.<sup>52</sup> Some 15,924,000 viewers had access to terrestrial platforms, and the share of public broadcaster was substantial. 29.87% of those viewers (673,000) watched TVP 1, 23.29% of those viewers (525,000) watched TVP 2. The share of public broadcaster in digital channels is much smaller (Polsat Cyfrowy: TVP1 – 15.57%, TVP2 – 11.40%; Cyfra Plus: TVP1 – 12.85%, TVP2 – 10.25%).

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<sup>49</sup> Concerns raised by the PBC on the package of draft laws, can be read at: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/komunikaty/wysluchanie/odp--sejm-uwagi-krrit---ustawy.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/wysluchanie/odp--sejm-uwagi-krrit---ustawy.pdf)

<sup>50</sup> From the report of the PBC, available at: <http://www.krrit.gov.pl/regulacje-prawne/konsultacje-krrit/news,2266,konsultacje-planow-finansowo-programowych-na-2017-rok-spolek-mediow-publicznych.html>

<sup>51</sup> From the report of the PBC, available at: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/kontrola/program/radio/kwartalne/rynek\\_radiowy2015.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/kontrola/program/radio/kwartalne/rynek_radiowy2015.pdf)

<sup>52</sup> The report of KRRIT is available at: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/kontrola/program/widownia\\_sat\\_ii\\_kwart2008.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/kontrola/program/widownia_sat_ii_kwart2008.pdf)

## **MEDIA PLURALISM IN ROMANIA**

**Report by Manuela Preoteasa and Andrei Schwartz<sup>1</sup>**

### **Summary**

#### ***The general media context***

In terms of media freedom and pluralism, Romania encompasses a set of unusual dynamics. In this regard, the country's media landscape is characterised by relatively transparent ownership structures,<sup>2</sup> but also a high degree of bias.<sup>3</sup> It features internationally award-winning investigative media centres, on the one hand, and politically-affiliated media outlets, on the other. And finally, it has both politicians involved in media and media businessmen trying to shape politics.

This description contradicts the general assumption that there is a hidden dominance of the ruling government over the media. In fact, Romania represents an example of a landscape crisscrossed by multiple interconnections between politics, business and media. Here, there is no ordinary dominance situation, as everyone is trying to get ahead and be more influential.

Media owners becoming politicians, politicians connected to media outlets, imprisoned media owners, prosecuted media outlets, tax evasion, blackmail, and a nearly bankrupt state TV station, but also award-winning investigative media centres and a vivid online community of investigative journalists and media civil society organisations – Romania has them all.

#### ***International legislation***

With respect to transposing EU and international norms, and reacting to international media freedom reports, Romania has made legislative progress, but with a minimum impact on the society. For example, requiring TV stations to disclose their ownership has had unusual results in which, on the one hand, non-transparent media ownership structures have been generally revealed, alongside their levels of political affiliation, while, on the other hand, no one seems to take an interest in these revelations.

#### ***The Internet***

These uneasy dynamics have also affected the online environment. Here, from a general perspective, it is clear that the Internet has become an essential instrument for both old media and newcomers. It has offered crucial incentives and instruments that have fostered an increase in terms of dialogue, debates, and the circulation of opinions within the Romanian society. Notwithstanding these achievements, the Internet illustrates in its Romanian media dimension an uneven ratio, as the online outlets affiliated to the more recognisable TV stations and print publications dominate over the smaller platforms of investigative journalism centres and independent outlets, in terms of audience.

The Internet in Romania is also characterised by a more complicated ownership dynamic, as the most important ISPs are also cable carriers, telephone operators, and even energy

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<sup>2</sup> Audiovisual Law 504/2002, *Monitorul Oficial* 534/22 July 2002, consolidated version with the latest updates available online in English at < <http://www.cna.ro/The-Audio-visual-Law,1655.html> >

<sup>3</sup> Reporters Without Borders, Data on Romania, available at: < <https://rsf.org/en/romania> >

suppliers.<sup>4</sup> This cross-ownership structure further deepens the vulnerabilities of a system that was already affected by a severe lack of transparency.<sup>5</sup> In this regard, in the absence of any ownership disclosure rules, the true nature of ISPs has solely been the target of independent research and civil society programmes. Although in its infancy, this kind of work has already revealed ownership transparency and political affiliation problems that affect not only Romania, but the entire Eastern European region.<sup>6</sup>

## I. Classic issues of pluralism

The pluralism of Romania's media landscape exists only on the surface. In this sense, there are numerous media outlets, but the bulk of the audience is concentrated around only a few of them. However, while horizontal concentration is at the core of legal and expert debates, vertical concentration is generally disregarded.

In recent years, transnational investments in media have decreased, giving place to the consolidation of local capital, which is often linked with obscure political and business interests. This has favoured the development of the so-called "mogulisation" process and the transformation of media into a "good-to-have" asset in politics and business.

Newspapers have dramatically decreased in circulation and influence, and most of them have abandoned hard news coverage. Independent print outlets have lost their role in political debates, while those that are part of larger media conglomerates have been overshadowed by their partner TV stations.

The top television channels formally continue with their generalist formats, although they focus massively on entertainment and infotainment, while having only a few key news programmes and, in some rare cases, in-depth programmes on current affairs (Pro TV, Antena 1).

In the TV news segment, most channels seem to be rivals not only in enlarging their audiences, but also in positioning themselves with respect to judicial and political affairs.

### 1. Ownership concentration

The economic consolidation of the media in the first years after Romania's accession to the EU was evaluated, especially when transnational capital got involved (Pro Sieben, Ringier, Grun + Jahr, WAZ), as "facilitating a greater independence of media reporting because, before, the very fragmented media landscape depended heavily on state advertising".<sup>7</sup> However, in the past five years, foreign capital has massively withdrawn from news and political coverage and local tycoons have increased their influence. Economic consolidation

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<sup>4</sup> News announcing Telekom intentions to enter the energy sector, Article on HotNews.ro, "Dupa RCS&RDS, si Telekom Romania intra pe piata de energie electrica" (After RCS&RDS, Telekom enters the energy market), 31.03.2015, available at <http://economie.hotnews.ro/stiri-telecom-19797493-dupa-rcsrds-telekom-romania-intra-piata-energie-vrem-combinam-serviciile-telecom-solutiile-energie-pentru-adece-mai-multa-valoare-adaugata.htm>

<sup>5</sup> Analysis developed within the framework of the "Who are the Gatekeepers of the Internet?" project, implemented by the Organised Crime and Corruption Reporting Project, Rise Project and EurActiv Romania. The data of the project is available on the project's platform at: <https://www.reportingproject.net/internetownership/>

<sup>6</sup> The "Who are the Gatekeepers of the Internet?" project, available online at: <https://www.reportingproject.net/internetownership/>

<sup>7</sup> Czepek, Andrea, Hellvig, Melanie, Nowak, Eva, 2009, "Introduction: Structural Inhibition of Media Freedom and Plurality Across Europe" in *Press Freedom and Pluralism in Europe: Concepts and Conditions*, Bristol/UK, Chicago/USA: Intellect Books. The notes about Romania are based on the case study by Mihai Coman.

seems to have been replaced by the concentration of political affiliation and the propagation of the “influence model” (media attached to various businesses and/or political interests). In this regard, some of the top generalist and news channels, summing up to an audience share of over 55% in their segment (cumulated, generalist and news channels<sup>8</sup>), are directly or indirectly politically affiliated.<sup>9</sup>

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<sup>8</sup> The relevance of putting together the generalist and the news channels consists in taking into consideration all channels covering news and political/economic affairs, while excluding the others (i.e. movies, cartoon, music channels, targeting female audience, etc.)

<sup>9</sup> A dedicated table illustrating an attempt at calculating the index of the political affiliation index for generalist and news channels has been attached to this report.

**Table A2: Romanian ownership data**

Political affiliation index								
Channel	Major shareholders and their political affiliation, if the case	Judicial investigations against the owner/founder, if the case / other relevant aspects	Annual Rating all day 2014 (000) Nation-wide	Annual Rating all day (2014)% Nation-wide	Annual audience share 2014	Monthly rating, all day: April 2016 (000) Nation-wide	Monthly rating all day April 2016 (%) Nation-wide	Monthly Audience Share April 2016 (%)
<b>Pro TV</b>	<b>Not the case. It does not host relevant debates. It avoids engaging in political debates</b>	<b>Adrian Sărbu, founder and former CEO - under criminal investigation</b>	<b>678430</b>	<b>3.65</b>	<b>15.45</b>	<b>676</b>	<b>3.69</b>	<b>16.01</b>
<b>Antena 1</b>	Camelia and Corina Voiculescu, Dan Voiculescu's daughters - Voiculescu used to be highly involved politically, in alliances mostly with the social-democrats, but not only. He made alliance also with the center-right government.	Dan Voiculescu was sentenced to 10-years in prison.	556,988	2.99	12.69	575	3.14	13.64
<b>Kanal D</b>	Generalist. Turkish Dogan. Not political affiliated. It is a generalist channel focusing on entertainment. Not an actor in news/debate field.	-	311,760	1.68	7.1	409	2.23	9.69
<b>România TV</b>	Sebastian Ghiță was the majority owner between 2011 and 2012. Despite the fact that the ownership was taken over by the station's management, Ghiță is suspected to have remained behind the station.	Ghiță is a businessman and a member of the Parliament. He was accused by the National Anticorruption Directorate of several economic crimes.	182,912	0.98	4.17	193	1.05	5.06
<b>Antena 3 (in the same group, Antena Stars, Happy Channel, ZU TV/Antena Play, Romantic FM Radio), the daily Jurnalul National</b>	Similar to Antena 1	Similar to Antena 1	292,572	1.57	6.67	184	1.00	4.36
<b>Național TV (generalist)</b>	Micula brothers – businessmen – beneficiaries of tax incentives in the past, suing the Romanian state recently for business advantages.	-	133,586	0.72	3.04	118	0.64	2.8
<b>Prima TV</b>	Cristian Burci (he also owns Adevărul Holding). Known to be close to the social-democrats, but he has also cross-party affiliations.	He is under criminal investigation for tax evasion, embezzlement and money laundering (the defrauding of a state-owned company)	137,000	0.74	3.12	107	0.59	2.55
<b>TVR1 first channel of the state-owned TV</b>	The board is politically appointed.	The company is on bankruptcy, which means high vulnerability.	164,555	0.88	3.75	101	0.55	2.39
<b>B1TV</b>	George Constantin Păunescu – 50%. Businessman close to the social-democrat factions in early 90s. Controversial businesses in the first post-communist decade, low-profiled afterwards.	Despite big controversy on Păunescu's family businesses in the first decade of post-communist transition, no judicial procedure was finalised and how they made their first millions seems forgotten.	108,108	0.58	2.46	64	0.35	1.51

<b>Realitatea TV (radio Realitatea FM is in the same group)</b>	Cozmin Horea Gușă (50%), Maricel Păcurariu (50%). Gușă used to be actively involved in politics.	Păcurariu - 4-year imprisoned for embezzling 4 million Euro from a state-owned company.	96,311	0.52	2.19	39	0.22	0.93
<b>Digi 24 all day-news channel</b>	Highly complicated ownership scheme / Major owner: Teszari Zoltan - very discreet businessman, so-called no-face billionaire. A cable (audiovisual and internet infrastructure) tycoon.	Teszari's cable company RCS-RDS played a key role in the blackmail case against Dan Voiculescu (founder of Antena group).	39,736	0.21	0.90	36	0.19	0.84
<b>TVR2 Generalist (youth oriented)/non-combat/State-owned TV - second channel</b>	Similar to TVR1	-	77,430	0.42	1.76	27	0.15	0.64
<b>Total all-day news and generalist channels</b>			<b>213477</b>	<b>1.15</b>	<b>4.85</b>	<b>102</b>	<b>0.56</b>	<b>2.41</b>
<b>Total political affiliation/influence pattern</b>			96,311	0.94	3.95	66.00	0.37	1.57
<b>Total non-combat in political affairs coverage (Pro TV, Kanal D)</b>	the ownership cannot be directly linked to politicians, but especially Pro TV has a very strong commercial influence		0	0.00	0.00	0	0	0
<b>Influential through their dominant commercial position (advertising market, infrastructure market): Pro TV, Digi 24, respectively</b>	not included in the political affiliation percentage, although the commercial influence is highly strong.		39,736	0.21	0.90	36	0.19	0.84
<b>Total political affiliation/influence pattern out of the news &amp; generalist segment (%)</b>			45.1	81.7	81.4	64.7	66.1	65.1
<b>Total non-combat out of the news &amp; generalist segment</b>			0.0	0.0	0.0	0.0	0.0	0.0
<b>Total economically influential</b>			18.6	18.3	18.6	35.3	33.9	34.9

**Sources:** Kantar Media cited by ARMA's website (for the audience figures), ownership data according to CNA's website

Regulations limit horizontal economic concentration only in the broadcasting field - Article 44 of the Audiovisual Law.<sup>1</sup> There are no existing restrictions against abusive cross-concentration or vertical concentration. According to the law cited, ownership needs to be transparent and reported, on a regular basis, to the national regulating authority (Article 48 of the Audiovisual Law), although no sanctions are envisaged in the text for non-reporting. Although the Constitution of Romania states that "Media outlets can be requested by law to make public their financing sources" (Article 30(5)), with the exception of the aforementioned audiovisual legislative framework, no other measure has ever been initiated by the government, or by the Parliament.

The subject of political affiliation is not dealt with in the existing regulations.

## 2. Ownership transparency

The Audiovisual Law 504/2002, Article 43(5)<sup>2</sup> requests broadcasters to disclose their owners – up to the first owner – and to notify the National Audiovisual Council (CNA) whenever a change in ownership takes place. The information is published on the CNA's website, although it is not easy to find it there. In the case of the print media, ownership data can be accessed via the online database for the National Registry of Commerce, as is the case with any other business.

Notwithstanding these elements, as a result of journalists' investigations, as well as of the overall dynamics of online communication, in general, for the main media outlets, the owners are known. Sometimes, especially in the cases of local media outlets, the owner (sometimes a politician) is recognised even though public records do not show it.

As such, the ties between politicians, businessmen and media owners are generally known and even accepted. In this sense, the Audiovisual Law does stipulate the necessity of the independence of the media, does require transparent ownership data and forbids proxy ownership, but it is not sophisticated enough to monitor the political affiliation of broadcasting stations.

Thus, the recent history of Romania's media landscape is one of numerous connections between political actors, controversial business people, media owners, and even former Securitatea (the communist secret police) collaborators.

In this context, many Romanian media tycoons have set-up an influence-driven business model, whereby media outlets are dependent and supportive of other businesses that create profits. As such, media have acquired in some cases the role of lobbying instruments, while in other situations they have played the part of the scarecrow, particularly in cases where investigations against people close to media tycoons were ongoing.

There is ample evidence of all of these elements and the general ownership-related vulnerabilities of Romanian media outlets. In this sense, on 12 May 2016, Dan Voiculescu – the founder of one of the most successful media groups in Romania, a known businessman and a former politician – was convicted for blackmail in direct relation to his media business.<sup>3</sup>

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<sup>1</sup> Article 44 (1, 5 respectively) of the Audiovisual Law 504/2002, *Monitorul Oficial* 534/22 July 2002 reads: "With a view to protecting pluralism and cultural diversity, ownership concentration and the extension of the audience in the audio-visual field are limited to dimensions ensuring economic efficiency, but not generating dominant positions in forming of public opinion. [...] A natural or legal person shall be deemed to hold a dominant position in shaping public opinion, in case the average market share of its services surpasses 30% of the relevant market."

<sup>2</sup> Audiovisual Law 504/2002, *Monitorul Oficial* 534/22 July 2002, consolidated version with the latest updates available online in English at <http://www.cna.ro/The-Audio-visual-Law,1655.html>

<sup>3</sup> HotNews.ro, 12 May 2016, "First ruling in blackmail case...", available at <http://www.hotnews.ro/stiri-esential-20992681-prima-sentinta-dosarul-santajului-antene-3-ani-jumatate-inchisoare-executare-pentru-sorin-alexandrescu-doi-ani-suspendare-pentru-camelia-voiculescu.htm>

Another interesting case is that of România TV – a station that resulted from a split in the Realitatea TV team, after the take-over attempt of Sebastian Ghiță in October 2010, launched against Sorin Ovidiu Vântu. The latter's media empire started to tremble and Sebastian Ghiță began negotiations for taking-over Realitatea TV, but ended up accusing Vântu of blackmail. Following this conflict, the TV station team split in two and a new TV channel, România TV, was created. Sebastian Ghiță is famous for his numerous public procurements contracts for IT&C services in various domains. Since 2012, Ghiță has been a member of the Romanian Parliament and of the Committee for Defence, Public Order and National Security. The prosecutors of the National Anticorruption Directorate requested that Parliament allow his detention, as part of one of their official investigations, but the measure was refused by the Parliament. In June, Sebastian Ghiță was put under new criminal charges by the National Anticorruption Directorate, being accused of traffic of influence and of being an accomplice to a destination change of European funds without legal grounds, as well as of money laundering, tax evasion, corrupting voters and performing financial operations incompatible with holding public office.<sup>4</sup> The case in which Sebastian Ghiță is under investigation also involves the business of the brother-in-law of the former Prime Minister Victor Ponta.<sup>5</sup> An insight into the way Sebastian Ghiță perceives the relation between media and politics was given to the public in an interview with him published by the Kamikaze online media outlet: "Everybody asks, 'Why do you get involved in politics?' But if my competitor becomes a minister and he starts doing business instead of me? What do I do? Stay and watch how he steals my life? As such, I start doing politics, I break him, I make articles about him, I do anything, just to survive. Things are simple: as long as politicians get involved in business, we also get involved in politics".<sup>6</sup> Sebastian Ghiță later admitted that he knows some top politicians very well and said that the interview in which he talked about getting involved in politics to attack his competitors was meant as a joke.<sup>7</sup>

The overall situation that encompasses these cases has been noticed and addressed by national and international civil society organisations. In this way, when analysing Romanian media independence in the period between 2014 and 2015, the report of Active Watch Romania notes that "the traditional media outlets are dominated by the agenda of their owners or sponsors."<sup>8</sup> Reporters Without Borders places Romania on the 49th place in the 2016 World Press Freedom Index, noting the "excessive politicization of the media, corrupt financing mechanisms, editorial policies subordinated to owner interests and intelligence agency infiltration of staff".<sup>9</sup> Finally, the Coalition for a Clean Press<sup>10</sup> describes the Romanian media landscape in recent years by noting that "the overall model seems to be closer to the

<sup>4</sup> National Anticorruption Directorate, press-release of 24 June 2015, available online in Romanian language at <http://www.pna.ro/comunicat.xhtml?id=6455>

AGERPRES, 26 June 2015, Sebastian Ghiță's complaint against changes in his judiciary supervision rejected (sources), available online at <http://www.agerpres.ro/english/2015/06/26/sebastian-ghita-s-complaint-against-changes-in-his-judiciary-supervision-rejected-sources--12-40-46>

<sup>5</sup> HotNews.ro, 24 June 2015, available online at <http://www.hotnews.ro/stiri-politic-20255010-cumnatul-lui-victor-pontai-catre-sebastian-ghita-sper-pot-multumesc-asa-cum-cuvine-pentru-tot-facut-pentru-mine-familia-mea-iti-multumesc-existi-prieten-drag-spunea-ghita-despre-hertanu-acum-patru-lun.htm>

<sup>6</sup> Tăpălagă, Dan, Portretul golanului la tinerete și la bătrânețe, 21 April 2011, *HotNews.ro*, available online in Romanian language at <http://www.hotnews.ro/stiri-opinii-8524501-portretul-golanului-tinerete-batranete.htm>

<sup>7</sup> Vasilache, Adrian, written interview by email with Sebastian Ghiță, *HotNews.ro*, available online in Romanian language at <http://economie.hotnews.ro/stiri-media-publicitate-7969891-sebastian-ghita-seful-asesoft-care-preluat-managementul-realitatea-media-cunosc-foarte-bine-victor-ponta-relatii-fel-bune-antonescu-bлага-orban-cocos-etc.htm>

<sup>8</sup> Ganea, Liana, Popa, Maria, Martin, Razvan, Szelmenczi, Adrian, Media freedom in Romania, Active Watch, p. 10

<sup>9</sup> Reporters Without Borders, data on Romania, available at: <https://rsf.org/en/romania>

<sup>10</sup> Press release, available at: <http://sar.org.ro/en/lansarea-coalitieii-pentru-o-presa-curata-cpc/>. The Coalition for a Clean Press was set up by three organisations: The Romanian Academic Society, the Centre for Independent Journalism and the Romanian Agency for Media Monitoring - Active Watch, in May 2014, aiming at promoting more transparency on media ownership and its financing sources.

Italian model than the Nordic one. Few newspaper readers, violent partisan outlets, precarious finances, low ethics and capture by vested interests characterize the media landscape. Blackmail and influence peddling (shadow profits) and non-transparent profit from advertising is what seems to keep most media going. This model of media capture explains why Romania's Freedom of the Press or media sustainability index scores is so poor, despite having little government intervention."<sup>11</sup>

### **3. Funding**

The infusion of public money was a major issue in the decade after 1990, when media outlets were being set up and consolidated, reaching a peak between 2000 and 2004, under the government run by the social democrat Adrian Năstase.<sup>12</sup> Subsidies were granted in the form of rescheduling and cancelling tax liabilities for several groups of companies. Neither fiscal incentives, nor subsidies have recently been directed to media. The distortion was, however, previously set up, when major media groups benefited from tax rescheduling, tax exemption, and state advertising. These incentives created advantages for the existing players in the market and raised obstacles for potential new-comers and for those who did not benefited from masked subsidies.

In recent years, Romania has adopted more sophisticated methods of providing financial support than through the direct form of public subsidies. As such, the latter have stopped being directly granted, instead being masked through transfers of money from various obscure businesses. Thus, if one measures public subsidies, one will notice that the numbers are close to zero. But if one looks at indirect subsidies – meaning investments in media from other businesses belonging to the owner or even state advertising transferred in most cases through media agencies – then the figures become significantly higher.

Concerning state advertising, it is currently granted in accordance with the public procurement law, which sets €30,000 as the limit beyond which an entity is requested to organise a tender for services. Nonetheless, although the necessary legislation and norms do exist, in practice, there are still cases of wrong-doings.

### **4. The protection of journalists from undue influence**

The legal Code regulating the audiovisual content (Decision 220/2011, Monitorul Oficial no. 174/11.03.2011) does not include provisions with regard to journalists resisting political or economic pressure. Another Code that pertains to the profession, which was adopted by the Convention of Media Organisations (uniting 32 local level media organisations), refers to the integrity of the journalist. According to it, "a journalist has the right to oppose censorship in any way (and can) (...) invoke the conscience clause. He/she has the right to refuse any journalistic action that he/she considers to be contrary to the principles of journalistic ethics or contrary to his/her own principles. This freedom derives from the obligation of a journalist to inform the public in good faith."<sup>13</sup> (The Journalists' Code of Ethics was initially adopted by the Convention of Media Organisations in 2004, following negotiations with associations representing media unions and major publishers. The unified form of the Code was adopted later in 2009. Its implementation, however, remains limited).

Although negotiated, in 2009, with the involvement of the Romanian Press Club (Clubul Român de Presă), the organisation representing the major Romanian publishers at the time, and also with some union representatives (Media Sind), the unified Code of Ethics adopted

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<sup>11</sup> Press release, available at: <http://sar.org.ro/en/lansarea-coalitieii-pentru-o-presa-curata-cpc/>

<sup>12</sup> Adrian Năstase was prime minister from December 2000 to December 2004. In 2012, he became the first post-1989 Romanian PM to be imprisoned for corruption.

<sup>13</sup> The Journalists' Code of Ethics, available at: [http://ethicnet.uta.fi/romania/the\\_journalists\\_code\\_of\\_ethics](http://ethicnet.uta.fi/romania/the_journalists_code_of_ethics)

by the Convention of Media Organisations did not get further than the status of a recommendation. Its provisions were followed by a small number of professional, honest journalists and media organisations. The Code even became part of the collective labour contract for the sector for years, but remained ineffective in practice.

Most journalists are paid based on intellectual property rights contracts. They do not have proper long-term working contracts.

There are some organisations that assist journalists in cases of defamation and of labour disputes. Active Watch (formerly the Media Monitoring Agency – Agenția de Monitorizare a Presei) has a long history in monitoring and signalling cases of harassment, attacks on journalists and/or other forms of pressure, as well as in assisting journalists. Through the FreeEx programme, Active Watch has monitored conflicts that involve journalists. It takes public positions, usually in partnership with other media organisations, like the Centre for Independent Journalism and the Convention of Media Organisations.

## **5. Protection of journalistic sources**

The CNA's Decision 220/2011 (updated several times) regarding the Regulatory Code of the audiovisual content does not contain specific regulations on the protection of journalistic sources. The Code establishes rules only to prevent the abusive use of confidential sources (Article 35 and Article 38).<sup>14</sup> This Code is effectively implemented, compared to the Codes applying to print media, which are seen as recommendations and whose implementation is not compulsory.

The unified Code of Ethics adopted in 2009 by the Convention of Media Organisations includes references to the protection of sources: "A journalist has the responsibility to maintain the confidentiality of those sources that demand it, or of those sources whose life, physical or mental integrity or workplace could be in jeopardy if their identities were revealed" (Article 15.1).<sup>15</sup> "The protection of professional secrecy is at the same time a right and an obligation of the journalist" (Article 15.2).<sup>16</sup>

Journalists can also refuse to disclose their sources in a legal case, but generally this implies a closed meeting with the judge during which the court is informed of the situation and of the reasons behind the decision, while also being precluded from making any information resulting from the discussion public.

## **II. Impact of international legislation**

The Audiovisual Media Services Directive has been transposed in due time by the Audiovisual Law 504/2002 (cited) while the E-Commerce directive was implemented through Law no. 365/2002 on E-commerce and Decision no. 1308/2002 on the Standards Applying to the Law.

The most delayed process is the digital switchover, which has been marked since 2010 by a series of unfulfilled promises. In this sense, the steps leading in the right direction were postponed, creating a paradoxical situation, whereby DTH technology flourished within the market. Licences for regional multiplexes started to be granted in 2014, but those for the

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<sup>14</sup> CNA's Decision 220/2011 regarding the Regulatory Code of the audiovisual, Monitorul Oficial no. 174/11.03.2011 available online, in English, at [http://www.cna.ro/IMG/pdf/Decision\\_220\\_of\\_24\\_February\\_2011\\_on\\_the\\_Code\\_of\\_regulation\\_for\\_the\\_audiovisual\\_content\\_updated\\_in\\_2014.pdf](http://www.cna.ro/IMG/pdf/Decision_220_of_24_February_2011_on_the_Code_of_regulation_for_the_audiovisual_content_updated_in_2014.pdf)

<sup>15</sup> Convention of Media Organizations, 2009, *The Unified Code of Ethics*, available online, in Romanian, at <http://www.cji.ro/codul-deontologic-unificat-adoptat-de-com-in-octombrie-2009>

<sup>16</sup> Convention of Media Organizations, 2009, *The Unified Code of Ethics*, available online, in Romanian, at <http://www.cji.ro/codul-deontologic-unificat-adoptat-de-com-in-octombrie-2009>

nation-wide multiplexes lacked enough interest from the main players, in a market where cable companies hold oligopolistic positions.

Following a digital television auction organized in 2014, a deal for three multiplexes was awarded to the National Broadcasting Company (Societatea Națională de Radiocomunicații – SNR), with a license costing about one million euro. For the first multiplex in UHF (MUX 1), free-to-air, SNR has the obligation to broadcast “under transparent, competitive and non-discriminatory conditions, the public and private television stations that are currently broadcast in analogue terrestrial system, with coverage, in fixed reception, of 90% of the population and 80% of the territory by 31 December 2016”.<sup>17</sup>

For the other two multiplexes won in the UHF band, “the National Broadcasting Company will have the obligation to launch in operation – by the 1<sup>st</sup> of May 2017 – at least 36 emission stations for each of the networks corresponding to these multiplexes, installed one in each allocation area.”<sup>18</sup>

### III. Internet

#### 1. Market definition, concentration, and risks

According to the Romanian National Authority for Management and Regulation in Communications (ANCOM), 1,000 companies<sup>19</sup> (743 operational<sup>20</sup>) are currently authorised to provide Internet services in Romania.

In 2014, as evidenced in a study<sup>21</sup> commissioned by the same authority, the three most powerful Internet Service Providers (ISPs) in terms of household numbers, were RCS-RDS (53%), Telekom (26%) and UPC (11%), accounting together for 90% of the entire market.

At first sight, these numbers seem to reveal a very high concentration of the market, as a very small number of ISPs from a highly diverse sector account for 90% of all household users. However, making a true estimation of the level of market concentration is extremely difficult in this case due to the absence of clear market definition. This is a direct consequence of the fact that the companies that have the largest shares of households do not only provide Internet services, but also telephone and mobile subscriptions, as well as cable connections and other complex communication services. As such, the real market is a complex scene in which both specialised and service-integrating companies compete for household and business users. Naturally, there are very few companies that can provide integrated services, and virtually none among the specialised that can compete against them at a national scale. Moreover, even if one was to define the relevant market as being based on integrated services, the complexity of the situation would not be eased, as the integration does not refer solely to the communication industry. Thus, in addition to the fact that most of these complex service providers have also become content/media companies, some of them have also

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<sup>17</sup> ANCOM, press-release 10 June 2014, “Digital Television Auction Ended”, available online in English at [http://www.ancom.org.ro/en/televiziune-digitala-terestra\\_5159](http://www.ancom.org.ro/en/televiziune-digitala-terestra_5159)

<sup>18</sup> ANCOM, press-release 10 June 2014, “Digital Television Auction Ended”, available online in English at [http://www.ancom.org.ro/en/televiziune-digitala-terestra\\_5159](http://www.ancom.org.ro/en/televiziune-digitala-terestra_5159)

<sup>19</sup> The list of authorised network and communication services providers – the list of authorised Internet Providers, the National Authority for Management and Regulation in Communications, available in Romanian at [http://www.ancom.org.ro/lista-furnizorilor-de-comunicatii-autorizati\\_4186/Pagina/800](http://www.ancom.org.ro/lista-furnizorilor-de-comunicatii-autorizati_4186/Pagina/800)

<sup>20</sup> The electronic communication service market in Romania – Statistical report, 01.07-31.12.2015, the National Authority for Management and Regulation in Communications, available at [https://statistica.ancom.org.ro:8000/sscpds/public/files/117\\_ro](https://statistica.ancom.org.ro:8000/sscpds/public/files/117_ro)

<sup>21</sup> Study by Mercury Research, commissioned by the National Authority for Management and Regulation in Communications, “The use of services offering Internet access in fix points – household users”, October-November 2014, available at: <https://statistica.ancom.org.ro:8000/sscpds/public/alldocuments/marketstudy?lang=r>

announced their intention to enter the energy sector, most notably the two top ISPs, RCS RDS<sup>22</sup> and Telekom<sup>23</sup> that in 2015 made their energy-related intentions public.

In this context, no legal rules exist regulating the Internet's market concentration and ISPs are solely monitored, as all other companies, by the National Competition Council<sup>24</sup> for market anti-competitive practices, as defined by the European and national antitrust legislative frameworks.

Concerning the ownership transparency of ISPs, this issue has only started to be addressed. At the moment, in Romania, these companies are not obliged to make their ownership information public on their websites and there are no related institutional online databases. To be sure, some of the information can be accessed through documents available at the Register of Commerce, but this does not cover, for example, the documents pertaining to companies registered offshore.

In response to this scarcity, a recent joint investigative journalism and civil society project has created the first online ownership map of ISPs in Central and Eastern Europe and the South Caucasus region. The online platform for the initiative contains data for Romania, Bulgaria, Hungary, Slovakia, Slovenia, the Czech Republic, Croatia, Serbia, Ukraine, Moldova and Armenia.

The research<sup>25</sup> that has followed the project's data-gathering activities has found that transparency is an important problem for this sector, both for the region, in general, and for Romania, in particular. The project team looked at the most powerful Romanian companies in terms of market share and found that many of them have intricate ownership structures that include multiple offshore and proxy owners. In addition, the analysis identified several close political ties within the ownership structures analysed, as well as links to criminal investigations. All of these, the team noted, reflect serious risks in terms of ISP management of online communications.

Concerning public restrictions of online content, from a legal and institutional perspective, in Romania no national authority exists capable of banning domestic online information. ANCOM has no such powers, and nor does the National Council of the Audiovisual. The only elements that can produce such results outside the aforementioned infrastructure ownership risks, or attacks on online communication, are court rulings related to the protection of the right to be forgotten as entrenched in a ruling by the European Court of Justice.

## 2. Online content providers

The data for 2015 provided by BRAT (The Romanian Bureau for Transmedia Audit) as part of their Internet Traffic and Audience Study (SATI)<sup>26</sup> show five main media online content providers who have occupied the top places in terms of Internet traffic with different shares throughout the previous year, i.e. [www.stirileprotv.ro](http://www.stirileprotv.ro), [www.realitatea.net](http://www.realitatea.net), [www.a1.ro](http://www.a1.ro), [www.romaniatv.net](http://www.romaniatv.net), and [www.adevarul.ro](http://www.adevarul.ro). All of them, with the exception of

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<sup>22</sup> RCS-RDS dedicated online platform for their new energy branch, available at <http://www.digienergy.ro/business.php>

<sup>23</sup> News announcing Telekom intentions to enter the energy sector, Article on HotNews.ro, "Dupa RCS&RDS, si Telekom Romania intra pe piata de energie electrica" (After RCS&RDS, Telekom enters the energy market), 31.03.2015, available at <http://economie.hotnews.ro/stiri-telecom-19797493-dupa-rsdrs-telekom-romania-intra-piata-energie-vrem-combinam-serviciile-telecom-solutiile-energie-pentru-adeuce-mai-multa-valoare-adaugata.htm>

<sup>24</sup> The Competition Council (the National Competition Authority) watches the main economic sectors, investigates potential competition law infringements, sets fines, and issues periodical reports.

<sup>25</sup> The analysis was developed within the "Who are the Gatekeepers of the Internet?" project, implemented by the Organised Crime and Corruption Reporting Project, Rise Project and EurActiv Romania. The gathered data is available on the project's platform at: <https://www.reportingproject.net/internetownership/>

<sup>26</sup> The Romanian Bureau for Transmedia Audit, the Internet Traffic and Audience Study, data available online at <http://www.brat.ro/sati>

[www.adevarul.ro](http://www.adevarul.ro), have consistently obtained monthly figures of more than 4 million unique views, reaching as much as 7 million unique views in certain months.

The first four online outlets are affiliated to TV stations, ProTV ([www.stirileprotv.ro](http://www.stirileprotv.ro)) and Antena 1 ([www.a1.ro](http://www.a1.ro)) being two of the most powerful channels in Romania and sharing the top two positions in terms of market share. The fifth is the online version of the printed newspaper Adevarul.

The primary advantage that online media have over broadcast and print is in their reach. The number of readers for printed newspapers has decreased significantly in the last decade, affecting the market and the viability of the business model applied by traditional media. Consequently, most printed newspapers have migrated to the online environment, reducing their circulation or shutting down altogether their printed formats.

Concerning the comparison between TV and online media, the latter is significantly more diverse and less subjected to ownership influences. Nonetheless, the most-accessed online outlets are usually those affiliated to TV stations. To be sure, there exists a plethora of news websites and blogging platforms that are independent, but the bulk of the online audience still goes to the TV-affiliated online media.

All in all, the Internet has played a crucial positive role within the Romanian society, including through online media and social media. But finding objective and independent Romanian online media outlets, although possible, is often more time consuming than orientating oneself towards the significantly more recognisable TV-affiliated and former-print-affiliated online outlets.

Thus, with a few exceptions, independent newcomers on the online media market have been unsuccessful in reaching the readership figures of TV- and former-print-affiliated online outlets. There are, as a result, numerous investigate journalism centres with online platforms and niche news websites, which, although they continue to be picked up by main stream media, remain modest in terms of readership.

## **IV. Public service broadcasting**

### **1. TVR – National Public TV Station**

The activity of the Romanian Broadcasting Society (The Romanian Television Network-TRV) is regulated by Law 41/1994. The act clearly identifies TVR as an autonomous public service of national interest, editorially independent. TVR runs its activities under the control of the Romanian Parliament and has a politically-appointed board. Law 41/1994 regulates the right of the Parliament to request reports and any other information, as well as to conduct its own verifications with respect to the activity of TVR.

TRV is currently on the brink of a financial collapse. The network has been consistently losing money over the last years and is currently passing through a severe management and internal reform crisis.

Confronted with a public network going through an unprecedented disaster and faced with the possibility of foreclosure, the current technocrat prime minister, Dacian Cioloş, has stated that there is a restructuring plan in development and that the network will not be closed. He explained that erasing the network's debts is not possible under the EU state aid rules.<sup>27</sup>

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<sup>27</sup> Article, HotNews.ro, 23.02.2016, available at: [http://economie.hotnews.ro/stiri-media\\_publicitate-20818504-ciolos-pana-iulie-quvernul-nu-poate-bani-pentru-tvr-trebuie-inchis-robinetul-risipei-irina-radu-din-februarie-tvr-nu-mai-putea-plati-taxe-impozite.htm](http://economie.hotnews.ro/stiri-media_publicitate-20818504-ciolos-pana-iulie-quvernul-nu-poate-bani-pentru-tvr-trebuie-inchis-robinetul-risipei-irina-radu-din-februarie-tvr-nu-mai-putea-plati-taxe-impozite.htm)

## 2. Agerpres – National Public News Agency

The Romanian Public News Agency (Agerpres) was reorganised through Law 19/2003. The act defined the agency as a national interest institution responsible for collecting, writing and disseminating materials for mass information.

Agerpres is publicly funded. In 2014, according to the Romanian National Court of Accounts,<sup>28</sup> the budget of the agency was approximately €3.1 million. This represents an immense sum, judging that for the same year the advertising market was estimated at €17 million for printed media, €18 million for radio and €51 million for online.<sup>29</sup>

Notwithstanding these public financial resources, the news agency sector has been dominated in post-communist times by the privately-owned Mediafax. The latter has been the leading supplier of information since the early 1990s, but it has also been at the centre of immense tax-related debt scandals.

Apart from these two agencies, no wire services have had any real chance to compete in the market.

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<sup>28</sup> National Court of Accounts, 2015, *Report for year 2014*, the Execution of the state budget, available online in Romanian language at: [http://www.curteadeconturi.ro/Publicatii/SINTEZA\\_cont\\_gen\\_exec\\_buq\\_2014.pdf](http://www.curteadeconturi.ro/Publicatii/SINTEZA_cont_gen_exec_buq_2014.pdf); average exchange rate for year 2014: €1 = 4.4446 Ron.

<sup>29</sup> Data Media Fact Books, for year 2014. For the year 2016, the estimates of the Media Fact Book of net advertising were: €351 million total net advertising, of which €225 million - TV, €14 million - printed press, €20 million - radio, €28 million - OOH and €64 million - online. Data available online by request at: [http://www.mediafactbook.ro/?qclid=CjwKEAjwya-6BRDR3p6FuY2-u3MSJAD1paxTGwyE3IVO2Y1qZJquAK\\_HVZfeauz9tHmTDuto4-SOtRoCdmDw\\_wcB](http://www.mediafactbook.ro/?qclid=CjwKEAjwya-6BRDR3p6FuY2-u3MSJAD1paxTGwyE3IVO2Y1qZJquAK_HVZfeauz9tHmTDuto4-SOtRoCdmDw_wcB), as released on 30 May 2016.



## DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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ISBN 9978-92-846-0032-8 (paper)  
ISBN 978-92-846-0033-5 (pdf)

doi: 10.2861/736427 (paper)  
doi: 10.2861/504378 (pdf)